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THE LAW  
OF  
REAL PROPERTY  
AND  
OTHER INTERESTS IN LAND

BY HERBERT THORNDIKE TIFFANY  
*Author of "The Law of Landlord and Tenant,"*

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# TABLE OF CONTENTS

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## CHAPTER XXXII.

### REGISTRATION OF TITLE.

- § 580. The purpose of the legislation.
- § 581. The method of registration.
- 582. Transfers after registration.
- 583. Equitable interests.
- 584. Liens.
- 585. Transfer of decedent's land.

## CHAPTER XXXIII.

### RESTRICTIONS UPON THE FREEDOM OF TRANSFER.

- § 586. General considerations.
- 587. Conveyances in fraud of creditors.
- 588. Conveyances in fraud of subsequent purchasers.
- 589. Conveyances in violation of the bankrupt act.
- 590. Transfers by disseisees.
- 591. The homestead exemption.
- 592. Restrictions in creation of estate.
  - (a) Fee simple estate.
  - (b) Fee tail estate.
  - (c) Life estate.
  - (d) Estate for years.
  - (e) Involuntary alienation.
  - (f) Equitable interests.
  - (g) Spendthrift trusts.

## CHAPTER XXXIV.

## PERSONAL DISABILITIES AS TO THE TRANSFER OF LAND.

- § 593. Married women.
- 594. Infants.
- 595. Persons mentally incapacitated.
- 596. Corporations.
- 597. Aliens.
- 598. Criminals.

## PART SIX.

## LIENS.

## CHAPTER XXXV.

## MORTGAGES.

## I. THE NATURE AND ESSENTIALS OF A MORTGAGE.

- § 599. Historical considerations.
- 600. Title and lien theories.
- 601. The right of redemption.
- 602. Interests which may be mortgaged.
- 603. The form and execution of a mortgage.
- 604. Necessity of acceptance.
- 605. Conveyance absolute in form.
  - (a) Separate written defeasance.
  - (b) Oral evidence that mortgage intended.
  - (c) Considerations determining character of transaction.
  - (d) Conveyance with right of repurchase.
  - (e) Protection of *bona fide* purchaser.
  - (f) Conveyance by third person.
  - (g) Trust deed to secure debt.
- § 606. Necessity of consideration.
- 607. The obligation secured.
  - (a) Character of obligation.
  - (b) Personal liability.
  - (c) Bond or note.
  - (d) Description in mortgage.
- § 608. Legality of purpose of mortgage.

## II. RIGHTS AND LIABILITIES INCIDENT TO THE MORTGAGE RELATION.

- § 609. Nature of the mortgagor's interest.
- 610. Nature of the mortgagee's interest.

- 611. The relation not fiduciary.
- 612. The right to possession of the land.
- 613. Rents and profits.
  - (a) Mortgagor in possession.
  - (b) Crops.
  - (c) Mortgagee in possession.
  - (d) Sequestration by receiver.
- § 614. Effect of a lease of the land.
  - (a) Lease before mortgage.
  - (b) Lease after mortgage.
- § 615. Expenditures by mortgagee.
- 616. Taxes.
- 617. Insurance.
- 618. Injuries to the land.
- 619. Execution sale of mortgagor's interest.

### III. TRANSFER OF MORTGAGED LAND.

- § 620. General considerations.
- 621. Transfer to mortgagee.
- 622. Transfer subject to mortgage.
- 623. Assumption of mortgage debt.
- 624. Transferor becoming surety.
- § 625. Transfer of part of land.
- 626. Transferor's conduct as affecting bar of limitation.

### IV. TRANSFER OF MORTGAGEE'S RIGHTS.

- § 627. General considerations.
- 628. Method of transfer.
  - (a) Transfer of the debt.
  - (b) Formal assignment.
  - (c) Assignment omitting reference to debt.
  - (d) Transfer of land or legal title thereto.
  - (e) Delivery and acceptance.
- § 629. Consideration for transfer.
- 630. Transfer subject to equities.
  - (a) In favor of debtor.
  - (b) In favor of others than debtor.
- § 631. Record and priorities.
- 632. Transfer of part of debt.

### V. PRIORITY OF LIEN.

- § 633. General considerations.
- 634. Contemporaneous mortgages.
- 635. "Waiver" of priority.
- 636. Purchase money mortgage.
- 637. Mortgage for future advances.
- 638. Right to question prior mortgage.
- 639. Tacking and consolidation.

## VI. EXTINCTION OF THE MORTGAGE.

- § 640. Discharge of obligation secured.
  - (a) General considerations.
  - (b) Payment.
  - (c) Payment to assignor after assignment.
  - (d) Tender.
  - (e) Merger.
  - (f) Bar of obligation by limitations.
  - (g) Recovery of personal judgment.
  - (h) Change in note or bond.
- § 641. Effect of new mortgage.
- 642. Express release or certificate of satisfaction.
  - (a) General considerations.
  - (b) Conveyance by mortgagee as release.
  - (c) Power or authority to execute.
  - (d) Execution by assignor.
  - (e) Conclusiveness of release or satisfaction.
- § 643. Subsequent reissue of mortgage.
- 644. Release of principal debtor.
- 645. Right to extinguish by payment (Right to redeem).
  - (a) Persons entitled.
  - (b) Amount to be paid.
  - (c) Loss of right.
  - (d) Enforcement of right.
- § 646. Subrogation on payment.
- 647. Marshalling of securities.

## VII. FORECLOSURE.

- § 648. Accrual of the right to foreclose.
- 649. Bar by lapse of time.
- 650. Strict foreclosure in equity.
- 651. Foreclosure by entry.
- 652. Foreclosure by writ of entry.
- 653. Foreclosure by scire facias.
- 654. Equitable proceeding for sale.
- 655. Parties to proceeding.
- 656. Power of sale.
- 657. Enforcement of personal liability.
- 658. Stipulation for attorney's fee.

## CHAPTER XXXVI.

## EQUITABLE LIENS.

- § 659. General considerations.
- 660. Express charges on land.
- 661. Agreements for security (equitable mortgages).

- 662. Lien for improvements.
- 663. Lien for owelty of partition.
- 664. Implied lien of grantor (vendor's lien).
- 665. Express lien of grantor.
- 666. Vendor's lien before conveyance.
- 667. Vendee's lien.

## CHAPTER XXXVII.

## STATUTORY LIENS.

- § 668. General considerations.
- 669. Mechanics' liens.
- 670. Judgment liens.
- 671. Attachment liens.
- 672. Execution liens.
- 673. Liens for taxes and assessments.
- 674. The lien of decedent's debts.
- 675. Liens on crops.
- 676. Lien for improvements.
- 677. Widow's allowance.



# REAL PROPERTY

## CHAPTER XXXII.

### REGISTRATION OF TITLE.

- § 580. The purpose of the legislation.
- 581. The method of registration.
- 582. Transfers after registration.
- 583. Equitable interests.
- 584. Liens.
- 585. Transfer of decedent's land.

§ 580. **The purpose of the legislation.** The system of registration of titles, frequently called the "Torrens System,"<sup>1</sup> has for its purpose the establishment of a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in this regard. Such a certificate is first issued after a judicial proceeding in the nature of a suit to quiet title, and all subsequent transfers or transactions affecting the title are either noted on this certificate, or on a new certificate substituted therefor. The advantages claimed for this system over that now generally in vogue in this country, by which a purchaser is dependent chiefly on the record of conveyances for knowledge of the state of his vendor's title, are many. Chief among them are the saving to the community of the cost of a new examination of the title in connection with each transfer or other transaction affecting the land, the removal of all uncertainties as to the title, which can be accomplished only partially by the present system of examining the records, and the greater speed with which transfers can be effected, after the title has once been

1. After Sir Robert Torrens, of South Australia, who first introduced it into use among English speaking people. A simi-

made the subject of judicial proceedings for its establishment. The details of the legislation providing for the introduction of this system differ greatly in different countries and, so far as introduced in this country, in different states, and a mere outline of the methods of procedure thereunder can here be given.<sup>2</sup>

§ 581. **The method of registration.** In order that land may be registered under the statute, and the initial certificate of title obtained, the following mode of procedure is usually prescribed: The person or persons claiming the ownership of the land in fee simple file an application, addressed to the court having jurisdiction under the statute, describing the land, setting forth any estates, interests, or liens outstanding in other persons, so far as known to the petitioner, the name of the occupant, and the names of owners of adjoining land. Upon the filing of the application it is referred to one or more official examiners of title, who, after making a proper examination, report to the court. Any persons who appear to be interested in the land are made parties, and the statute provides for the sending of notices to such persons, and also for the publication of a notice in a newspaper for a prescribed period. If the examiner approves the title, and no adverse claims are presented, or if those presented do not appear meritorious, the court confirms the applicant's title, and directs the person having charge of the registration office, known usually as the registrar, to issue to the applicant a certificate of title. This certificate states that the applicant has

2. There is a great deal of literature on the subject, largely in the form of articles in legal periodicals, discussing the merits of the system. The best detailed treatment of the subject is that by James Edward Hogg, Esq., under the title "The Australian Torrens System." The

most satisfactory American treatise which has come to the writer's notice is, "An Analysis of the Torrens System" by William C. Niblack, Esq., of the Chicago Bar. See for references to the specific statutes, editorial note, 17 *Columbia Law Rev.* 354.



a fee-simple title (or otherwise, as the case may be), and also there are noted on the certificate any outstanding interests, trusts, or incumbrances in other persons which are recognized by the decree of the court. This certificate is made out in duplicate, one copy being issued to the applicant and one copy being retained in the registration office, where it is inserted in a book called the "register" or "registration book."

No person other than the owner in fee simple can, under most of the acts adopted in this country, obtain the registration of the title, but the existence of lesser estates in other persons does not affect such owner's right to registration, the rights of the owners of lesser estates being protected by statements upon the certificate issued to the owner in fee simple.

The proceeding by which the title is registered is by the terms of the statute, absolutely conclusive upon all persons, either immediately upon the rendition of the decree, or within a short period thereafter. The proceeding is thus in effect one to quiet title. The constitutionality of such legislation, in so far as it makes the decree binding upon persons interested in the land, who receive notice of the proceeding merely by publication, has been vigorously questioned, on the ground that it deprives such persons of property without due process of law; but it has been upheld in several states.<sup>3</sup> The United States supreme court has refused to assume jurisdiction to determine the question until a case is presented by one who has actually been deprived of property by means of such legislation,<sup>4</sup> but in view of decisions by that court upon analogous questions,<sup>5</sup> there

3. Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129; People v. Crissman, 41 Colo. 450, 92 Pac. 949; State v. Westfall, 85 Minn. 437, 57 L. R. A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; People v. Simon, 176 Ill. 165, 44 L. R. A. 801, 68 Am. St. Rep. 175, 52 N. E. 910; Tyler v. Judges of Court

of Registration, 175 Mass. 71, 51 L. R. A. 433, 55 N. E. 812.

4. Tyler v. Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252.

5. American Land Co. v. Zeiss, 219 U. S. 47, 55 L. Ed. 82; Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97.

appears little reason to doubt that it would uphold the validity of the legislation in this regard.

§ 582. **Transfers after registration.** After the title to particular land has been registered, all subsequent transactions affecting such title must be by means of the machinery furnished by the act. If the owner of the fee-simple title, as registered, desires to make a transfer thereof, he makes the usual conveyance, and hands it, together with his certificate of title, to the intending purchaser, who in turn hands them to the registrar, who then cancels the former certificate, and makes out a new one in favor of the purchaser. The latter is protected, as against any adverse claims unknown to him, by his ability to inspect the original certificate before paying over the price, and on this he can, in theory at least, absolutely rely, except with reference to the classes of rights excepted in the statute, and, under some statutes, in case of fraud or mistake.<sup>6</sup> The manual transfer of the conveyance to the grantee therein is not regarded as effecting a transfer of title, but this takes place only upon the issuance of the new certificate. In case the fee-simple owner desires to transfer only a part of the land, his former certificate is canceled, and a new certificate is issued to him for the part retained, and another is issued to the purchaser for his part.

§ 583. **Equitable interests.** The registration is of the legal title only, but, in case an equitable interest has been created in another by a declaration of trust or otherwise, a memorandum to that effect may, by some statutes, be made upon the certificate, without stating the terms of the instrument creating the same, but referring to the place of record of such instrument, or, in case it is merely filed with the registrar, to the file number. Under some of the foreign statutes no notice of any trust is allowed to be entered on the register.

6. See Hogg, *op. cit.* p. 821 158, 168, 215; Editorial note, 29 *et seq.*; Niblack, *op. cit.* §§ 136- Harv. Law Rev. at p. 772.

The statutes in force in this country usually provide that no instrument undertaking to deal with land held in trust shall be registered until it has been approved by a court, or, in one state at least, by official examiners of title, as being in accordance with the terms of the trust, it being provided that such approval shall be conclusive as to the validity of the transfer.<sup>7</sup>

The certificate issued upon the registration of the title is conclusive that no outstanding interests and incumbrances exist in other persons, with certain exceptions, specified in the statute, these exceptions ordinarily including liens for taxes, leases for terms of but a few years, highways, and easements, or particular classes of easements, and, as to all such excepted interests, any purchaser of the land must satisfy himself otherwise than by reference to the certificate of title.

Rights of ownership in the land less than fee simple, as well as rights in the land existing in others, such as easements and profits *à prendre*, are not usually the subject of a separate certificate, but they are protected by memoranda upon the certificate of the fee-simple owner.

§ 584. **Liens.** Though the subject of liens, including mortgages, is treated in a subsequent part of this work, it seems desirable to here consider the effect of the registration of the title to land upon such liens as may be created thereon.

All existing liens, equitable or statutory, except those excepted in the statute, are noted upon the certifi-

7. The Illinois act (Laws 1897, p. 156, § 69), making the approval of such transfer by two examiners conclusive as to its validity, has been criticized as conferring judicial powers upon ministerial officers. It has, however, been sustained by the supreme court of the state. *People v. Simon*, 176 Ill. 165, 44 L.

R. A. 801, 68 Am. St. Rep. 175, 52 N. E. 910. In Massachusetts this difficulty is avoided by the establishment of a court of land registration, which renders a decree construing the trust in such a case, and performs any other acts of a judicial nature which may be called for in the administration of the law.

cate of title when issued upon the registration of the land, and those subsequently created on the land are also required to be noted on the certificate, generally upon the filing with the registrar of a copy of the proceedings or instrument upon which the lien is based.

In the case of a mortgage on the land, made subsequent to the registration of the title, the statute sometimes provides for the issue of a duplicate certificate of title to the mortgagee, a memorandum of such issue being noted on the original certificate in the registration book, while sometimes the mortgage merely is given to the mortgagee, a duplicate being held by the registrar, and the transaction being, as in the other case, noted in the registration book. Upon an assignment or discharge of the mortgage, these facts are noted upon the certificate in the registration book.

§ 585. **Transfer of decedent's land.** The acts providing for the registration of title differ in their provisions for the transfer upon the register of lands belonging to a decedent. By some statutes it is provided that the title to all registered land shall, on the death of the owner, pass to the executor or administrator, or to a trustee to be selected, and that he, under an order of court, shall transfer the title upon the register to the heirs or devisees as named in the order, or to the purchaser, in case the land is sold for purposes of administration. Other statutes provide that the heirs or devisees shall make application for the entry of a new certificate in their favor, and, after notice to all persons in interest by publication and otherwise, and after due hearing, such a certificate is issued, subject, however, to all claims against deceased until final settlement of the estate, and a transfer of the land to another.

## CHAPTER XXXIII.

### RESTRICTIONS UPON THE FREEDOM OF TRANSFER.

- § 586. General considerations.
- 587. Conveyances in fraud of creditors.
- 588. Conveyances in fraud of subsequent purchasers.
- 589. Conveyances in violation of the bankrupt act.
- 590. Transfers by disseisees.
- 591. The homestead exemption.
- 592. Restrictions in creation of estate.
  - (a) Fee simple estate.
  - (b) Fee tail estate.
  - (c) Life estate.
  - (d) Estate for years.
  - (e) Involuntary alienation.
  - (f) Equitable interests.
  - (g) Spendthrift trusts.

§ 586. **General considerations.** As a general rule, the owner of an estate in land has full power to make any disposition thereof, transferring either all his rights in the land or a part only. There are, however, certain restrictions imposed by law upon the right of transfer. One class of such restrictions, those growing out of the legal incapacity of certain classes of persons to transfer any interests in land, or, in some cases, to acquire them, will be considered in the next chapter. Of the other restrictions upon the right of the owner of land to transfer his land when and as he chooses, those imposed by the rule against perpetuities,<sup>1</sup> by the prohibition of invalid conditions,<sup>2</sup> by the law as to charitable trusts,<sup>3</sup> and for the purpose of protecting marital rights,<sup>4</sup> have been before discussed.

There remain to be considered the restrictions arising from the prohibition of conveyances in fraud of

1. *Ante*, §§ 179-189.

2. *Ante*, § 81.

3. *Ante*, § 117.

4. *Ante*, §§ 220, 243.

creditors,<sup>5</sup> the prohibition of conveyances in fraud of subsequent purchasers,<sup>6</sup> those imposed by the bankrupt act,<sup>7</sup> those existing, in a few states, as a result of a statutory prohibition of the conveyance of land in the adverse possession of another.<sup>8</sup> The restrictions previously enumerated are imposed solely upon the voluntary transfer of interests in land by the person entitled thereto. There also exist, in many of the states, statutes of great importance, exempting from forced sale in behalf of a creditor the "homestead" or residence of the debtor, and these statutes also usually prohibit a conveyance of such homestead without the assent of the owner's wife, they thus effecting a restriction upon both the voluntary and involuntary transfer of his title.<sup>9</sup> Frequently, although the law imposes no restriction upon the right of the owner of land to dispose thereof, or of his creditors to enforce payment therefrom, the instrument by which he is given title to the land undertakes to restrict his rights, or those of his creditors, in this regard.<sup>10</sup>

§ 587. **Conveyances in fraud of creditors.** By St. 13 Eliz. c. 5,<sup>11</sup> it was provided "that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, . . . and all and every bond, suit, judgment, and execution," made to hinder, delay, or defraud creditors or others "of their just and lawful actions, suits, debts, accounts, damages," etc., should be deemed, as against that person or persons, his heirs and successors, whose actions, suits, etc., are or might be in any wise disturbed, hindered, delayed, or defrauded, utterly void. This statute has been frequently asserted to be merely declaratory of the common law, and probably at the present day, even in the absence of

5. *Post*, § 587.

6. *Post*, § 588.

7. *Post*, § 589.

8. *Post*, § 590.

9. *Post*, § 591.

10. *Post*, § 592.

11. A. D. 1570.

any statute, the rights of creditors would be protected at law or in equity as against such a fraudulent attempt by the debtor to avoid paying his debts.<sup>12</sup> In most of the states, however, there is an express statute essentially similar to the English statute.<sup>13</sup> In at least two states the law embodied in the statute has been adopted as part of the common law of the state.<sup>14</sup>

The statutes directed against fraudulent conveyances do not ordinarily prohibit the preference by a debtor in failing circumstances of one or more of his creditors, provided the property conveyed for the purpose of effecting such preference does not exceed the *bona fide* amount of the debt or debts, and no benefit is reserved to the grantor.<sup>15</sup> It is only by reason of an express prohibition of such preferences, such as is found in the bankrupt act, and in the statutes of some of the states, that they can be regarded as invalid.

The creditors protected by the terms of the statutes above referred to include not only those who are such at the time of the conveyance alleged to be fraudulent, but also those persons who may thereafter become creditors. So, in case one makes a conveyance of property with the present intention of entering into a hazardous business, or of otherwise creating debts, with the knowledge that the conveyance will probably affect his ability to pay such debts, the conveyance will be void as against the persons with whom the debts are contracted.<sup>16</sup>

12. Bigelow, *Fraudulent Conveyances*, ch. 2.

13. 1 Stimson's *Am. St. Law*, § 4591.

14. *Robinson v. Holt*, 39 N. H. 557, 75 *Am. Dec.* 233; *Howe v. Ward*, 4 Me. 195.

15. *Huntley v. Kingman*, 152 U. S. 527, 38 L. Ed. 546; *Southern White Lead Co. v. Haas*, 73 Iowa, 399, 33 N. W. 657, 35 N. W. 494; *Banfield v. Whipple*,

14 Allen (Mass.) 13; *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 2 *Am. Dec.* 474; *Sklpwith's Ex'r v. Cunningham*, 8 Leigh (Va.) 271, 31 *Am. Dec.* 642; Bigelow, *Fraud. Conv.* ch. 32.

16. *Rudy v. Austin*, 56 Ark 72, 35 *Am. St. Rep.* 85, 19 S. W. 111; *Redfield v. Buck*, 35 Conn. 328, 95 *Am. Dec.* 241; *Moritz v. Hoffman*, 35 Ill. 553; *Winchester v. Charter*, 12 Allen

If a conveyance is made with the intention of defrauding creditors, the fact that it is based on a valuable consideration will not render it valid as against them.<sup>17</sup>

A voluntary conveyance, that is, one not supported by a valuable consideration, is, in some states, void as against existing creditors, on a conclusive presumption of fraud on the part of the grantor.<sup>18</sup> But in most jurisdictions, though a voluntary conveyance is presumptively fraudulent as against existing creditors, it is upheld if it can be shown that, at the time of making it, the grantor retained amply sufficient property to satisfy the claims of his creditors, and that it was owing only to the happening of unforeseen contingencies that he was unable to pay such claims.<sup>19</sup> In a number of states the statute provides, in accordance with this view, that a conveyance is not necessarily void because voluntary.<sup>20</sup> The fact that a conveyance is voluntary does not

(Mass.) 606; Snyder v. Free, 114 Mo. 360, 21 S. W. 847; Case v. Phelps, 39 N. Y. 164; Monroe v. Smith, 79 Pa. 459; Churchill v. Wells, 7 Cold. (Tenn.) 364; Mackey v. Douglas, L. R. 14 Eq. 106; *Ex parte Russell*, 19 Ch. Div. 588.

17. *Twyne's Case*, 3 Coke, 80b, 1 Smith, Lead. Cas. Eq. 1; *Gragg v. Martin*, 12 Allen (Mass.) 498; *Gable v. Columbus Cigar Co.*, 140 Ind. 563, 38 N. E. 474; *Haymaker's Appeal*, 53 Pa. St. 306; *Billings v. Russell*, 101 N. Y. 226, 4 N. E. 531; *May. Fraud. Conv.* (2d Ed.) 85 *et seq.*; *Wait, Fraud. Conv.* §§ 207, 208.

18. *Wooten v. Steele*, 169 Ala. 55 Am. St. Rep. 947, 19 So. 972; *Swartz v. Hazlett* 8 Cal. 126; *Severs v. Dodson*, 53 N. J. Eq. 633, 51 Am. St. Rep. 641, 34 A. 7; *Woody v. Dean*, 24 S. C.

499. See *Marmon v. Harwood*, 124 Ill. 104, 7 Am. St. Rep. 345, 16 N. E. 236.

19. *Parish v. Murphree*, 13 How. (U. S.) 92, 14 L. Ed. 65; *Pratt v. Curtis*, 2 Lowell 87, Fed. Cas. No. 11,375; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85 and note, 19 S. W. 111; *Harting v. Jockers*, 136 Ill. 627, 29 Am. St. Rep. 341, 27 N. E. 188; *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 Am. Dec. 475; *Goodman v. Wineland*, 61 Md. 449; *Matthews v. Thompson*, 186 Mass. 14, 66 L. R. A. 421, 104 Am. St. Rep. 550, 71 N. E. 93; *Cole v. Tyler*, 65 N. Y. 78; *Elfelt v. Hinch*, 5 Or. 255; *Clark v. Depew*, 25 Pa. St. 509, 64 Am. Dec. 717.

20. 1 *Stimson's Am. St. Law* § 4598.



render it open to attack by subsequent creditors, unless it is made under circumstances showing actual fraud.<sup>21</sup>

A fraudulent conveyance, though declared by the statute to be "void" as against creditors, is merely voidable by them, and, as between the parties thereto and their successors in interest, and as against other persons not creditors, it is perfectly valid.<sup>22</sup> A conveyance which is fraudulent as to one or more creditors is, it seems, invalid as to all;<sup>23</sup> and, by some decisions, a conveyance fraudulent as to existing creditors is regarded as voidable at the instance of subsequent creditors,<sup>24</sup> though, in some states, such a view is considered to be applicable only under particular circumstances, as when there is a secret trust for the grantor, or the pre-existing debts remain unpaid, or the subsequent creditors were, at the time the debts were con-

21. See *Elyton Land Co. v. Iron City Bottling Works*, 109 Ala. 602, 20 So. 51; *Kane v. Desmond*, 63 Cal. 464; *Moritz v. Hoffman*, 35 Ill. 553; *Winchester v. Charter*, 12 Allen (Mass.) 606; *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732 and note, 45 N. J. Eq. 292; *Carr v. Breese*, 81 N. Y. 584; *Todd v. Nelson*, 109 N. Y. 316, 16 N. E. 360; *Morton v. Denham*, 39 Ore. 227, 64 Pa. 384; *Thompson v. Allen*, 103 Pa. St. 44, 49 Am. Rep. 116.

22. *Knight v. Glasscock*, 51 Ark. 390, 11 S. W. 580; *Lawton v. Gordon*, 34 Cal. 36, 91 Am. Dec. 670; *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. 435; *Stillings v. Turner*, 153 Mass. 534, 27 N. E. 671; *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685, 41 Atl. 862; *Anderson v. Roberts*,

18 Johns. (N. Y.) 515, 9 Am. Dec. 235; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664, 2 S. E. 780.

23. *Lehman v. Kelly*, 68 Ala. 192; *Personette v. Cronkhite*, 140 Ind. 586, 40 N. E. 59; *Spuck v. Logan*, 97 Md. 152, 99 Am. St. Rep. 427, 54 Atl. 989; *Savage v. Knight*, 92 N. C. 493, 53 Am. Rep. 423; *Barrett v. Nealou*, 119 Pa. St. 171, 4 Am. St. Rep. 628, 12 Atl. 861.

24. *Pratt v. Curtis*, 2 Lowell 87, Fed. Cas. No. 11,375; *Jordan v. Collins*, 107 Ala. 572, 18 So. 137; *Bassett v. McKenna*, 52 Conn. 437; *Day v. Cooley*, 118 Mass. 527; *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831; *Trezevant v. Terrell*, 96 Tenn. 528, 33 S. W. 109; *McLane v. Johnson*, 43 Vt. 48; *Lockhard v. Beckley*, 10 W. Va. 87. See *Bigelow, Fraud. Conv.* 85 *et seq.*

tracted, entirely without knowledge of the previous conveyance.<sup>25</sup>

—**Protection of bona fide purchasers.** Although a conveyance is otherwise voidable as being in fraud of creditors, it will not be so treated in case the grantee is a purchaser for value without notice of the fraud. The Statute of Elizabeth and most of the state statutes contain an exception in favor of such a purchaser;<sup>26</sup> but even in the absence of any statute, the exception has been recognized in pursuance of the usual equitable policy of protecting *bona fide* purchasers for value.<sup>27</sup>

The protection accorded to a *bona fide* purchaser for value is also extended to one who is, not the grantee in the fraudulent conveyance, but a purchaser from the grantee; and this, although the conveyance could have been avoided as against the original grantee, owing to his knowledge of the fraud, or because he did not pay a valuable consideration.<sup>28</sup>

§ 588. **Conveyances in fraud of subsequent purchasers.** St. 27 Eliz. c. 4, made perpetual by St. 39 Eliz. c. 18, provided in effect that all alienations of land, made with intent to defraud and deceive sub-

25. See *Springer v. Bigford*, 160 Ill. 495, 43 N. E. 751; *Sheppard v. Thomas*, 24 Kan. 780; *Clark v. French*, 23 Me. 221, 39 Am. Dec. 618; *Wyman v. Brown*, 50 Me. 139; *Simmons v. Ingram*, 60 Miss. 886; *Clafin v. Mess*, 30 N. J. Eq. 211; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732 and note, 17 Atl. 946; *Monroe v. Smith*, 79 Pa. St. 459; *Aldous v. Olverson*, 17 S. D. 190, 95 N. W. 917.

26. 1 *Stimson's Am. St. Law*, § 4598.

27. *Gridley v. Bingham*, 51 Ill. 153; *Farlin v. Sook*, 30 Kan. 401, 46 Am. Rep. 100, 1

Pac. 123; *Dougherty v. Cooper*, 77 Mo. 528; *Jackson v. Glaze*, 3 Okla. 143, 41 Pac. 79; *Tiernay v. Clafin*, 15 R. I. 220, 2 Atl. 762; *Leach v. Francis*, 41 Vt. 670; *Shauer v. Alterton*, 151 U. S. 607, 38 L. Ed. 286.

28. *Thames v. Rembert's Adm'r*, 63 Ala. 561, *Williamson v. Russell*, 39 Conn. 406; *Scott v. Purcell*, 7 Blackf. (Ind.) 66, 39 Am. Dec. 453; *George v. Kimball*, 24 Pick. (Mass.) 234; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; *Young v. Lathrop*, 67 N. C. 63, 12 Am. Rep. 663; *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101.

sequent purchasers for valuable consideration, should, as against such persons and persons claiming under them, be void, unless the alienation be made for good consideration and bona fide. The expression "good" consideration, as used in the statute, has always been construed as meaning 'valuable' consideration.<sup>29</sup>

This statute has been frequently stated to be declaratory of the common law.<sup>30</sup> This is questionable, however.<sup>31</sup> In many states in this country there is an express statutory provision substantially equivalent to the English statute,<sup>32</sup> while occasionally such statute has been regarded as in force without any local provision upon the subject.<sup>33</sup>

In England the statute was construed as invalidating any conveyance not made on a valuable consideration, as against one to whom the grantor subsequently conveyed the land on a valuable consideration, even though the subsequent alienee had notice of the previous conveyance, the execution of the subsequent conveyance being regarded as evidence that the first conveyance was fraudulent. The effect of this construction was that a conveyance of land not based on a valuable consideration could always be revoked by the grantor by means of a subsequent conveyance by him for value, unless the first grantee had conveyed the land to a purchaser for value.<sup>34</sup> This construction placed

29. *Twyne's Case*, 3 Coke, 80b, 1 Smith, Lead. Cas. 1; *Dolphin v. Aylward*, L. R. 4 H. L. 486; *Bigelow, Fraud. Conv.* 637; *May, Fraud. Conv.* (2d Ed.) 245.

30. *Cadogan v. Kennett*, Cowp. 434; *Hamilton v. Russel*, 1 Cranch (U. S.) 309, 2 L. Ed. 118; *Kimball v. Hutchins*, 3 Conn. 450; *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318; *Howe v. Waysman*, 12 Mo. 169, 49 Am. Dec. 126.

31. 1 Story, Eq. Jur. § 352; *Bigelow, Fraud. Conv.* 15.

32. 1 Stimson's Am. St. Law, § 4592. See *Bigelow, Fraud. Conv.* 622 *et seq.*

33. *Beal v. Warren*, 2 Gray (Mass.) 447; *Lancaster v. Dolan*, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; *City of Baltimore v. Williams*, 6 Md. 235; *Gardner v. Cole*, 21 Iowa, 205.

34. *Doe d. Otley v. Manning*, 9 East, 59; *Doe d. Newman v. Rusham*, 17 Q. B. 723, 6 Gray's Cas. 314; *Dolphin v. Aylward*, L. R. 4 H. L. 486. See *May, Fraud. Conv.* (2d Ed.) 189 *et*

upon the statute was finally removed by a comparatively late statute,<sup>35</sup> providing that no voluntary conveyance of land, if *bona fide* and free from fraudulent intent, should be defeated by a subsequent purchase for value.

In this country the construction placed upon the act by the English courts has not been adopted, and consequently the influence of the statute has been much less felt. So it has been usually held that, if the subsequent purchaser has notice of the previous voluntary conveyance, he cannot claim to have been defrauded thereby, provided there was no actual fraud in the making of the first conveyance.<sup>36</sup> In many states the statute specifically provides that the prior conveyance shall not be void as against a subsequent purchaser with actual or legal notice.<sup>37</sup> Moreover, the notice, so to preclude the subsequent purchaser from claiming the protection of the statute, need not, by the weight of authority, be actual, constructive notice from the recording of the first conveyance being sufficient.<sup>38</sup> Apart from the question of the effect of notice of the previous conveyance, the making of the second conveyance is not

*seq.*; Mellick v. Mellick, 47 N. J. Eq. 86, 19 Atl. 870. But the heir or devisee of the grantor could not revoke the voluntary conveyance by making a conveyance for value. Doe d. Newman v. Rusham, 17 Q. B. 723; Lewis v. Rees, 3 Kay & J. 132.

35. 56 & 57 Vict. c. 21 (A. D. 1893).

36. Gilliland v. Fenn, 90 Ala. 230, 9 L. R. A. 413, 8 So. 15; Chaffin v. Kimball's Heirs, 23 Ill. 36; Anderson v. Etter, 102 Ind. 115, 26 N. E. 218; Gardner v. Cole, 21 Iowa, 212; City of Baltimore v. Williams, 6 Md. 235; Verplanck v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; Lancaster v. Dolan, 1 Rawle. (Pa.) 231, 18 Am. Dec. 625;

Foster v. Walton, 5 Watts (Pa.) 378; Laird v. Scott, 5 Heisk. (Tenn.) 314.

37. 1 Stimson's Am. St. Law, § 4592.

38. McNeely v. Rucker, 6 Blackf. (Ind.) 391; City of Baltimore v. Williams, 6 Md. 235; Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Laird v. Scott, 5 Heisk. (Tenn.) 314; Harton v. Lyons, 97 Tenn. 180, 36 S. W. 851. *Contra*, Fleming v. Townsend, 6 Ga. 103, 50 Am. Dec. 318; Gardner v. Cole, 21 Iowa, 205; Enders v. Williams, 1 Metc. (Ky.) 346. And see Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Mellick v. Mellick, 47 N. J. Eq. 86, 19 Atl. 870.

usually regarded as necessarily showing a fraudulent intent in making the first conveyance, so as to bring it within the terms of the statute;<sup>39</sup> though it may cast upon the grantee in the first conveyance the burden of showing the absence of such an intent.<sup>40</sup> The general result of the decisions in this country, accordingly, is that, while a conveyance intended to be in fraud of a subsequent purchaser is invalid as against him, it is not so, even though voluntary, if not actually fraudulent, and he has notice of its existence.

Even though the prior conveyance be invalid so far as concerns the grantee therein, it cannot be set aside as against a purchaser from him for value without notice of the fraud, nor, when the fraud is based, as formerly in England, on the voluntary character of the conveyance, although he knows of its voluntary character.<sup>41</sup>

The Statute of 27 Eliz. c. 4, also contained a provision that a conveyance containing a power of revocation in the grantor should be invalid as against a subsequent conveyance by the same grantor to a purchaser for a valuable or good consideration. This provision, or its substantial equivalent, has been adopted in many states;<sup>42</sup> but occasion for the application of such statutes has, in England, but seldom arisen, and, in this country, practically never.

**§ 589. Conveyances in violation of the bankrupt act.** The national bankruptcy act<sup>43</sup> provides that a

39. *Beal v. Warren*, 2 Gray (Mass.) 447; *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. Ed. 120; *Jackson v. Town*, 4 Cow. (N. Y.) 603; *City of Baltimore v. Williams*, 6 Md. 235; *Shaw v. Tracy*, 83 Mo. 224; 4 Kent's Comm. 463, note.

40. *City of Baltimore v. Williams*, 6 Md. 235; *Gardner v. Cole*, 21 Iowa, 212; *Gilliland v. Fenn*, 90 Ala. 230, 9 L. R. A. 413, 8 So. 15; *Cathcart v. Robin-*

*son*, 5 Pet. (U. S.) 264, 8 L. Ed. 120; 1 Story, Eq. Jur. § 427; 2 Pomeroy, Eq. Jur. § 974.

41. *Prodgers v. Langham*, 1 Sid. 133; *Doe d. Newman v. Rusham*, 17 Q. B. 723; *Gilliland v. Fenn*, 90 Ala. 230, 9 L. R. A. 413, 8 So. 15; *Fletcher v. Peck*, 6 Cranch (U. S.) 87, 3 L. Ed. 162; *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238.

42. 1 Stimson's Am. St. Law. § 4593.

person shall be deemed to have given a preference if, being insolvent, he has, within four months of the filing of the petition in bankruptcy or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class, such period of four months not to expire until four months after the date of the recording or registering of the transfer, if such recording or registering is required by law; and it furthermore provides that in such case, if the person receiving the judgment or transfer, or to be benefitted by it, or his agent, shall have reasonable cause to believe that the enforcement of such judgment or transfer will effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. The statute also gives the trustee the right to take proceedings to set aside any transfer in fraud of creditors, made within four months prior to the filing of the petition, and vests in him the title to property so transferred.<sup>44</sup> Under the act, moreover, any general assignment for the benefit of creditors, although free from fraudulent intent, and containing no preferences, is an act authorizing an adjudication of bankruptcy, whereupon the assignment becomes void.<sup>45</sup>

§ 590. **Transfers by disseisees.** By St. 32 Hen. VIII. c. 9,<sup>46</sup> it was declared to be unlawful to buy or sell any pretended right or title to any lands or hereditaments unless the vendors or their ancestors, or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or re-

43. Act July 1, 1898, § 60, as amended June 25, 1910. *liet, Bankr. (10th Ed.) 97 et seq.*

44. Bankruptcy Act. §§ 67, 70;

45. Bankruptcy Act, § 3; Col- 46. The "Pretended Title Act"

(A. D. 1540).

mainder thereof, or taken the rents or profits thereof, for one whole year next before the sale, but the purchase of a pretended title, by a person in lawful possession of the rents and profits, was declared to be allowable. It is sometimes said that this statute is merely declaratory of the common law, but since, at common law, and before the Statute of Uses, the transfer of freehold interests in land necessarily involved a transfer of the seisin, there was, it would seem, but little room for the application of a statute forbidding the transfer of land by one who was disseised, that is, the transfer of a right of entry merely.<sup>47</sup>

In a few states in this country the English statute, or the principle involved therein, was adopted as a part of the common law.<sup>48</sup> In other states there are specific statutory provisions invalidating transfers of land in the adverse possession of another person.<sup>49</sup> In a majority of the states, however, at the present time, no restriction upon the right of transfer arising from the fact that the land is in the adverse possession of a third person is recognized,<sup>50</sup> and that such is the law is quite frequently declared by statute.<sup>51</sup>

47. See Rawle, *Covenants for Title*, § 47. Article in 2 *Law Quart. Rev.* 481, by Prof. Maitland.

48. *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *Patterson v. Nixon*, 79 Ind. 251; *Tabb v. Baird*, 3 Call. (Va.) 481; *Barry v. Adams*, 3 Allen (Mass.) 493; 4 Kent's Comm. 448.

In England, the statute was regarded as invalidating a sale by one who had not been in possession for a year. *Doe d. Williams v. Evans*, 1 C. B. 717. But 8 & 9 Vict. C. 106, making rights of entry alienable, changed the law in this respect. *Kennedy v. Lyell*, 15 Q. B. Div. 491; *Jenkins* 3 R. 1.

*v. Jones*, 9 Q. B. Div. 128.

49. *Stimson's Am. St. Law* § 1401.

50. *Roberts v. Cooper*, 20 How. (U. S.) 467, 15 L. Ed. 969; *Lytle v. State*, 17 Ark. 608; *Mathewson v. Fitch*, 22 Cal. 86; *Bayard v. McLane*, 3 Har. (Del.) 139; *Matthews v. Hevner*, 2 App. D. C. 349; *Doe d. Cain v. Roe*, 23 Ga. 82; *Bon v. Graves*, 216 Mass. 440, 103 N. E. 1023; *Farrar v. Fessenden*, 39 N. H. 268; *Hall v. Ashby*, 9 Ohio, 96; *Stoever v. Whitman's Lessee* 6 Binn. (Pa.) 416; *Hall v. Ashby*, 9 Ohio, 96.

51. 1 *Stimson's Am. St. Law*, § 1401. See *Shortall v. Hinckley*, 31 Ill. 219; *Trustees of Putnam*

The adverse possession in a third person which invalidates the conveyance need not, as a rule, be under color of title,<sup>52</sup> though in two states the statute is otherwise construed.<sup>53</sup>

The statute has been held not to apply to a transfer made in the performance of an executory contract valid when made,<sup>54</sup> to a transfer made to correct a mistake,<sup>55</sup> to a judicial sale,<sup>56</sup> to a transfer by the state,<sup>57</sup> nor to a conveyance operating by way of release to the person in possession.<sup>58</sup>

A conveyance of land in the adverse possession of another, in violation of the statute, though it does not convey the legal title, so as to enable the grantee to maintain an action against the person in possession, is

*Free School v. Fisher*, 34 Me. 172; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Cassedy v. Jackson*, 45 Miss. 397; *Carrington v. Goddin*, 13 Grat. (Va.) 587; *Stewart v. McSweeney*, 14 Wis. 468; *Sims v. De Graffenreid*, 4 McCord (S. C.) 253; See *Schaferman v. O'Brien*, 28 Md. 565.

The history and present status of the doctrine are the subject of a valuable article by Professor George P. Costigan, in 19 Harv. Law Rev. 267.

52. *Sharp v. Robertson's Ex'rs*, 76 Ala. 343; *Dubois v. Marshall*, 3 Dana (Ky.) 336; *Barry v. Adams*, 3 Allen (Mass.) 493; *German Mut. Ins. Co. of Indianapolis v. Grim*, 32 Ind. 249, 2 Am. Rep. 341.

53. See *Crary v. Goodman*, 22 N. Y. 170; *Higinbotham v. Stoddard*, 72 N. Y. 94; *Stoddard v. Whiting*, 46 N. Y. 627; *Kreuger v. Schultz*, 6 N. D. 310, 70 N. W. 269.

54. *Greer v. Wintersmith*, 85

Ky. 516, 7 Am. St. Rep. 613, 4 S. W. 232; *Simon v. Gouge*, 12 B. Mon. (Ky.) 156; *Gunn v. Scovill*, 4 Day (Conn.) 234; *Hale v. Darter*, 10 Humph. (Tenn.) 92.

55. *Hopkins v. Paxton*, 4 Dana (Ky.) 36; *Ross v. Blair, Meigs* (Tenn.) 525; *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75.

56. *Humes v. Bernstein*, 72 Ala. 546; *Little v. Bishop*, 9 B. Mon. (Ky.) 240; *Preston v. Breckinridge*, 86 Ky. 319, 6 S. W. 641; *Hoyt v. Thompson*, 5 N. Y. 320; *Coleman v. Manhattan Beach Improvement Co.*, 94 N. Y. 229; *Doe d. Williams v. Bennett*, 26 N. C. 122.

57. *Ward v. Bartholomew*, 6 Pick. (Mass.) 409; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Cassedy v. Jackson*, 45 Miss. 407; *Hill v. Dyer*, 3 Me. 441.

58. *Cameron v. Irwin*, 5 Hill (N. Y.) 272; *Adams v. Buford*, 6 Dana (Ky.) 413; *Sessions v. Reynolds*, 7 Smedes & M. (Miss.) 130; *Williams v. Council*, 49 N. Car. 206.



almost invariably regarded as effective for the purpose of transferring the title as between the parties, and as against everybody except the person in possession and those claiming under him.<sup>59</sup> Consequently, while the grantor can alone sue in ejectment or otherwise for the recovery of the land, a recovery by him inures to the benefit of the grantee,<sup>60</sup> and the grantee may himself, if he so desires, bring ejectment in the name of his grantor.<sup>61</sup> In accordance with the theory that the conveyance is a nullity as regards the person in possession, it has been held that, in spite of the conveyance, a release by the grantor to such person is effective as against the grantee.<sup>62</sup>

§ 591. **The homestead exemption.** In most of the states there are constitutional or statutory provisions exempting from execution or other forced sale for debts, to a certain extent, the "homestead" or residence of the debtor. While these provisions have usually been dictated, in the various states, by the same policy,—that of protecting the family home as against the demands of creditors,—they are exceedingly diverse in character, and even substantially similar provisions have received

59. *Pearson v. King*, 99 Ala. 125, 10 So. 919; *Farnum v. Peterson*, 111 Mass. 148; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Snow v. Inhabitants of Orleans*, 126 Mass. 453; *Den d. Hadley v. Geiger*, 9 N. J. Law, 225; *Hamilton v. Wright*, 37 N. Y. 502; *Van Hoesen v. Benham*, 15 Wend. (N. Y.) 164; *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Park v. Pratt*, 38 Vt. 545. *Contra* *Graves v. Leathers*, 17 B. Mon. (Ky.) 665, and see *Green v. Cumberland, etc. Co.*, 110 Tenn. 35, 72 S. W. 459.

60. *Wilson v. Nance*, 11 Humph. (Tenn.) 189; *Hamilton v.*

*Wright*, 37 N. Y. 502; *Chamberlain v. Taylor*, 92 N. Y. 348; *Coogler v. Rogers*, 25 Fla. 853, 7 So. 391; *Galbraith v. Payne*, 12 N. Dak. 164, 96 N. W. 258.

61. *Farnum v. Peterson*, 111 Mass. 148; *Cleverly v. Whitney*, 7 Pick. (Mass.) 36; *Coogler v. Rogers*, 25 Fla. 853, 7 So. 391; *Thompson v. Richards*, 19 Ga. 594; *Justice v. Eddings*, 75 N. C. 581; *Park v. Pratt*, 38 Vt. 545; *Key v. Snow*, 90 Tenn. 664, 18 S. W. 251. *Contra*, *Crowley v. Vaughan*, 11 Bush. (Ky.) 517.

62. *Everenden v. Beaumont*, 7 Mass. 76; *Dever v. Hagerty*, 169 N. Y. 481, 62 N. E. 586

different constructions in different courts. A brief summary only of the more important features of this legislation, as construed by the courts, can here be given.

The courts have sometimes spoken of the homestead right as an "estate" in land.<sup>63</sup> While the widow's homestead, as before explained, frequently has the characteristics of an estate,<sup>64</sup> it is difficult to understand how the right of an owner of particular land to hold such land exempt from liability for debts can be in any sense an "estate;" and even in states where the statute expressly declares that it is an "estate,"<sup>65</sup> a new meaning must, it would seem, be given to the latter term, in order that the provision may have any real significance.<sup>66</sup> That the homestead right is not an estate has been quite frequently asserted judicially.<sup>67</sup>

—**Persons entitled to the right.** The policy of the homestead statutes is usually to protect the family home, rather than individuals,<sup>68</sup> and consequently the statute

63. *Dorrington v. Myers*, 11 Neb. 388, 5 N. W. 555. *Gilbert v. Cowan*, 3 Lea (Tenn.) 203; *Poe v. Hardie*, 65 N. C. 447; *Hargadene v. Whitfield*, 71 Tex. 482, 9 S. W. 475.

64. *Ante*, § 247.

65. As in Illinois and Massachusetts. See *Browning v. Harris*, 99 Ill. 460; *Abbott v. Abbott*, 97 Mass. 136; *Pratt v. Pratt*, 161 Mass. 276, 37 N. E. 166.

66. The right of homestead exemption is but a partial restoration of the common law exemption of one's land from liability for debts. The estate of the owner whether a fee simple, for life, or for years, is not changed by the fact that he marries or takes indigent relatives to live with him, or otherwise acquires a right to the exemption, or by

the fact that he loses it by abandonment or otherwise. See the discussion in *Waples, Homestead*, c. 9. And see, particularly, the dissenting opinion of Clark, J., in *Vanstory v. Thornton*, 112 N. C. 211, 34 Am. St. Rep. 483, 17 S. E. 566, for a clear and forcible statement of the character of the homestead right.

67. *Black v. Curran*, 14 Wall. (U. S.) 463, 20 L. Ed. 849; *McDonald v. Crandall*, 43 Ill. 231, 92 Am. Dec. 112; *Burns v. Keas*, 21 Iowa, 257; *Little's Guardian v. Woodward*, 14 Bush (Ky.) 585; *Jones v. Britton*, 102 N. Car. 166, 4 L. R. A. 178, 9 S. E. 554; *Yoe v. Hanvey*, 25 S. Car. 56; *Carrigan v. Rowell*, 96 Tenn. 185, 34 S. W. 4.

68. *Waples, Homestead* c. 3.

ordinarily in terms gives the exemption only to the "head of a family," or to a "householder," or "housekeeper" having a family.<sup>69</sup> Whether one is the head of a family is usually determined by the consideration whether he is under a legal or moral obligation to support a person or persons living with him who are dependent on him for support.<sup>70</sup> The family need not consist of more than two persons.<sup>71</sup> But a person living

69. *Waples, Homestead*, c. 3. See *Linton v. Crosby*, 56 Iowa, 386, 41 Am. Rep. 107; *Bosquett v. Hall*, 90 Ky. 566, 9 L. R. A. 351, 29 Am. St. Rep. 404, 13 S. W. 244; *Barry v. Western Assur. Co.*, 19 Mont. 571, 61 Am. St. Rep. 530, 49 Pac. 148; *Moyer v. Drummond*, 32 S. Car. 165, 7 L. R. A. 747, 17 Am. St. Rep. 850, 10 S. E. 952; *Stanley v. Greenwood*, 24 Tex. 224, 76 Am. Dec. 106; *Calhoun v. Williams*, 32 Gratt. (Va.) 18, 34 Am. Rep. 759.

70. *Holloway v. Holloway*, 86 Ga. 576, 11 L. R. A. 518, 22 Am. St. Rep. 484, 12 S. E. 943; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; *Bosquett v. Hall*, 90 Ky. 566, 9 L. R. A. 351, 29 Am. St. Rep. 404, 13 S. W. 244; *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004; *Moyer v. Drummond*, 32 S. Car. 165, 7 L. R. A. 747, 17 Am. St. Rep. 850, 10 S. E. 952.

Accordingly, an unmarried woman, supporting the children of a deceased sister, is entitled to the homestead exemption. *Arnold v. Waltz*, 53 Iowa, 706, 36 Am. Rep. 248, 6 N. W. 40. And likewise an unmarried man supporting brothers or sisters dependent on and living with him. *Green-*

*wood v. Maddox*, 27 Ark. 649; *Marsh v. Lazenby*, 41 Ga. 153. So, a woman supporting the children or grandchildren of a deceased husband (*Wolfe v. Buckley*, 52 Tex. 641; *Holloway v. Holloway*, 86 Ga. 576, 11 L. R. A. 518, 22 Am. St. Rep. 484, 12 S. E. 943), and a father for whom adult children living with him did work without wages (*Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004), have been held to be entitled to claim the exemption. But one who supports relatives living with him who are independent of his support is not entitled to claim the homestead right. *Harbison v. Vaughan*, 42 Ark. 539; *Ramey v. Allison*, 64 Tex. 697. Nor is one who supports persons living with him who are not related to him. *Bosquett v. Hall*, 90 Ky. 566, 9 L. R. A. 351, 29 Am. St. Rep. 404, 13 S. W. 244; *Galligar v. Payne*, 34 La. Ann. 1057; *Hill v. Franklin*, 54 Miss. 632; *Betts v. Mills*, 8 Okla. 351, 58 Pac. 957; *Whitehead v. Nickelson*, 48 Tex. 517.

71. *Kitchell v. Burgwin*, 21 Ill. 40; *Barney v. Leeds*, 51 N. H. 253; *Chamberlain v. Brown*, 33 S. C. 597, 11 S. E. 439; *Miller*

alone is not usually entitled to the benefit of the law,<sup>72</sup> even though he supports others, if these others live apart from him.<sup>73</sup> In a number of states, however, it has been held that one who has been entitled to the exemption as head of a family continues to be so entitled, so long as he remains in possession of the same home, although he ceases to be actually the head of a family, owing to the death or departure of all the other members.<sup>74</sup> The head of the family need not be a man;<sup>75</sup> nor need he or she be married.<sup>76</sup> But a mere contract relation, as when one has only servants living with him, is not sufficient.<sup>77</sup>

During the husband's life, the wife is, by the construction placed on some of the statutes, excluded from the right to a homestead exemption, even in her own property, she not being the head of a family,<sup>78</sup> while,

v. Finegan, 26 Fla. 29, 6 L. R. A. 813, 7 So. 140.

72. Wilson v. Cochran, 31 Tex. 677, 98 Am. Dec. 553; Calhoun v. Williams, 32 Grat. (Va.) 18, 34 Am. Rep. 759; Rock v. Haas, 110 Ill. 528.

73. Rock v. Haas, 110 Ill. 528; Ridenour-Baker Grocery Co. v. Monroe, 142 Mo. 165, 43 S. W. 633. And see Pearson v. Miller, 71 Miss. 379, 42 Am. St. Rep. 470, 14 So. 731.

74. Silloway v. Brown, 12 Allen (Mass.) 30; Stanley v. Snyder, 43 Ark. 429; Stults v. Sale, 92 Ky. 5, 13 L. R. A. 743, 36 Am. St. Rep. 575, 7 S. W. 148; Wilkinson v. Merrill, 87 Va. 513, 11 L. R. A. 622, 12 S. E. 1015; Doyle v. Coburn, 6 Allen (Mass.) 71; Barney v. Leeds, 51 N. H. 253.

75. Brooks v. Collins, 11 Bush (Ky.) 622; Chamberlain v. Brown, 33 S. C. 597, 11 S. E.

439. And see cases referred to *ante*, note 70.

76. Arnold v. Waltz, 53 Iowa, 706, 36 Am. Rep. 248, 6 N. W. 40; Ellis v. White, 47 Cal. 73; Lane v. Philips, 69 Tex. 240, 5 Am. St. Rep. 41, 6 S. W. 610; Chamberlain v. Brown, 33 S. C. 597, 11 S. E. 439; Marsh v. Lazenby, 41 Ga. 154; Greenwood v. Maddox, 27 Ark. 649.

77. Calhoun v. McLendon, 42 Ga. 405; Garaty v. Du Bose, 5 Rich. (S. C.) 493; Ellis v. Davis, 90 Ky. 183, 14 S. W. 74; Whitehead v. Nickelson, 48 Tex. 517; Calhoun v. Williams, 32 Grat. (Va.) 18, 34 Am. Rep. 759. But one having only a servant living with him was held to be a "housekeeper." Pierce v. Kusic, 56 Vt. 418.

78. Fuselier v. Buckner, 28 La. Ann. 594; Turner v. Argo, 89 Tenn. 443, 14 S. W. 930; Barry v. Western Assur. Co., 19 Mont.

under other statutes, she is entitled to such homestead in her own property.<sup>89</sup> Occasionally the wife has been held to be entitled to claim a homestead in the husband's land on the husband's failure to do so,<sup>80</sup> or upon the desertion of the wife and family by the husband.<sup>81</sup>

—**Land in which the right exists.** Since the purpose of the homestead law is usually to protect the family residence, only such land is ordinarily exempt thereunder as is occupied as such residence.<sup>82</sup> This requirement of occupancy is not regarded as satisfied by a mere indefinite intention to occupy the land as a home in the future.<sup>83</sup> But acts constituting a preparation of the premises for residence, coupled with an intention to reside thereon, are usually regarded as sufficient.<sup>84</sup> The premises may, if partly used as a residence, be occupied in part for business purposes,<sup>85</sup> or they may, according

571, 61 Am. St. Rep. 530, 49 Pac. 148. See *Rosenberg v. Jett*. (C. C.) 72 Fed. 90.

79. *Crane v. Waggoner*, 33 Ind. 83; *Partee v. Stewart*, 50 Miss. 717; *Hill v. Myers*, 46 Ohio St. 183, 19 N. E. 593; *Ehreck v. Ehreck*, 106 Iowa, 614, 68 Am. St. Rep. 330, 76 N. W. 793; *McPhee v. O'Rourke*, 10 Colo. 301, 3 Am. St. Rep. 579, 15 Pac. 420. See *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31.

80. *Bowen v. Bowen*, 55 Ga. 182; *Farley v. Hopkins*, 79 Cal. 203, 21 Pac. 737.

81. *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28, 27 S. W. 73; *Moore v. Dunning*, 29 Ill. 130; *Cullers v. James*, 66 Tex. 494, 1 S. W. 314.

82. *Waples, Homestead*, c. 6.

83. *Grosholz v. Newman*, 21 Wall. (U. S.) 481, 22 L. Ed. 471; *Williams v. Dorris*, 31 Ark. 466;

*Greenman v. Greenman*, 107 Ill. 404; *Christy v. Dyer*, 14 Iowa, 438, 81 Am. Dec. 493; *Fant v. Talbot*, 81 Ky. 23; *Lee v. Miller*, 11 Allen (Mass.) 37; *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606, 52 N. W. 787; *Power v. Burd*, 18 Mont. 22, 43 Pac. 1094; *Currier v. Woodward*, 62 N. H. 63; *Fort v. Powell*, 59 Tex. 321.

84. *Gilworth v. Cody*, 21 Kan. 702; *Deville v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 853, 31 N. W. 533; *Hanlon v. Pollard*, 17 Neb. 368, 22 N. W. 767; *Cameron v. Gebhard*, 85 Tex. 610, 34 Am. St. Rep. 832, 22 S. W. 1633; *Woodbury v. Warren*, 67 Vt. 251, 48 Am. St. Rep. 815, 31 Atl. 295; *Shaw v. Kirby*, 93 Wis. 379, 57 Am. St. Rep. 927, 67 N. W. 700; *Waples, Homestead*, 193.

85. *In re Ogburn's Estate*, 105 Cal. 95; *Corey v. Schuster*, 44 Neb. 269, 62 N. W. 470; *DeFord*

to some decisions, be leased in part to others.<sup>86</sup> But, generally, occupation by a tenant is not sufficient to give the homestead exemption to the landlord.<sup>87</sup>

In some states one is allowed a homestead right in a tract of land adjoining that on which the residence is situated, provided, generally, that the tract is used in connection with the residence.<sup>88</sup> And the exemption has been allowed in land adjoining, and used in connection with, the claimant's residence, without reference to his ownership of the latter, or to whether he has the same quantum of estate in both tracts.<sup>89</sup> In some states the right of homestead extends even to land not adjoining the family residence, if used in connection therewith.<sup>90</sup>

v. Painter, 3 Okla. 80, 30 L. R. A. 722, 41 Pac. 96; Stevens v. Hollingsworth, 74 Ill. 202; Bebb v. Crowe, 39 Kan. 342, 18 Pac. 223; Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244. *Contra*, Johnson v. Moser, 66 Iowa, 536, 24 N. W. 32; Crow v. Whitworth, 20 Ga. 38.

86. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451; Lubbock v. McMann, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. 1145; Layson v. Grange, 48 Kan. 440, 29 Pac. 585; Mercier v. Chace, 11 Allen (Mass.) 194; De Ford v. Painter, 3 Okla. 80, 30 L. R. A. 722, 41 Pac. 96. *Contra*, Rhodes v. McCormack, 4 Iowa, 368, 68 Am. Dec. 663; Hargadene v. Whitfield, 71 Tex. 482, 9 S. W. 475; Casselman v. Packard, 16 Wis. 114, 82 Am. Dec. 710.

87. Kaster v. McWilliams, 41 Ala. 302; Maloney v. Hefer, 75 Cal. 422, 7 Am. St. Rep. 180, 17 Pac. 539; Ashton v. Ingle, 20 Kan. 670, 27 Am. Rep. 197; Evans v. Calman, 92 Mich. 427,

31 Am. St. Rep. 606, 52 N. W. 787; Wade v. Wade, 9 Baxt. (Tenn.) 612; True v. Morrill's Estate, 28 Vt. 672; Casselman v. Packard, 16 Wis. 114, 82 Am. Dec. 710.

88. Gregg v. Bostwick, 33 Cal. 20, 91 Am. Dec. 637; Walters v. People, 18 Ill. 194, 65 Am. Dec. 730; Randal v. Elder, 12 Kan. 257; Secombe v. Borland, 34 Minn. 258, 25 N. W. 452; Perkins v. Quigley, 62 Mo. 498; Medlenka v. Downing, 59 Tex. 32.

89. Mason v. Columbia Finance & Trust Co., 99 Ky. 117, 59 Am. St. Rep. 451, 35 S. W. 115; Libbey v. Davis, 68 N. H. 355, 34 Atl. 744; Tyler v. Jewett, 82 Ala. 93, 2 So. 905.

90. Hodges v. Winston, 95 Ala. 514, 36 Am. St. Rep. 241, 11 So. 200; Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Bothell v. Sweet (N. H.) 6 Atl. 646; Martin v. Hughes, 67 N. C. 293; Pryor v. Stone, 19 Tex. 271, 70 Am. Dec. 341; Hastie v. Kelley, 57 Vt. 293.

The quantity of land which may be held as exempt from the claims of creditors is limited by the statute, either as regards value or extent, and occasionally as regards both,<sup>91</sup> the limitation being frequently different, accordingly as the property is located in a town or city, or in the country, that is, accordingly as it is an "urban" or a "rural" homestead.<sup>92</sup>

The statutory limitation upon the pecuniary amount of the exemption has been in some states applied with reference to the value of a fee simple estate in the property, though the claimant of the exemption has only a less estate therein.<sup>93</sup> and in some with reference merely to the value of his estate therein.<sup>94</sup> The value of improvements is ordinarily to be included in the estimate,<sup>95</sup> while the amount of incumbrances is deducted.<sup>96</sup>

—**Character of the claimant's interest in the land.**  
In determining the right to a homestead exemption, the character of the claimant's estate in the land is immaterial.<sup>97</sup> A life estate in the land is, accordingly, suffi-

91. *Waples, Homestead*, c. 7.

92. See *First Nat. Bank of Owantonna v. Wilson*, 62 Ark. 140, 34 S. W. 544; *Kiewert v. Anderson*, 65 Minn. 491, 60 Am. St. Rep. 487, 67 N. W. 1031; *Crilly v. Sheriff*, 25 La. Ann. 219; *McDaniel v. Mace*, 47 Iowa, 509; *Topeka Water-Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *Gallagher v. Smiley*, 28 Neb. 189, 26 Am. St. Rep. 319, 44 N. W. 187; *Taylor v. Boulware*, 17 Tex. 74.

93. *Brown v. Starr*, 79 Cal. 608, 12 Am. St. Rep. 186, 21 Pac. 973; *Yates v. McKibben*, 66 Iowa, 357, 23 N. W. 752; *Arnold v. Jones*, 9 Lea (Tenn.) 545; *Franks v. Lucas*, 14 Bush (Ky.) 395.

94. *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591, 58 N. W. 125; *Squire v. Mudgett*, 63 N. H. 71; *Bank of Columbia v. Gibbs*, 54 S. Car. 579, 32 S. E. 690.

95. *Vanstory v. Thornton*, 110 N. C. 10, 14 S. E. 637; *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. 1145; *Richards v. Nelms*, 38 Tex. 445.

96. *Contra*, under statute, *Chase v. Swayne*, 88 Tex. 218, 53 Am. St. Rep. 742, 30 S. W. 1049.

97. *Hoy v. Anderson*, 39 Neb. 386, 42 Am. St. Rep. 591, 58 N. W. 125; *State v. Mason*, 88 Mo. 222; *Kilmer v. Garlick*, 185 Ill. 406, 56 N. E. 1103.

97. *Waples, Homestead*, 108; *Tyler v. Jewett*, 82 Ala. 93, 2 So. 905; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *John-*

cient to entitle one to assert the right,<sup>98</sup> as is a leasehold estate.<sup>99</sup> A present right of possession is, however, necessary, and consequently an estate in remainder or reversion is insufficient.<sup>1</sup>

One may be entitled to the homestead exemption, though he has an equitable estate only in the land,<sup>2</sup> as when he is occupying the land under a contract of purchase.<sup>3</sup> It may be claimed in land subject to a mortgage, though this constitutes a mere "equity of redemption."<sup>4</sup>

In some states, a tenant in common may claim the exemption in the land so concurrently held, if he occupies it as a family residence,<sup>5</sup> while in other states a contrary

son v. Richardson, 33 Miss. 462; Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378.

98. Steiner v. Berney, 130 Ala. 289, 30 So. 570; White Sewing Machine Co. v. Wooster, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000; Deere v. Chapman, 25 Ill. 610, 79 Am. Dec. 350; Pendergast v. Heekin, 94 Ky. 384, 22 S. W. 605; Kendall v. Powers, 96 Mo. 142, 9 Am. St. Rep. 326, 8 S. W. 793; Arnold v. Jones, 9 Lea (Tenn.) 545.

99. Conklin v. Foster, 57 Ill. 104; White v. Danforth, 122 Iowa. 403, 98 N. W. 136; Maatta v. Kippola, 102 Mich. 116, 60 N. W. 300; *In re* Emerson's Homestead, 58 Minn. 450, 60 N. W. 23; Cul- lers v. James, 66 Tex. 494, 1 S. W. 314; Beranek v. Beranek, 113 Wis. 272, 89 N. W. 146.

1. Murchison v. Plyler, 87 N. C. 79; Brokaw v. Ogle, 170 Ill. 115, 48 N. E. 394; Cornish v. Frees, 74 Wis. 490, 43 N. W. 507; Howell v. Jones, 91 Tenn. 402, 19 S. W. 757. But if the particular estate ends before a sale under execution, the exemption may be asserted. Stern v.

Lee, 115 N. C. 426, 26 L. R. A. 814, 20 S. E. 736.

2. Bartholomew v. West, 2 Dill. 290, Fed. Cas. No. 1,071; Hewitt v. Rankin, 41 Iowa, 35; Rice v. Rice, 108 Ill. 199; Doane's Ex'r v. Doane, 46 Vt. 485; Waples, Homestead, 117.

3. Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. 593; Myrick v. Bill, 5 Dak. 167, 37 N. W. 369; Stafford v. Woods, 144 Ill. 203, 23 N. E. 539; Lessell v. Goodman, 97 Iowa, 681, 59 Am. St. Rep. 432, 66 N. W. 917; McKee v. Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Hook v. Northwest Thresher Co. 91 Minn. 482, 98 N. W. 463; Smith v. Chenault, 48 Tex. 455; Canfield v. Hard, 58 Vt. 217, 2 Atl. 136.

4. Fellows v. Dow, 58 N. H. 21; State v. Mason, 88 Mo. 222; Hinson v. Adrian, 92 N. C. 121; Doane's Ex'r v. Doane, 46 Vt. 485.

5. Wike v. Garner, 179 Ill. 257, 70 Am. St. Rep. 162, 53 N. E. 613; Thorn v. Thorn, 14 Iowa, 49, 81 Am. Dec. 451; Lozo v. Sutherland, 38 Mich. 171; Lewis



view has been taken.<sup>6</sup>

Land owned by a partnership is, in a number of the states, not exempt from liability for the debts of a partnership because used by one of the partners as a family residence,<sup>7</sup> though in other states it is exempt if all the partners assent to the claim of exemption.<sup>8</sup> The right of one of the copartners to an exemption in his share of the partnership land as against an individual creditor might, it would seem, be decided with reference to the rule prevailing in the particular jurisdiction in regard to land owned in common, the right to such exemption being contingent upon whether he has himself occupied the land with his family.

—**Debts to which the exemption extends.** The existence of the homestead exemption has the effect, generally, of relieving the property from liability for the debts of the owner, but the statute frequently makes exceptions in favor of certain classes of creditors. The statute in almost all the states provides in express terms that the exemption of the land from liability for debts shall not extend to a debt to the vendor for the purchase price,<sup>9</sup> and, apart from any such express provision, the

v. White, 69 Miss. 352, 30 Am. St. Rep. 557, 13 So. 349; Giles v. Miller, 36 Neb. 346, 38 Am. St. Rep. 730, 54 N. W. 551; Clements v. Lacy, 51 Tex. 150; McClary v. Bixby, 36 Vt. 354, 84 Am. Dec. 684.

6. Wolf v. Fleischacker, 5 Cal. 244, 63 Am. Dec. 121; Ventress v. Collins, 38 La. Ann. 783; Thurston v. Maddocks, 6 Allen (Mass.) 427; Holmes v. Winchester, 138 Mass. 542; J. I. Case Co. v. Joyce, 89 Tenn. 337, 12 L. R. A. 519, 16 S. W. 147; West v. Ward, 26 Wis. 579.

7. Bishop v. Hubbard, 23 Cal. 514, 83 Am. Dec. 132; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Drake v. Moore, 66

Iowa, 58, 23 N. W. 263; Michigan Trust Co. v. Chapin, 106 Mich. 384, 58 Am. St. Rep. 490, 64 N. W. 334; Terry v. Berry, 13 Nev. 514; *Ex parte* Karish, 32 S. C. 437, 17 Am. St. Rep. 865, 11 S. E. 298; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083; Chalfant v. Grant, 3 Lea (Tenn.) 118; Short v. McGruder (C. C.) 22 Fed. 46.

8. Hunnicutt v. Summey, 63 Ga. 586; Ferguson v. Speith, 13 Mont. 487, 40 Am. St. Rep. 459, 34 Pac. 1020; McMillan v. Williams, 109 N. C. 252, 13 S. E. 764; Swearingen v. Bassett, 65 Tex. 267.

9. Waples, Homestead, c. 11.

land would usually be regarded as liable for such a debt, either on the ground of the existence of a vendor's lien, or by the construction placed upon the statute. But the exemption has been held to extend to a claim for money borrowed to pay the purchase price, this not being within the statutory exception in favor of purchase-money claims,<sup>10</sup> though in some cases the view is taken that, if it is understood between the purchaser and the lender that the loan shall be used in paying the purchase price, the lender may enforce his claim against the homestead.<sup>11</sup>

There is quite frequently a provision that the exemption shall not exist as against debts incurred in improving the premises.<sup>12</sup>

Taxes likewise are usually made enforceable against the homestead, either by the terms of the homestead law or the provisions in regard to sales of land for taxes.<sup>13</sup> Generally speaking, however, claims of the state stand upon the same plane as the claims of private individuals as regards their enforcement against the homestead property.<sup>14</sup>

10. *Eyster v. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336; 34 Pac. 349; *Perry v. Ross*, 104 Cal. 15, 43 Am. St. Rep. 66, 37 Pac. 757; *Loftis v. Loftis*, 94 Tenn. 232. See *Nottes' Appeal*, 45 Pa. St. 361.

11. *Acruman v. Barnes*, 66 Ark. 442, 74 Am. St. Rep. 104, 51 S. W. 319; *White v. Wheelan*, 71 Ga. 533; *Warhumund v. Merritt*, 60 Tex. 24; *Nichols v. Overacker*, 16 Kan. 54; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47. If the loan and the purchase can all be considered one transaction, then the lender is, it seems, entitled to stand in the position of the vendor. *Austin v. Underwood*.

37 Ill. 438, 87 Am. Dec. 254; *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, 34 Pac. 349.

12. See *Lewton v. Hower*, 18 Fla. 872; *McWilliams v. Bones*, 84 Ga. 203; *Hurd v. Hixon*, 27 Kan. 722; *All v. Goodson*, 33 S. C. 229, 11 S. E. 703; *Miller v. Brown*, 11 Lea (Tenn.) 155; *Butler v. Davis*, 15 Ky. L. Rep. 273, 23 S. W. 220.

13. *Higgins v. Bordages*, 88 Tex. 458; *Douthett v. Winter*, 108 Ill. 330; *Lamar v. Sheppard*, 80 Ga. 25, 5 S. E. 247; *Shell v. Duncan*, 31 S. C. 547, 5 L. R. A. 821, 10 S. E. 330; *Waples, Homestead*, 327.

14. *Central Kentucky Lunatic*

In some states the statute is construed as exempting the homestead premises only from claims based on contract, leaving them liable for claims arising from tort; this construction being placed on a provision exempting the premises from liability for "debts contracted."<sup>15</sup> In some states the exemption is effective only as against debts incurred after the acquisition of the property, or after its occupation as a homestead, or after a formal declaration of an intention to claim the homestead rights.<sup>16</sup>

Liens which have attached to the land before its purchase, or before it acquired its homestead character, can be enforced against it.<sup>17</sup>

The exemption cannot be asserted as against debts which were contracted before the adoption of the law creating or enlarging the right, and under which the right is asserted, since the law, if given such retroactive

*Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323, 32 S. W. 291; *Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196; *Colquitt v. Brown*, 63 Ga. 440; *Ren v. Driskell*, 11 Lea (Tenn.) 642; *State v. Pitts*, 51 Mo. 133. Accordingly, the homestead has been held to be exempt from sale under execution to satisfy a fine or judgment for costs in a criminal prosecution. *Com. v. Lay*, 12 Bush (Ky.) 283, 23 Am. Rep. 718; *Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196; *Hollis v. State*, 59 Ark. 211, 43 Am. St. Rep. 28, 27 S. W. 73; *Loomis v. Gerson*, 62 Ill. 11.

15. *Whitacre v. Rector*, 29 Grat. (Va.) 714, 26 Am. Rep. 420; *Nowling v. McIntosh*, 89 Ind. 593; *Burton v. Mill*, 78 Va. 468; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *McLaren v. Anderson*, 81 Ala. 106; *Davis v. Henson*, 29 Ga. 345.

16. *Waples, Homestead*, 282 *et seq.*

17. *Zander v. Scott*, 165 Ill. 51, 46 N. E. 2; *Bullene v. Hiatt*, 12 Kan. 98; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Meador v. Meador*, 88 Ky. 217, 10 S. W. 651; *Davis Sewing-Mach. Co. v. Whitney*, 61 Mich. 518, 28 N. W. 674; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 48, 7 S. W. 473; *Pender v. Lancaster*, 14 S. C. 25, 37 Am. Rep. 720; *Dye v. Cook*, 88 Tenn. 275, 17 Am. St. Rep. 882, 12 S. W. 631; *Clements v. Lacy*, 51 Tex. 150. So in the case of mortgage liens. *Webster v. Dundee Mortgage & Trust Co.*, 93 Ga. 278, 20 S. E. 310; *McCormick v. Wilcox*, 25 Ill. 274; *Gibson v. Mundell*, 29 Ohio St. 523; *Mabry v. Harrison*, 44 Tex. 286; *Spaulding v. Crane*, 46 Vt. 292.

effect, would impair the obligation of contracts, in violation of the United States constitution.<sup>18</sup>

—**Claim and selection.** Though, usually, occupancy for residence purposes is sufficient to give to land the homestead character,<sup>19</sup> in some states it is necessary that the owner and occupant also put on record his claim of homestead rights in the property, and the exemption is not effective as against debts incurred before this is done.<sup>20</sup>

The procedure to be adopted in order to secure the exemption in case of issuance of execution against the owner varies greatly in the different states, there usually being a provision for the presentation by the owner of his claim of exemption, and a selection by him of the amount allowed by law from the premises occupied by him.<sup>21</sup>

—**Transfer of the homestead property.** The requirement which usually exists, that the wife of the owner join in or consent to any transfer of the homestead property, has been previously discussed.<sup>22</sup> Subject to this requirement, the owner has ordinarily the right to transfer the homestead to the same extent as other property,<sup>23</sup> and creditors cannot object to such

18. *Gunn v. Barry*, 15 Wall. (U. S.) 610, 21 L. Ed. 212; *Edwards v. Kearzey*, 36 U. S. 595; *Tillotson v. Millard*, 7 Minn. 513 (Gil. 419), 82 Am. Dec. 112; *Homestead Cases*, 22 Grat. (Va.) 266, 12 Am. Rep. 507; *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882, 12 S. W. 631.

19. *Davis v. Day*, 56 Ark. 156, 19 S. W. 502; *Taylor v. Hargous*, 4 Cal. 272, 60 Am. Dec. 606; *Broome v. Davis*, 87 Ga. 584, 13 S. E. 749; *Imhoff v. Lipe*, 162 Ill. 282, 44 N. E. 493; *Green v. Farrar*, 53 Iowa, 426, 5 N. W. 557; *Barton v. Drake*, 21 Minn.

299; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705.

20. See *Goodwin v. Colorado Mortgage Inv. Co. of London*, 110 U. S. 1, 28 L. Ed. 47; *Drake v. Root*, 2 Colo. 685; *Timothy v. Chambers*, 85 Ga. 267, 21 Am. St. Rep. 163, 11 S. E. 598; *Wright v. Westheimer*, 2 Idaho, 962; *Threat v. Moody*, 87 Tenn. 143, 9 S. W. 424.

21. See *Waples, Homestead*, c. 22.

22. *Ante*, § 248.

23. *Waples, Homestead*, 469, 497. See *Roger v. Adams*, 66

action as being fraudulent as against them, since they have no rights against the homestead property in any case.<sup>24</sup> Likewise, the land may, in the absence of express prohibition, be mortgaged by the owner, with the joinder or consent of his wife.<sup>25</sup> By statute, occasionally, however, there is a restriction upon the right to transfer or mortgage the homestead. In one state, for instance, it can be mortgaged only to secure the purchase money or the cost of improvements.<sup>26</sup>

In most of the states the conveyance of the homestead premises, though it involves an abandonment of the homestead, does not give a right to enforce against the land in the hands of the purchaser a judgment which was obtained against the owner of the homestead during his occupancy.<sup>27</sup>

Ala. 600; *Fishback v. Lane*, 36 Ill. 437; *Larson v. Reynolds*, 13 Iowa, 581, 81 Am. Dec. 444; *Wea Gas, Coal & Oil Co. v. Franklin Land Co.*, 54 Kan. 533, 45 Am. St. Rep. 297, 38 Pac. 790; *Brame v. Craig*, 12 Bush. (Ky.) 404; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Barton v. Drake*, 21 Minn. 299; *Kendall v. Powers*, 96 Mo. 142, 9 Am. St. Rep. 326, 8 S. W. 793; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730, 54 N. W. 551; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674, 11 S. E. 1099; *Astugueville v. Loustaunau*, 61 Tex. 233; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. 303.

24. *Winter v. Ritchie*, 57 Kan. 212, 57 Am. St. Rep. 331, 45 Pac. 595; *Tong v. Erfort*, 80 Ky. 152; *Castle v. Palmer*, 6 Allen (Mass.) 401; *Smith v. Rumsey*, 33 Mich. 183; *Bank of Versailles v. Guthrey*, 127 Mo. 189, 48 Am. St. Rep. 621, 29 S. W. 1004; *Roberts v. Robinson*, 49 Neb. 717,

59 Am. St. Rep. 567, 68 N. W. 1035; *Williams v. Watkins*, 92 Va. 680, 24 S. E. 223.

25. *Preiss v. Campbell*, 59 Ala. 635; *Low v. Anderson*, 41 Iowa, 476; *Jamison v. Bancroft*, 20 Kan. 169; *Hand v. Winn*, 52 Miss. 784; *Grimes v. Portman*, 99 Mo. 229, 12 S. W. 792; *Moran v. Clark*, 30 W. Va. 358, 8 Am. St. Rep. 66, 4 S. E. 303.

26. Const. Tex. art. 16, § 50. See *Equitable Mortgage Co. v. Norton*, 71 Tex. 683. And in Georgia any mortgage is, it seems, invalid, while a sale is valid only if approved by the court. *Planter's Loan Savings Bank v. Dickinson*, 83 Ga. 711, 10 S. E. 446. The prohibitions formerly existing in Arkansas and California against the alienation of the homestead property were repealed. *Peterson v. Hornblower*, 33 Cal. 266; *Brown v. Watson*, 41 Ark. 309.

27. *Bonds v. Strickland*, 60 Ga. 624; *Cummings v. Long*, 16

The statute sometimes authorizes the proceeds of the sale of homestead premises to be invested in another homestead, which will be exempt from all the debts from which the previous homestead was exempt,<sup>28</sup> and occasionally the proceeds of sale, pending such reinvestment, are exempt.<sup>29</sup> The proceeds of a sale of the premises under order of court or by judicial process are also usually exempt to the same extent as the premises,<sup>30</sup> and the proceeds of insurance on the property are, in some states, exempt.<sup>31</sup>

The statute does not usually prohibit a testamentary disposition of the homestead premises by the owner, but such right is frequently restricted by the provisions giving the surviving consort and children certain rights in the land. Occasionally, but not frequently, a prohibi-

Iowa, 41, 85 Am. Dec. 502; *Ellwell v. Hitchcock*, 41 Kan. 130, 21 Pac. 109; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448; *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730, 54 N. W. 551; *Vanstory v. Thornton*, 112 N. C. 196, 34 Am. St. Rep. 483, 17 S. E. 566; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674, 11 S. E. 1099; *Black v. Epperson*, 40 Tex. 162; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696. *Contra*, *Denis v. Gayle*, 40 La. Ann. 826, 4 So. 3; *Whitworth v. Lyons*, 39 Miss. 468. And see the able dissenting opinion in *Vanstory v. Thornton*, *supra*.

28. *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448; *Watson v. Saxer*, 102 Ill. 585; *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188; *Cooper v. Arnett*, 95 Ky. 603, 26 S. W. 811.

The same effect frequently follows when there is a direct exchange of the old homestead

for a new one. *Creath v. Dale*, 84 Mo. 349; *Mann v. Corrington*, 93 Iowa, 108, 57 Am. St. Rep. 256, 61 N. W. 409; *Schneider v. Bray*, 59 Tex. 668.

29. *Smith v. Gore*, 23 Kan. 488, 33 Am. Rep. 188; *Schuttloffel v. Collins*, 98 Iowa, 575, 60 Am. St. Rep. 216, 67 N. W. 397; *Hewett v. Allen*, 54 Wis. 583, 12 N. W. 45; *Prugh v. Portsmouth Sav. Bank*, 48 Neb. 414, 67 N. W. 309.

30. *Swandale v. Swandale*, 25 S. C. 389; *Keyes v. Rines*, 37 Vt. 260, 86 Am. Dec. 707; *Jackson v. Reid*, 32 Ohio St. 443; *Simpson v. Biffle*, 63 Ark. 289, 38 S. W. 345.

31. *Culbertson v. Cox*, 29 Minn. 309, 43 Am. Rep. 204, 13 N. W. 177; *Cameron v. Fay*, 55 Tex. 58; *Houghton v. Lee*, 50 Cal. 101. *Contra*, *Smith v. Ratcliff*, 66 Miss. 683, 14 Am. St. Rep. 606, 6 So. 460; *Wooster v. Page*, 54 N. H. 125, 20 Am. Rep. 128.

tion in general terms of a transfer or alienation by the husband alone has been held to apply to a transfer by will.<sup>32</sup>

—**Loss of rights by abandonment.** The right to the homestead exemption in particular land is lost by the abandonment of the land as a place of residence.<sup>33</sup> But to constitute an abandonment, the removal from the property must be permanent, without an intention to return.<sup>34</sup> An abandonment is not necessarily shown by the fact that the owner leases the homestead property to a tenant, provided the owner's absence therefrom is but temporary.<sup>35</sup>

—**Waiver of rights.** The right to hold land exempt from forced sale for debts may, as before stated, be in effect waived as to a debt secured by mortgage on the land. Under the statutes or decisions of a number of courts, moreover, the owner of land may, by agreement, waive the right of exemption as regards a particular debt, provided, usually, the waiver be in writing, and the wife join therein.<sup>36</sup> In some states, however,

32. *Waples*, Homestead, c. 14.

33. *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247; *Fyffe v. Beers*, 18 Iowa, 4, 85 Am. Dec. 577; *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Shepherd v. Cassidy*, 20 Tex. 26, 70 Am. Dec. 372; *Foster v. Leland*, 141 Mass. 187, 6 N. E. 859; *Niehaus v. Paul*, 43 Ohio St. 63, 1 N. E. 87.

34. *Tumlinson v. Swinney*, 22 Ark. 400, 76 Am. Dec. 432; *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31; *Boot v. Brewster*, 75 Iowa, 631, 9 Am. St. Rep. 515, 36 N. W. 649; *Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323, 32 S. W. 291; *Kaes v. Gross*, 92

3 R. P.—3

Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 59 N. W. 202; *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642; *McDermott v. Kernan*, 72 Wis. 268, 7 Am. St. Rep. 864, 39 N. W. 537.

35. *Wiggins v. Chance*, 54 Ill. 175; *Stewart v. Brand*, 23 Iowa, 477; *Dulanty v. Pyncheon*, 6 Allen (Mass.) 510; *Earl v. Earl*, 60 Mich. 30, 26 N. W. 822; *Wetz v. Beard*, 12 Ohio St. 431; *Herrick v. Graves*, 16 Wis. 163.

36. *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Foley v. Cooper*, 43 Iowa, 376; *Littlejohn v. Egerton*, 76 N. C. 468; *Crout v. Sauter*, 13 Bush (Ky.) 442;

one cannot agree not to assert the right as against a particular debt.<sup>37</sup> Whether the owner impliedly waives his right of exemption by failure to assert it at the time of an attempted sale of the land at the instance of creditors is a question on which the decisions are in direct conflict.<sup>38</sup>

—**Federal homestead exemption.** The acquisition of public lands by individuals under the United States homestead law has been before referred to. The purpose of this law is primarily entirely different from the state homestead exemption laws, though they bear similar names. There is, however, one point of resemblance, in that the statute providing for the acquisition of public land by one establishing a home thereon declares that the land so acquired shall be exempt from liability to forced sale for debts incurred previous to the issuance of a patent therefor.<sup>39</sup>

§ 592. **Restraints in creation of estate.**—(a) **Fee simple estate.** A condition, a special limitation, or an executory limitation, terminating an estate in fee simple, or making it terminable, upon the making of a transfer by the owner thereof, is invalid,<sup>40</sup> as is a provision imposing a penalty to be charged on the land,

Dye v. Mann, 10 Mich. 291;  
Ferguson v. Kumler, 25 Minn.  
183.

37. Terrell v. Hurst, 76 Ala.  
588; Tanner v. Mutual Benefit  
Building Ass'n, 95 Ga. 528, 20 S.  
E. 499.

38. Waples, Homestead, 729.

39. Rev. St. U. S. § 2296.

40. Litt. § 360; Co. Litt. 233a;  
2 Jarman, Wills, 855; *In re*  
Roshier, 26 Ch. Div. 801; *In re*  
Dugdale, 38 Ch. Div. 176; Potter  
v. Couch, 141 U. S. 296, 35 L.  
Ed. 721; Freeman v. Phillips, 113  
Ga. 589, 38 S. E. 943; *In re*

Ogle's Estate, 146 Iowa, 33, 124  
N. W. 758; Winser v. Mills, 157  
Mass. 362, 32 N. E. 352; Mutual  
Benefit Life Ins. Co. v. Rector,  
etc., of Grace Church, 53 N. J.  
Eq. 413, 32 Atl. 691; Hardy v.  
Galloway, 111 N. C. 519, 32 Am.  
St. Rep. 828, 15 S. E. 896; Turley  
v. Massengill, 7 Lea (Tenn.)  
353; Diamond v. Rotan, 58 Tex.  
Civ. App. 263, 124 S. W. 196.  
But a limitation over in case  
of an alienation by a tenant in  
fee simple was regarded as  
valid in Camp v. Cleary, 76 Va.  
140, and the rule referred to



in case of a transfer.<sup>41</sup> Such an indirect restriction upon the alienation of an estate in fee simple is frequently said to be repugnant to the nature of the estate, but it is so repugnant merely because the courts have so regarded it. Before the statute *Quia Emptores*,<sup>42</sup> it appears to have been regarded as possible for a feoffor to provide against alienation by the feoffee,<sup>43</sup> and as has been remarked by a writer of high authority,<sup>44</sup> "the conception of a condition against alienation attached to a legal fee simple estate presents no logical difficulties." The real basis of the rule prohibiting a provision of the character mentioned which, by divesting, or giving power to divest, the estate created in case of its voluntary transfer, operates to prevent such transfer, is to be found in considerations of public policy, adverse to the withdrawal of property from commerce, and the check upon its improvement and development which must result therefrom; and in the case of an estate in fee simple, since the abolition of subinfeudation by the statute referred to, there is no interest remaining in the grantor to be benefitted by such a restriction,<sup>45</sup> and consequently no reason why these considerations of public policy should be denied their full effect.

As a condition or limitation operating indirectly to restrict alienation by a tenant in fee simple is invalid, so a direct prohibition of such alienation is invalid, that is, a tenant in fee simple cannot, by the terms of the

was ignored by Joyce, J., in *Re Leach* (1912), 2 Co. 422, criticized, 33 Law Quart. Rev. 13, 240.

41. *De Peyster v. Michael*, 6 N. Y. 467; *In re Rosher*, 26 Ch. Div. 806; *Billing v. Welch*, Ir. Rep. 6 C. L. 88. As is a similar provision in the case of a fee tail. *King v. Burckell*, Amb. 379; *Gray, Restraints on Alienation*, § 25.

42. *Ante*, § 11.

43. See Co. Litt. 223a, and extracts from Bracton and Britton in *Gray, Restraints on Alienation*, §§ 16, 17.

44. *Gray, Restraints on Alienation*, § 257.

45. See Co. Litt. 223a; *Mandlebaum v. McDonell*, 29 Mich. 78, 95; *De Peyster v. Michael*, 6 N. Y. 467, 491.

creation of the estate, be compelled to retain the property against his will.<sup>46</sup> The invalidity of such a provision may be regarded as based, not only on its tendency to withdraw the property from commerce, but also on the fact that the statutes fully recognize the right of the tenant to dispose of his property by transfer *inter vivos* or by will, and a provision of the character referred to would operate in contravention of such statutes. Moreover a mere prohibition of alienation is invalid, it seems, by reason of the fact that there is no person intended to benefit in case of its breach and consequently no person entitled to enforce it.<sup>46a</sup>

If one is given, not an estate, but a mere possibility of an estate, such as an executory interest or a contingent remainder, a restraint on alienation until the time of vesting is valid, that is, the non alienation of the interest given may be made a part of the condition precedent on which the vesting is to occur.<sup>47</sup>

—**Limited restriction.** A provision which operates, directly or indirectly, to restrain alienation by a legal tenant in fee simple in some particular way, as by

46. Hill v. Gray, 160 Ala. 273, 49 So. 676; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Stamey v. McGinnis, 145 Ga. 226, 88 S. E. 935; Johnson v. Preston, 226 Ill. 447, 10 L. R. A. (N. S.) 564, 80 N. E. 1001; Goldsmith v. Petersen, 159 Iowa, 692, 141 N. W. 60; Turner v. Hallowell Sav. Inst., 76 Me. 527; Clark v. Clark, 99 Md. 356, 58 Atl. 24; Lathrop v. Merrill, 207 Mass. 6, 92 N. E. 1019; Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; Loosing v. Loosing, 85 Neb. 66, 122 N. W. 707; Schwren v. Falls, 170 N. C. 251, L. R. A. 1916B,

1235, 87 S. E. 49; McWilliams v. Nisley, 2 Serg. & R. (Pa.) 507; McIntyre v. McIntyre, 123 Pa. 329, 10 Am. St. Rep. 529, 16 Atl. 783; McCravey v. Otts, 90 S. C. 447, 74 S. E. 142; Seay v. Cockrell, 102 Tex. 280, 115 S. W. 1160.

46a. Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61; *In re Ogle's Estate*, 146 Iowa, 33, 124 N. W. 758.

47. Mandlebaum v. McDonell, 29 Mich. 78, 18 Am. Rep. 61, explaining *Large's Case* 2 Leon 82, 3 Leon 182. And see *Bank of State v. Forney*, 33 N. C. 181.

conveyance *inter vivos*,<sup>48</sup> or mortgage,<sup>49</sup> or for some particular purpose, as to carry out a sale,<sup>50</sup> is, by perhaps the weight of authority, invalid,<sup>51</sup> for the same reasons as apply in the case of a provision in more general terms.

A provision operating to discriminate against alienation by will, by limiting the property over in case the tenant dies without having disposed of the property in his lifetime is likewise, it seems, invalid,<sup>52</sup> not, it is evident, because such a provision tends to withdraw the property from commerce, for this it does not do, but rather because it operates to deprive the tenant of his legal right of testamentary disposition, and may deprive his heirs of their right to take by descent. And likewise,

48. *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668; *Kaufman v. Burgert*, 195 Pa. St. 274, 78 Am. St. Rep. 813, 45 Atl. 725; *Martin v. Martin*, 19 L. R. Ir. 72. *Contra, Re Winstansley*, 6 Ont. 315; *Smith v. Faught*, 45 Up. Can. Q. B. 484; *Re Bell*, 30 Ont. 318.

49. *Ware v. Cann*, 10 Barn. & Cr. 433. *Contra, Chisholm v. London & Western Trusts Co.*, 28 Ont. 347; *Re Martin & Dagneau*, 11 Ont. Law Rep. 349.

50. *Cushing v. Spalding*, 164 Mass. 287, 41 N. E. 297; *Re Rosher*, 26 Ch. D. 801; *Hood v. Oglander*, 34 Beav. 513. *Contra, Re Macleay*, L. R. 20 Eq. 186 (*semble*); *Re Winstansley*, 6 Ont. 315; *Smith v. Faught*, 45 Up. Can. Q. B. 484; *Re Martin & Dagneau*, 11 Ont. Law Rep. 349.

In *Dulin v. Moore*, 96 Tex. 135, 70 S. W. 742, it was decided, without discussion, that in the case of trust property a provision against alienation except for the purpose of reinvestment is valid. But as a trustee has power to alien only when it

is expressly given, such a proviso would seem to be simply nugatory, or equivalent to a power to alien for purposes of reinvestment only. The similar provision in *Hood v. Oglander*, 34 Beav. 513, which was held invalid, was not associated with a trust.

It is argued by Charles Sweet, Esq. that a restraint on the alienation of a fee simple is valid if inserted, not to prevent alienation, but for some other purpose. See article 33 Law Quart. Rev. at pp. 246-253.

51. See *Re Rosher*, 26 Ch. D. 801 criticizing *Re Macleay*, L. R. 20 Eq. 186 and see also Gray, *Restraints on Alienation*, § 55.

52. *Henderson v. Cross*, 29 Beav. 216; *Perry v. Merritt*, L. R. 18 Eq. 152; *Re Jones, Richards v. Jones* (1898) 1 Ch. 438; *Case v. Dwire*, 60 Iowa, 442, 15 N. W. 267. See Gray, *Restraints on Alienation*, §§ 56-56b. See also the numerous decisions in this country, to the effect that the limitation over in such form is invalid, not because it operates

a provision prohibiting disposition of the property by conveyance, *inter vivos* has been regarded as invalid.<sup>52a</sup>

—**As to person.** A provision operating to prevent alienation to any except particular named individuals, or except to a certain class of individuals, is, by the weight of authority, invalid,<sup>53</sup> as is, perhaps, a requirement that the property shall not be sold without having first been offered to a person named,<sup>54</sup> as well as a requirement of the consent of a particular person to the alienation.<sup>55</sup> But a condition directed at a transfer to a particular person or persons has been regarded as

to restrain alienation, but on the theory that a gift over which can be defeated by the first taker is invalid. Gray, *Restraints on Alienation*, §§ 66-74f, and *ante*, § 167.

52a. *Bonnell v. McLaughlin*, 173 Cal. 213, 159 Pac. 590; *Kaufman v. Burgert*, 195 Pa. St. 274, 78 Am. St. Rep. 813, 45 Atl. 725. There are occasional decisions to the effect that a gift over at the death of the first taker provided he dies intestate, is invalid. *Holmes v. Godson*, 8 D. M. & G. 152; *Shaw v. Ford*, 7 Ch. Div. 669; *In re Dixon* (1903) 2 Ch. 458; *Fisher v. Wister*, 154 Pa. St. 65, 25 Atl. 1009.

53. *Attwater v. Attwater*, 18 Beav. 330; *In re Rosher*, 26 Ch. Div. 801; *Anderson v. Cary*, 36 Ohio St. 506; *Schermerhorn v. Negus*, 1 Denio (N. Y.) 448; *Manierre v. Welling*, 32 R. I. 104, Ann. Cas. 1912 C, 1311, 78 Atl. 507. See *Morse v. Blood*, 68 Minn. 442, 71 N. W. 682. This view is approved in Gray, *Restraints on Alienation*, § 41. See also editorial notes in 11 *Columbia Law Rev.* at p. 365 and 24

*Harv. Law Rev.* at p. 584; article by Mr. Sweet, 33 *Law Quart. Rev.* at p. 342-348. *Contra*, *Doe d. Gill v. Pearson*, 6 East, 173; *In re Macleay*, L. R. 20 Eq. 186. *Re Martin & Dagneau*, 11 Ont. Law Rep. 349. Especially would this seem to be so if there is also a restriction on the price fixed at a sum below the value of the property. See *Crofts v. Beamish* (1905) 2 Ir. R. 249; *Re Rosher*, 26 Ch. D. 801.

54. That it is invalid, see *Hardy v. Galloway*, 111 N. C. 519, 32 Am. St. Rep. 828, 15 S. E. 890; *In re Rosher*, 26 Ch. D. 801; Gray, *Restraints on Alienation*, § 26. That it is valid, see *Jackson v. Schutz*, 18 Johns. (N. Y.) 174, 9 Am. Dec. 195; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Bing v. Burns*, 106 Va. 478, 56 S. E. 222.

55. *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Prey v. Stanley*, 110 Cal. 423, 42 Pac. 908; *Muhlke v. Tiedemann*, 177 Ill. 606, 52 N. E. 843; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *Hill v. Gray*, 160 Ala. 273, 49 So. 676 (*semble*); *McCravey v.*

not so substantially interfering with the freedom of alienation as to be within the general rule.<sup>56</sup>

—**As to time.** The fact that a restriction upon the right to alienate a vested estate in fee simple is to endure for a limited time only does not, by the weight of authority, render the restriction valid.<sup>57</sup> But there are *dicta* and occasional decisions to the effect that a condition or limitation, looking to the divesting of the estate upon the making of a conveyance within a period named, is valid,<sup>58</sup> and in one state, Kentucky, the validity

Otto, 90 S. C. 447, 74 S. E. 142 (*semble*); *McRae v. McRae*, 30 Ont. 54. *Contra*, *Earls v. McAlpine*, 27 Grant's Ch. 161, 6 Ont. App. 145. A requirement of the consent of a considerable number of persons would seem to be unquestionably invalid. See *Manierre v. Welling*, 32 R. I. 104, Ann. Cas. 1912C 1311, 78 Atl. 507.

56. Litt, § 361; as quoted by Charles Sweet, Esq., 33 Law Quart. Rev. 242. That such a limited restraint on alienation is valid, is decided in *Overton v. Lea*, 108 Tenn. 505, 68 S. W. 250, and for judicial *dicta* to that effect, see *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Langdon v. Ingraham*, 28 Ind. 360; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *McWilliams v. Nisly*, 2 Serg. & R. (Pa.) 507, 7 Am. Dec.; *Jaureche v. Proctor*, 48 Pa. St. 466. And see Editorial note 11 Columbia Law Rev. at p. 366. But that such a condition or provision is invalid, see 4 Kent's Comm. 131; *Barnard's Lessee v. Bailey*, 2 Harr. (Del.) 56; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Morse v. Blood*, 68 Minn.

442, 71 N. W. 682; *Williams v. Jones*, 2 Swan (Tenn.) 620; *Ludlow v. Bunbury*, 35 Beav. 36.

57. *Re Rosher*, 26 Ch. Div. 801; *Renaud v. Tourangeau*, L. R. 2 P. C. 4; *Blackburn v. McCallum*, 33 Can. Sup. 65; *Stamey v. McGinnis*, 145 Ga. 226, 88 S. E. 935; *Jones v. Port Huron Engine & Thresher Co.*, 171 Ill. 502, 49 N. E. 700; *Goldsmith v. Petersen*, 159 Iowa, 692, 141 N. W. 60; *Clark v. Clark*, 99 Md. 356, 58 Atl. 24, (compare *Gerke v. Colonial Trust Co.* 114 Md. 289, 79 Atl. 587); *In re O'Leary's Estate*, 136 Minn. 126, 161 N. W. 392; *Latimer v. Waddell*, 119 N. C. 370, 3 L. R. A. (N. S.) 669, 26 S. E. 122, (but see *Ex parte Watts*, 130 N. C. 237, 41 S. E. 289); *Manierre v. Welling*, 32 R. I. 104, Ann. Cas. 1912C 1311, 78 Atl. 507; *O'Connor v. Thetford*,—Tex. Civ. App.—, 174 S. W. 680; *Zillmer v. Landguth*, 94 Wis. 607, 69 N. W. 568.

58. See *Cowell v. Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Langdon v. Ingram*, 28 Ind. 360; *McWilliams v. Nisly*, 2 Serg. R. (Pa.) 507; *Bouldin v. Miller*, 87 Tex. 359, 28 S. W.

of a restriction for a "reasonable time" is fully recognized.<sup>59</sup> As to what is a reasonable time the decisions in that state undertake to assert no positive rule,<sup>60</sup> but the question is to some extent simplified by the fact that there the statute prohibits a suspension of the absolute power of alienation for a longer period than a life or lives in being and twenty-one years and ten months thereafter.<sup>61</sup> In other states, also, there are occasional suggestions to the effect that, conceding the validity otherwise of a restraint on alienation limited as to time, it is invalid if it is to continue for a time longer than that fixed by the Rule against Perpetuities.<sup>62</sup> This would seem necessarily to be the case in a state, like New York, where such is the name given to a statutory provision limiting the time during which the right of alienation may be suspended.

—**Charitable gifts.** It is sometimes said that the rules forbidding restraints on alienation have no application in the case of land given for charitable purposes.<sup>63</sup>

940; *Camp v. Cleary*, 76 Va. 140; and other cases cited, *Gray, Restraints on Alienation*, §§ 47-54; note to *Latimer v. Waddell*, 3 L. R. A. (N. S.) at p. 672. The English *dicta* to this effect are examined, and condemned, 33 *Law Quart. Rev.* 348-351, article by Mr. Sweet.

59. *Stewart v. Brady*, 3 Bush (Ky.) 623; *Wallace v. Smith*, 113 Ky. 263, 68 S. W. 131; *Frazier v. Combs*, 140 Ky. 77, 130 S. W. 812.

60. Suspension of the right of alienation for the life of the tenant in fee simple has been regarded as unreasonable. *Cropper v. Bowles*, 150 Ky. 393, 150 S. W. 380; *Harkness v. Lisle*, 132 Ky. 767, 117 S. W. 264; but not necessarily so if for the life

of another person, *Lawson v. Lightfoot*, 27 Ky. L. Rep. 217, 84 S. W. 739; *Frazier v. Combs*, 140 Ky. 77, 130 S. W. 812. See also *Call v. Shewmaker* 24 Ky. L. Rep. 686, 69 S. W. 749; *Wallace v. Smith*, 113 Ky. 262, 68 S. W. 131; *Harkness v. Lisle*, 132 Ky. 767, 117 S. W. 264.

61. See *Morton v. Morton*, 126 Ky. 251, 85 S. W. 1188 and editorial note 24 *Harv. Law Rev.* at p. 245.

62. *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *Gerke v. Colonial Trust Co.*, 114 Md. 289, 79 Atl. 587; *Oxley v. Lane*, 35 N. Y. 340; *Dwyer v. Cahill*, 228 Ill. 617, 81 N. E. 1142.

63. *Perin v. Carey*, 24 How. (U. S.) 465, 16 L. Ed. 701; *Mills v. Davison*, 54 N. J. Eq.

But it may perhaps be questioned whether a restraint of that character, which would be invalid in the case of a private gift, is validated by the fact that it is contained in a gift to a charity.<sup>64</sup> Such a restraint is not valid, it appears, as against a decree of a court of equity directing a sale of the property for the benefit of the charity,<sup>65</sup> and the question of its effectiveness in the absence of such a decree is not a very practical one, especially in view of the lack of incentive, in the ordinary case, to dispose of property devoted to a charitable purpose. Even if a condition against alienation in a charitable gift is invalid, the purpose of such a condition could ordinarily be effected by a condition of forfeiture on the utilization of the land for another purpose.

—(b) **Estates in fee tail.** The right of a tenant in tail to transfer the land by a common recovery, or a fine levied in accordance with certain statutes, and so to bar the entail, has been recognized as an essential incident of the estate, of which it cannot be deprived by any provision in the instrument creating it;<sup>66</sup> and the statutory right of barring the entail by a conveyance no doubt stands upon the same footing.<sup>67</sup>

—(c) **Life estate.** A provision attached to the creation of a legal estate for life, not that it shall or may

664, 35 L. R. A. 113, 55 Am. St. Rep. 594, 35 Atl. 1072; Rolfe & Rumford Asylum v. Lefebvre, 69 N. H. 241, 45 Atl. 1087.

64. In Female Orphan Society v. Young Men's Christian Ass'n, 119 La. 278, 12 Ann. Cas. 811, 44 So. 15 such a provision was regarded as invalid under the Louisiana Law.

65. Stanley v. Colt, 5 Wall. (U. S.) 119, 18 L. Ed. 502; Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401; Amory v. Attorney-General, 179 Mass. 89, 60 N. E.

391; Woman's Christian Ass'n v. Kansas City, 147 Mo. 103, 48 S. W. 960; Rolfe & Rumford Asylum v. Lefebvre, 69 N. H. 238, 45 Atl. 1087; Smart v. Town of Durham, 77 N. H. 56, 86 Atl. 821; Tacoma v. Tacoma Cemetery, 28 Wash. 238, 68 Pac. 723.

66. Portington's Case, 10 Coke, 35b; Gray, Restraints on Alienation, § 77; Stansbury v. Hubner, 73 Md. 228, 11 L. R. A. 204, 25 Am. St. Rep. 584, 20 Atl. 904.

67. See Dawkins v. Penryhn, 4 App. Cas. 51.

terminate upon its voluntary transfer, but declaring in effect that such a transfer shall be nugatory, is invalid.<sup>68</sup> But a condition, a special limitation, or an executory limitation, terminating a legal estate for life, or making it terminable, upon the making of a transfer by the owner thereof, is valid.<sup>69</sup> The first case in which a provision of this latter character, occurring in connection with a life interest, was upheld,<sup>70</sup> suggests the analogy of a lease for years, in which a condition against alienation has always been regarded as valid, but the analogy is incomplete, since, in the case of a life interest, the creator of the interest ordinarily retains no reversionary interest which such a provision serves to protect. It is true that a restriction upon the alienation of a life estate does not, to the same extent as in the case of a fee simple, operate to withdraw the property from commerce, but it does to some extent so operate, and the courts might reasonably, it is conceived, from the point of view of public policy, have refused to recognize a condition or limitation restricting the alienation of a life estate, except when the creator of the estate retains a reversion and has consequently a possible

68. *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 475; *Jones v. Port Huron Engine & Thresher Co.*, 171 Ill. 502, 49 N. E. 700; *Streit v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648; *McCleary v. Ellis*, 54 Iowa, 311, 37 Am. Rep. 205, 6 N. W. 571; *McCormick Harvesting Mach. Co. v. Gates*, 75 Iowa, 343, 39 N. W. 657; *Nash v. Simpson*, 78 Me. 142, 3 Atl. 53; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *Fristoe v. Laytham*, 18 Ky. L. Rep. 157, 36 S. W. 920; *Wool v. Fleetwood*, 136 N. C. 460, 67 L. R. A. 444, 48 S. E. 785; *Lee v. Oates*, 171

N. C. 717, 88 S. E. 889; *Scruggs v. Murray*, 2 Lea (Tenn.) 44; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160; *Bridge v. Ward*, 35 Wis. 687. *Contra*, *Abbott v. Doyle*, 90 Kan. 45, 132 Pac. 1177.

69. *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. 735; *Conger v. Lowe*, 124 Ind. 368, 9 L. R. A. 165, 24 N. E. 889; *Bull v. Kentucky Nat. Bank*, 90 Ky. 452; *Bramhall v. Ferris*, 14 N. Y. 41; *Camp v. Cleary*, 76 Va. 140; *Lewes v. Lewes*, 6 Sim. 304; *Hurst v. Hurst*, 21 Ch. D. 278.

70. *Lockyer v. Savage*, 2 Strange, 947.



interest in the identity of the person to whom the life estate may belong.<sup>70a</sup>

—(d) **Estates for years.** A condition or limitation, by which a term of years is, in favor of the landlord, to terminate, or to be terminable, upon a transfer by the tenant, is valid;<sup>71</sup> but a lessee cannot, on transferring the term, impose any restrictions upon alienation by his transferee, since this would be equivalent to imposing a restriction upon the transfer of an absolute interest in personalty.<sup>72</sup> Furthermore, as in the case of a legal life estate, a provision that the term shall not be transferred, but that, in spite of any such attempt by the tenant or his creditors, it shall still belong to him, is, it seems, invalid.<sup>73</sup>

—(e) **Involuntary alienation.** To the same extent that a provision in connection with a legal estate, which restricts the right or possibility of voluntary transfer by the tenant is invalid, a provision in connection with such an estate restricting the liability to involuntary transfer in behalf of creditors is likewise invalid. That is, a mere provision that the estate shall not be liable for the tenant's debts is invalid whatever the *quantum* of the estate,<sup>74</sup> and a provision terminating an estate

70a. That a provision defeating an estate for life upon its alienation is invalid appears to be decided in *Streit v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648; *Diamond v. Rotan*, 58 Tex. Civ. App. 263, 124 S. W. 196.

71. *Roe d. Hunter v. Galliers*, 2 Term Rep. 133; *Gray*, *Restrictions on Alienation*, § 46. See *ante*, § 54(a).

72. *Co. Litt.* 223a; *Gray*, *op. cit.* §§ 27, 102.

73. *Hobbs v. Smith*, 15 Ohio St. 419; *Gray*, *op. cit.* § 278; 1 *Tiffany*, *Landlord & Ten.* § 152j.

74. So in the case of a fee simple estate see *Jones v. Port Huron Engine & Thresher Co.*, 171 Ill. 502, 49 N. E. 700; *Turner v. Hallowell Sav. Inst.* 76 Me. 527; *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; *Sparhawk v. Cloon*, 125 Mass. 263; *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128; *Kessner v. Phillips*, 189 Mo. 515, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005, 88 S. W. 66; *Ricks v. Pope*, 129 N. C. 52, 39 S. E. 638; *McIntyre v. McIntyre*, 123 Pa. St. 329, 10 Am. St. Rep. 529, 16 Atl. 783; *Manierre v. Welling*,

in fee simple, or rendering it terminable, upon the bankruptcy of the tenant, or on a sale under a judgment against him, is likewise invalid,<sup>75</sup> while a provision termination, or rendering terminable, an estate for life or for years in such case has been regarded as valid.<sup>76</sup>

In thus applying similar rules in determining the validity of restraints on voluntary and involuntary alienation, the courts inferentially suggest that the same considerations necessarily apply in both cases. But a particular restriction upon involuntary alienation cannot, like a similar restriction upon voluntary alienation, be regarded as invalid by reason of the desirability of preventing the withdrawal of property from commerce, since immunity from forced sale does not have that effect. The invalidity, in so far as it exists, of a provision directly or indirectly restricting involuntary alienation in behalf of creditors must, it would seem, be based either upon the theory that public policy requires that one should not enjoy the benefits of ownership without being subject to the burdens usually incident thereto, or upon the theory that such a provision operates in contravention of the execution and bankruptcy statutes, which clearly recognize the liability of such property to be disposed of for the satisfaction of

32 R. I. 104, Ann. Cas. 1912C 1311, 78 Atl. 507; Van Osdell v. Champion, 89 Wis. 661, 27 L. R. A. 773, 46 Am. St. Rep. 864, 62 N. W. 539. So in the case of a life estate, see *Streit v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648; *Thompson v. Murphy*, 10 Ind. App. 464, 37 N. E. 1094; *McCormick Harvesting-Mach. Co. v. Gates*, 75 Iowa, 343, 39 N. W. 657; *Wellington v. Janvrin*, 60 N. H. 174; *Bramhall v. Ferris*, 14 N. Y. 41; *Mattison v. Mattison*, 53 Ore. 254, 133 Am. St. Rep. 829, 19 Ann. Cas. 218,

100 Pac. 4; *Ehrisman v. Sener*, 162 Pa. St. 577, 29 Atl. 719; *Bridge v. Ward*, 35 Wis. 687.

75. *Potter v. Couch*, 141 U. S. 296, 35 L. Ed. 721; *Re Dugdale*, 38 Ch. D. 176. See *Wieting v. Bellinger*, 50 Hun (N. Y.) 324, 3 N. Y. Supp. 361.

76. *Bramhall v. Ferris*, 14 N. Y. 41; *Dommett v. Bedford*, 6 Term. Rep. 684; *Cooper v. Wyatt*, 5 Madd. 482. *Contra*, *Streit v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648; *Diamond v. Rotan*, 58 Tex. Civ. App. 263, 124 S. W. 196.

creditors. The former theory appears to be in effect excluded by the decisions, hereafter referred to, recognizing the validity of "spendthrift trusts," since, so far as public policy is concerned, the same considerations would seem to apply in the case of legal and equitable interests. And consequently, in states where the right of the creator of a trust to exclude the *cestui's* creditors is recognized, the inability of the creator of a legal estate to exclude the donee's or grantee's creditors would seem to be based upon the theory that the bankruptcy and execution statutes cannot thus be nullified as regards particular property, by the language used in the creation of a legal estate therein.

—(f) **Equitable interests.** The validity of a clause of cesser, or limitation over, upon the alienation, voluntary or involuntary, of an equitable estate, is to be determined by the same rules as apply in the case of such a provision in connection with a legal estate, that is, it is invalid in connection with an equitable estate in fee simple,<sup>77</sup> but valid in connection with an equitable estate for life.<sup>78</sup> In the case even of a life estate, however, a provision for cesser, or a limitation over, upon bankruptcy of the life tenant, has been regarded as invalid if it occurs in a settlement made by the life tenant himself, that is, one cannot create an equitable estate in his own favor to be divested upon his bankruptcy, this being regarded as in fraud of the bankrupt law.<sup>78</sup> But the validity of a limitation over, divesting an equitable life estate created by the settlor in his

77. *Potter v. Couch*, 141 U. S. 296, 35 L. Ed. 721; *Re Machu*, 21 Ch. D. 838; *Re Dugdale*, 38 Ch. D. 176.

78. *Shée v. Hale*, 13 Ves. 404; *Stephens v. James*, 4 Sim. 499; *Re Alwyn's Trusts*, L. R. 16 Eq. 535; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Mebane v. Mebane*, 4 Ired. Eq. (39 N. Car.)

131, 44 Am. Dec. 102; *Bull v. Kentucky Nat. Bank*, 90 Ky. 452, 12 L. R. A. 37, 14 S. W. 425; *Tillinghast v. Bradford*, 5 R. I. 205; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 16, 55 Am. Dec. 654.  
78. *Higinbotham v. Holme*, 19 Ves. 88; *Mackintosh v. Pogose*, (1895) 1 Ch. 595; *Lewin, Trusts* (12th Ed.) 118.

own favor, upon voluntary alienation by him, has been recognized in English cases,<sup>79</sup> though there appears to be authority to the contrary.<sup>80</sup>

The mere fact that a trust exists in land does not ordinarily affect the freedom of alienation. If A has an estate for life, with remainder to B and C in fee simple, the three persons named, if *sui juris*, can, by joining in a conveyance, transfer the absolute and complete ownership, and so if X holds the property in trust for A for life, and after A's death in trust for B and C and their heirs, the three persons last named can, if *sui juris*, in the ordinary case, call for the legal title, and then transfer the complete ownership. And even if the *cestui* or *cestuis que trust* have no right to call for a conveyance of the legal title,<sup>81</sup> it does not seem that, so long as the trustee is able, by voluntarily joining with the *cestuis* in a conveyance, to vest the complete ownership in the grantee, that the existence of the trust can be regarded as involving a restraint on alienation. And it does not involve such a restraint if the trustee is expressly given a power to dispose of the land free from the trust. In the absence, however, of such a power, the trust would seem to operate as a restraint on alienation in so far as the intention of the creator of the trust may prevent the merger of the legal and equitable interests, into whose soever hands they may pass, as by a requirement that the trust shall continue for a certain period or until a certain event. The existence of the trust may also suspend the right of alienation if the interest of the *cestui que trust* is such that it cannot be transferred, owing either to a statutory prohibition of such transfer, or to the expression of an intention to this effect in the creation of the trust.

79. Knight v. Browne, 7 Jur. N. S. 894; Re Brewer's Settlement (1896) 2 Ch. 503; Detmold v. Detmold, 40 Ch. D. 585.

80. See Phipps v. Ennismore,

4 Russ. 131; Gray. Restraints on Alienation, §§ 95-100. See also the remarks in Doherty v. Power (1916) 1 Ir. 337.

81. *Ante*, § 116(d).

The question of the legal effectiveness of such an expression of intention by the creator of the trust has been the subject of much debate, particularly with regard to his right thus to prevent involuntary alienation of the *cestui's* interest, that is, to relieve it from liability to sale for the latter's debts. In so far as such an expression of intention is given effect, the trust is ordinarily referred to as a "spendthrift trust."

—(g) **Spendthrift trusts.** In England, ordinarily, both the right of voluntary alienation and the liability to involuntary alienation in behalf of creditors are regarded as necessary incidents of property, legal or equitable, and consequently any indication of a contrary intention in connection with the creation of a trust is nugatory.<sup>82</sup> But even there the equitable separate estate of a married woman may, by the terms of the settlement upon her, be enjoyed by her, so far as regards the income, without any right to alienate the *corpus* of the fund, or to anticipate the income, and free from the claims of creditors, the theory being that since the separate estate is the creature of equity, and it is only by reason of the recognition thereof that, apart from modern statutes, a married woman has any right of alienation, the allowance by equity of restrictions upon the right to alien the separate estate involves merely a partial return to the common law view of a married woman's status.<sup>83</sup>

82. *Brandon v. Robinson*, 18 Ves. 429; *Snowdon v. Dales*, 6 Sim. 524, *Lewin Trusts* (12th Ed.) 111.

83. *Jackson v. Hobhouse*, 2 Mer. 483; *Stogdon v. Lee* [1891] 1 Q. B. 661; *Perry, Trusts*, §§ 670, 671; 2 *Jarman, Wills*, 779; *Gray, Restraints on Alienation*, §§ 270, 271. The restraining clause ceases to have any effect when the coverture ends by the

husband's death. *Barton v. Briscoe*, Jac. 603. As to such a restriction in a settlement made by the married woman herself, see *Gray, Restraints on Alienation*, § 277a; Editorial note in 12 *Harv. Law Rev.* at p. 53.

For American cases involving the validity of such a provision in connection with the separate estate of a married woman, see *Robinson v. Randolph*, 21 Fla.

In some states the English view, that one cannot be given an equitable interest, any more than a legal one, free from liability for his debts, has been asserted,<sup>84</sup> but the later decisions have usually adopted a contrary view, to the effect that the intention of the creator of a trust, as indicated by the language used in its creation, that the interest of the *cestui que trust* shall not be liable for his debts, will be given effect by a court of equity.<sup>86</sup> As before stated, a trust the beneficial interest in which is thus immune from liability for the *cestui's* debts is ordinarily referred to as a spendthrift trust.

629, 58 Am. Rep. 692; Wells v. McCall, 64 Pa. St. 207; Lampert v. Haydel, 96 Mo. 439, 2 L. R. A. 113, 9 Am. St. Rep. 358, 9 S. W. 780; Mebane v. Mebane, 4 Ired. Eq. (39 N. C.) 131, 44 Am. Dec. 102; Scruggs v. Mayberry, 135 Tenn. 586, 188 S. W. 207; Simonton v. White, 93 Tex. 50, 77 Am. St. Rep. 824, 53 S. W. 339.

84. Jones v. Reese, 65 Ala. 134; Samuel v. Salter, 3 Metc. (Ky.) 259; Knefler v. Shreve, 78 Ky. 297; Brock v. Brock, 168 Ky. 847, 183 S. W. 213; Bramhall v. Ferris, 14 N. Y. 41 (*dictum*) Mebane v. Mebane, 4 Ired. Eq. (N. Car.) 131, 44 Am. Dec. 102; Vaughan v. Wise, 152 N. Car. 31, 67 S. E. 33 (valid only as authorized by statute); Tillinghast v. Bradford, 5 R. I. 212; Heath v. Bishop, 4 Rich. Eq. (S. Car.) 46; Hutchinson v. Maxwell, 100 Va. 169, 93 Am. St. Rep. 944, 57 L. R. A. 384, 40 S. E. 665; Honaker v. Duff, 161 Va. 675, 44 S. E. 900. This view is strongly presented in Professor Gray's work, *Restraints on Alienation of Property*, especially the preface to the second edition.

See also editorial note in 11 Columbia Law Rev. at p. 765.

86. Nichols v. Eaton, 91 U. S. 716, 21 L. Ed. 254 (*dictum*); Seymour v. McAvoy, 121 Cal. 438, 41 L. R. A. 544, 53 Pac. 496; Mason v. Rhode Island Hospital Trust Co., 78 Conn. 81, 3 A. & E. Ann. Cas. 586, 61 Atl. 57 (*dictum*); Fearson v. Dunlop, 21 Dist. Col. 236; Sinnott v. Moore, 113 Ga. 908, 39 S. E. 415; Wagner v. Wagner, 244 Ill. 101, 18 Ann. Cas. 490, 91 N. E. 66; McCoy v. Houck, 180 Ind. 634, 99 N. E. 97; Olsen v. Youngerman, 136 Iowa, 404, 113 N. W. 938; Sherman v. Havens, 94 Kan. 654, 146 Pac. 1030, Ann. Cas. 1917B 394; Roberts v. Stevens, 84 Me. 325, 17 L. R. A. 266, 24 Atl. 873; Smith v. Towers, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; Jackson Square Loan Ass'n v. Bartlett, 95 Md. 661, 93 Am. St. Rep. 416, 53 Atl. 426; Broadway National Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504; Billings v. Marsh, 153 Mass. 311, 10 L. R. A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000; Lathrop v. Merrill, 207 Mass. 6, 92 N. E. 1019; Boston Safe De-

In vindication of the validity of spendthrift trusts the courts have referred to various considerations, as that the donor of property should be entitled to determine who shall be the beneficiary of his bounty, that the creditors of the beneficiary of such a trust are no worse off than if the trust had not been created, and that such a trust finds support in the analogy both of the English doctrine of restraints on anticipation by married women and of the exemption and homestead statutes in force in various states. It is also sometimes said that a provision of this character, originating in affection, by which it is sought to afford to the beneficiary protection from the vicissitudes of fortune, is entitled to the fostering care of a court of equity.<sup>87</sup> Of these various considerations, however, all except perhaps the last would apply as well in support of a provision exempting a *legal* estate from the claims of creditors, and yet the invalidity of such a provision in the case of a legal estate is clearly recognized. The justification for any distinction which may be recognized in this regard must be based upon the fact that the characteristics of a legal estate, among which is its liability to voluntary and involuntary alienation, are fixed and absolute, while the characteristics of an equitable interest are determined by the intention of the creator of the trust. This is recognized in all jurisdictions to the extent that if the trustee has absolute discretion as to the distribution of the income among persons named, one of such persons has no right to demand any part

posit & Trust Co. v. Collier, 222 Mass. 390, Ann. Cas. 1918c, 962, 111 N. E. 163; Leigh v. Harrison, 69 Miss. 923, 18 L. R. A. 49, 11 So. 604; Lampert v. Haydell, 96 Mo. 444, 9 Am. St. Rep. 358. 8 S. W. 793; Kessner v. Phillips, 189 Mo. 515, 107 Am. St. Rep. 380, 88 S. W. 82; Weller v. Noffsinger, 57 Neb. 45, 77 N. W. 3 R. P.—4

1075; Mattison v. Mattison, 53 Ore. 254, 133 Am. St. Rep. 829, 18 Ann. Cas. 218, 100 Pac. 4; Thackara v. Muntzer, 100 Pa. St. 151; Wallace v. Campbell, 53 Tex. 229; Monday v. Vance, 92 Tex. 428, 49 S. W. 516; Lindsey v. Rose,—Tex. Civ. App.—, 175 S. W. 829.

87. The judicial statements of

of the income, and has consequently no interest which is accessible to his creditors.<sup>88</sup> In the case of a spendthrift trust the intention of the creator of the trust is that the income be paid only to the *cestui* whom he names,<sup>89</sup> or, in some cases, that it be applied only for his support and maintenance,<sup>90</sup> and this being so, the

grounds for upholding such a trust are conveniently collated in 26 Am. & Eng. Encyc. Law (2nd Ed.) at p. 140.

88. *Chambers v. Smith*, 3 App. Cas. 795; *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Godden v. Crowhurst*, 10 Sim. 649; *Re Coleman*, 39 Ch. D. 443; *Nichols v. Eaton*, 91 U. S. 716, 21 L. Ed. 254; *Mason v. Rhode Island Hospital Trust Co.*, 78 Conn. 81, 3 A. & E. Ann. Cas. 586, 61 Atl. 57; *Sterling v. Ives*, 78 Conn. 498, 62 Atl. 948; *King v. King*, 168 Ill. 273, 48 N. E. 582; *Davidson v. Kemper*, 79 Ky. 5; *Bland v. Bland*, 90 Ky. 400, 9 L. R. A. 599, 29 Am. St. Rep. 390, 14 S. W. 243; *Murphy v. Delano*, 95 Me. 229, 55 L. R. A. 727, 49 Atl. 1053; *True Real Estate Co. v. True*, 115 Me. 533, 99 Atl. 627; *Hall v. Williams*, 120 Mass. 344; *Leverett v. Barnwell*, 214 Mass. 105, 101 N. E. 75; *Brown v. Lumbelt*, 221 Mass. 419, 108 N. E. 1079; *Banfield v. Wiggin*, 58 N. H. 155; *Keyser v. Mitchell*, 67 Pa. 473; *Barker's Estate*, 159 Pa. 518, 28 Atl. 365, 368; *Stone v. Westcott*, 18 R. I. 685, 29 Atl. 838; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 46, 55 Am. Dec. 654. In *Petty v. Moores Brook Sanitarium*, 110 Va. 815, 27 L. R. A. (N. S.) 800, 19 Ann. Cas. 271, 76 S. E. 335 it was held that even in the case of such a

discretionary trust, a beneficiary named had an interest which could be reached by creditors, if the trust was created by the beneficiary himself. The decision is criticized in 23 Harv. Law Rec. at p. 649.

In England, though creditors or alienees of one of the *cestuis* under such a discretionary trust have no rights as regards income not yet paid over to such *cestuis*, the trustee must account to such *cestui's* voluntary assignee or assignee in bankruptcy for any payments made to the *cestui* after notice of the assignment. *Re Coleman*, 39 Ch. Div. 443; *Re Neil*, 62 L. T. N. S. 649.

89. See *Fearson v. Dunlop*, 21 Dist. Col. 236; *King v. King*, 168 Ill. 273, 48 N. E. 582; *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. 497, 15 Atl. 92; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Nickerson v. Van Horn*, 181 Mass. 562, 64 N. E. 204; *Morgan's Estate*, 223 Pa. 228, 25 L. R. A. N. S. 236, 132 Am. St. Rep. 732, 72 Atl. 498.

90. *Parker Holmes & Co. v. Bushnell*, 80 Conn. 233, 67 Atl. 479; *King v. King*, 168 Ill. 273, 48 N. E. 582; *Merchants Nat. Bank v. Crist*, 140 Iowa, 308, 23 L. R. A. N. S. 526, 132 Am. St. Rep. 367, 118 N. W. 394; *Gar-*



trustee can acquit himself of his obligation under the trust only by payment or application of the income accordingly. Payment by him to a voluntary or involuntary assignee, not being in accordance with the requirement of the trust, would be nugatory for this purpose, and it consequently cannot be demanded.

The question of the validity of a provision, the effect of which is to make an equitable interest inalienable, has more usually arisen in connection with the question of the subjection of the interest to the claims of creditors, but considerations of a similar character would seem to apply in connection with the question of the power of the *cestui que trust* voluntarily to alienate it. If the *cestui's* interest is of such a limited character that it is not available to his creditors, it would seem not to be available to his voluntary transferee.<sup>91</sup> And conversely, it is submitted, if there is no right of volun-

ner v. Wills, 92 Ky. 386, 17 S. W. 1023; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Berry v. Dunham, 202 Mass. 133, 88 N. E. 904; Leigh v. Harrison, 69 Miss. 923, 18 L. R. A. 49, 11 So. 604; Monday v. Vance, 92 Tex. 428, 49 S. W. 516; Barnes v. Dow, 59 Vt. 530, 10 Atl. 258; Garland v. Garland, 87 Va. 758, 13 L. R. A. 212, 24 Am. St. 682, 13 S. E. 487; Hoffman v. Beltzhoover, 71 W. Va. 72, 76 S. E. 968. And see Winthrop Co. v. Clinton, 196 Pa. 472, 79 Am. St. Rep. 729, 46 Atl. 435; Slattery v. Wason, 151 Mass. 266, 7 L. R. A. 395, 21 Am. St. Rep. 448, 23 N. E. 843; Wenzel v. Powder, 100 Md. 36, 108 Am. St. Rep. 380, 59 Atl. 194.

91. See Bennett v. Bennett, 217 Ill. 434, 4 L. R. A. N. S. 470, 75 N. E. 339; Roberts v. Stevens, 84

Me. 325, 17 L. R. A. 266, 24 Atl. 873; Nickerson v. Van Horn, 181 Mass. 562, 64 N. E. 204; *In re Siegwarth's Estate*, 226 Pa. 591, 134 Am. St. Rep. 1086, 75 Atl. 842; Jourolmon v. Massengill, 92 Tex. 428; Barnes v. Dow, 59 Vt. 530, 10 Atl. 258. In Pearson v. Hanson, 230 Ill. 610, 82 N. E. 813; Johnson v. Preston, 226 Ill. 447, 10 L. R. A. N. S. 564, 80 N. E. 1001; Huntress v. Allen, 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949; Parker v. Carpenter, 77 N. H. 453, 92 Atl. 955 it appears to be considered that the equitable interest may be subject to voluntary alienation though not subject to involuntary alienation. This involves, it is submitted, a somewhat unsatisfactory view of the nature of a spendthrift trust.

tary alienation, there is no liability to involuntarily alienation.<sup>92</sup>

Whether in any particular case the interest of the *cestui* named is of such a restricted character that there is nothing available to his voluntary or involuntary alienee, whether, in other words, the trust is a spendthrift trust, is a question of the intention of the creator of the trust.<sup>93</sup> The cases are generally to the effect that, in order to exclude the right of voluntary alienation or the rights of creditors, it is unnecessary explicitly so to provide in the instrument creating the trust, it being sufficient that such an intention can be inferred on a construction of the instrument taken as whole.<sup>94</sup> Occasionally a mere direction that the income shall be paid to the *cestui* has been construed as showing an intention to create an inalienable interest,<sup>95</sup> but such a provision has also received a different construction.<sup>96</sup> Even though the instrument creating the trust expressly de-

92. See *Coyne v. Plume*, 90 Conn. 293, 97 Atl. 337.

93. *Huntington v. Jones*, 72 Conn. 45, 43 Atl. 564; *Wagner v. Wagner*, 244 Ill. 101, 18 Ann. Cas. 490, 91 N. E. 66; *Jackson Square Loan etc. Ass'n v. Bartlett*, 95 Md. 661, 93 Am. St. Rep. 416, 53 Atl. 426; *Nickerson v. Van Horn*, 181 Mass. 562, 64 N. E. 204; *Leigh v. Harrison*, 69 Miss. 923, 18 L. R. A. 11 So. 604; *Winslow v. Rutherford*, 59 Ore. 124, 114 Pac. 930; *Winthrop Co. v. Clinton*, 196 Pa. 472, 79 Am. St. Rep. 729, 46 Atl. 435.

94. *Roberts v. Stevens*, 84 Me. 325, 17 L. R. A. 266, 24 Atl. 873; *Baker v. Brown*, 140 Mass. 369, 15 N. E. 783; *Berry v. Dunham*, 202 Mass. 133, 88 N. E. 904; *Mattison v. Mattison*, 53 Ore. 254, 123 Am. St. Rep. 829, 18 Ann. Cas. 218, 100 Pac. 4; *Barnes v.*

*Dow*, 59 Vt. 530, 10 Atl. 258; *Hoffman v. Beltzhoover*, 71 W. Va. 72, 76 S. E. 968.

95. *Bennett v. Bennett*, 217 Ill. 434, 4 L. R. A. N. S. 470, 75 N. E. 339; *Wallace v. Foxwell*, 250 Ill. 616, 50 L. R. A. (N. S.) 632, 95 N. E. 985; *Stambaugh v. Stambaugh*, 135 Pa. 585, 19 Atl. 1058; *In re Siegewarth's Estate*, 226 Pa. St. 591, 134 Am. St. Rep. 1086, 75 Atl. 842; *Stansel v. Hahn*, 96 Miss. 616, 50 So. 696; *Castree v. Shotwell*, 73 N. J. Eq. 590, 68 Atl. 774.

96. *Wenzel v. Powder*, 100 Md. 36, 108 Am. St. Rep. 380, 59 Atl. 194; *Slattery v. Wason*, 151 Mass. 268, 7 L. R. A. 395, 21 Am. St. Rep. 448, 23 N. E. 843; *Girard Life Ins. Co. v. Chambers*, 46 Pa. 485, 86 Am. Dec. 513; *In re Shoup's Estate*, 31 Pa. Super. 162.

clares that the property shall not be subject to the claims of the *cestui's* creditors, he has such an interest as to be so subject, if he is given not only a right to the income, but also a right to demand a conveyance of the legal title. He has in such a case an alienable interest in the corpus of the property.<sup>97</sup> Occasional decisions<sup>98</sup> to the effect that the gift to the *cestui* of an absolute right to the possession of land, the subject of the trust, is not incompatible with an exemption of his equitable interest from the claims of creditors, appear open to question. Such a right in the *cestui* would seem to involve an equitable estate of an absolute character.

There can be no trust for the purpose of rendering the *cestui's* interest inalienable<sup>99</sup> or, it seems, for other purposes;<sup>1</sup> if the sole trustee named and the sole *cestui* named are the same person.

There is one limitation, generally recognized, upon the right to create a spendthrift trust, based on considerations of public policy, to the effect that one cannot settle his property upon himself under a trust by which he himself is given an equitable interest not subject to the claims of his creditors.<sup>2</sup> And the same policy has determined the construction of the New York statute which undertakes to exempt the beneficial interests under

97. *Morgan's Estate*, 223 Pa. 228, 25 L. R. A. N. S. 236, 132 Am. St. Rep. 732, 72 Atl. 498; *Croom v. Plumbing, etc., Co.* 62 Fla. 460, 57 So. 243.

98. *Mattison v. Mattison*, 53 Ore. 254, 133 Am. St. Rep. 829, 18 Ann. Cas. 218, 100 Pac. 4. *In re Minnich's Estate*, 206 Pa. 405, 55 Atl. 1067; *Garland v. Garland*, 87 Va. 758, 13 L. R. A. 212, 24 Am. St. Rep. 682 13 S. E. 478.

99. *Streit v. Fay*, 230 Ill. 319, 120 Am. St. Rep. 304, 82 N. E. 648; *Hahn v. Hutchinson*, 159 Pa. St. 133, 28 Atl. 167.

1. *Ante*, § 104.

2. *Brown v. MacGill*, 87 Md. 161, 39 L. R. A. 806, 67 Am. St. Rep. 334, 39 Atl. 613; *Pacific Nat. Bank v. Windram*, 133 Mass. 175; *Hale v. Bowler*, 215 Mass. 354, 102 N. E. 415; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295; *Mackason's Appeal*, 42 Pa. 330; *Ghermley v. Smith*, 139 Pa. 584, 11 L. R. A. 565, 23 Am. St. Rep. 215, 21 Atl. 135; *Egbert v. De Solms*, 218 Pa. 207, 67 Atl. 212; *Menken Co. v. Brinkley*, 94 Tenn. 721, 31 S. W. 92.

a trust from liability for the *cestui's* debts.<sup>3</sup> It is clear that the bankrupt and execution laws would become to a considerable extent nugatory if one could, before incurring any debts, place his property in trust, so that he could receive the income thereof without any possibility of recourse thereto by his creditors. It has been decided that one who pays value to another in consideration of the creation of a trust in his favor in effect creates, or has the trust created, out of his own property, within the rule referred to, and that consequently any attempt on his part to relieve his interest under the trust from liability for debts is necessarily invalid.<sup>4</sup>

It being conceded that, even in jurisdictions in which spendthrift trusts are recognized, one cannot create an equitable interest in his own favor which will not be subject to *involuntary* alienation in behalf of his creditors, the question might arise whether one can create such an interest in his own favor not subject to *voluntary* alienation by him. There appears to be no decision in this regard, but it would seem that on principle the same rule might well apply in both cases. Opposed as are the courts to restrictions upon the power of alienation, there appears to be no reason why they should allow the owner of property, while retaining the beneficial ownership in other respects, to deprive himself of this power by the creation of a trust.

—**Statutory provisions.** In a number of states the question of the rights of creditors as against the

3. See *Schenck v. Barnes*, 156 N. R. 316, 41 L. R. A. 395, 56 N. E. 967. So as to the California statute *McColgan v. Walter Magee, Inc.* 172 Cal. 182, Ann. Cas. 1917D, 1050, 155 Pac. 995.

4. *Re Qua v. Graham*, 187 Ill. 67, 52 L. R. A. 64, 58 N. E. 357; *Bank of Commerce v. Chambers*,

96 Mo. 459, 10 S. W. 38; *Hutchinson v. Maxwell*, 100 Va. 169, 57 L. R. A. 384, 93 Am. St. Rep. 944, 40 S. E. 655. But see *Merchants Nat'l Bank v. Crist*, 120 Iowa, 308, 23 L. R. A. (N. S.) 562, 132 Am. St. Rep. 267, 118 N. W. 394.

interest of a *cestui que trust* is fixed by the statutes, so as to render the intention of the creator of the trust in this regard immaterial. The New York Real Property Law<sup>5</sup> provides that where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors, while the Code of Civil Procedure<sup>6</sup> provides for a proceeding to discover property held in trust for a judgment debtor, except "where the trust has been created by a person other than the judgment debtor." But by force of an act passed in 1908, the creditor can subject to his claim ten per cent of the income of a trust fund even though the trust was created by a person other than himself.<sup>7</sup> Consequently, at the present time, a creditor of the *cestui* may, it seems, subject to his claim not only any surplus over the sum necessary for the maintenance of the *cestui*, but also ten per cent of the total income.<sup>8</sup> But there, as elsewhere,<sup>9</sup> if the trustee has an absolute discretion as to what part of the income he will pay to the *cestui*, the latter has nothing which can be reached by his creditors.<sup>10</sup>

The New York legislation, as it existed before the act of 1908, has been copied more or less closely in other states, with the general effect of exempting from the claims of creditors, either in part or wholly, an equitable interest created by one other than the *cestui que trust* himself.<sup>11</sup>

5. Section 103.

6. Section 1391.

7. See *Brearly School v. Ward*, 201 N. Y. 358, 40 L. R. A. N. S. 1215 Ann. Cas. 1912B 251, 94 N. E. 1001.

8. See *Heppenstall v. Baudouine*, 73 N. Y. Misc. 118, 148 N. Y. App. Div. 892, 132 N. Y.

Supp. 511.

9. *Ante*, this subsection, note 88.

10. *Raymond v. Tiffany*, 59 N. Y. Misc. 283, 112 N. Y. Supp. 252.

11. See *e. g.* Cal. Civ. Code, § 859; Mich. How. Ann. St. § 10681; Wisconsin St. 1913, § 2083.

In Illinois the statute<sup>12</sup> authorizes a judgment creditor to take proceedings to sequester property held in trust for the defendant, "except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself," and under this statute the income of the trust fund is, apart from any express provisions, beyond the reach of creditors.<sup>13</sup>

The Kentucky statute<sup>14</sup> provides that estates held in trust shall be subject to the debts and charges of the beneficiaries, as they would be subject if those persons owned the like interest in the property itself. The effect of this statute is to render nugatory any attempt to create a trust exempt from the claims of the *cestui's* creditors,<sup>15</sup> except as the trustee is given an absolute discretion as to whether the *cestui* shall have anything<sup>16</sup> or as the interests of various *cestuis* are incapable of separation for this or any other purpose.<sup>17</sup>

12. Rev. St. 1916 ch. 23, § 49.

13. *Binns v. La Forge*, 191 Ill. 598, 61 N. E. 382.

14. Ky. Stat. 1909, § 2355.

15. *Bland's Adm'r v. Bland*, 90 Ky. 400, 9 L. R. A. 599, 29 Am. St. Rep. 390, 14 S. W. 423; *Cecil's Trustee v. Robertson*, 32 Ky. Law, 357, 105 S. W. 926.

16. *Davidson v. Kemper*, 79

Ky. 5, 82 Ky. 415; *Marshall's Trustee v. Rash*, 87 Ky. 6, 12 Am. St. Rep. 467, 7 S. W. 879; *Garner v. Wills*, 92 Ky. 386, 17 S. W. 1023; *Ratliff's Ex'rs. v. Comm.*, 31 Ky. Law Rep. 154, 101 S. W. 978.

17. *Hackett's Trustee v. Hackett*, 146 Ky. 408, 142 S. W. 673.

## CHAPTER XXXIV.

### PERSONAL DISABILITIES AS TO THE TRANSFER OF LAND.

- § 593. Married women.
- 594. Infants.
- 595. Persons mentally incapacitated.
- 596. Corporations.
- 597. Aliens.
- 598. Criminals.

§ 593. **Married women.** At common law, a married woman could not dispose of her land by her sole deed, and could convey it even in conjunction with her husband only by the levy of a fine.<sup>1</sup> In this country a conveyance jointly with her husband, acknowledged by her apart from him was, at a quite early date, substituted for a conveyance by means of a fine,<sup>2</sup> and this mode of conveyance is no doubt legal in all the states. In most states, moreover, at the present day, the formality of a separate acknowledgment by the wife is dispensed with, and the statutes extending her rights over her property free from any control by her husband have in some states given her power to convey her lands by a conveyance executed by her alone, without the joinder of her husband.<sup>3</sup> Such right of sole transfer has for many years been recognized by courts of equity in connection with her equitable separate estate, the right being, however, in some jurisdictions, dependent upon

1. 1 Blackst. Comm. 444; 2 Williams, Real Prop. (18th Ed.) Id. 293, 2 Kent's Comm. 150; Albany Fire Ins. Co. v. Pay, 4 N. Y. 9.

2. 5 Mason, 67. Fed. Cas. No. 9,005; Fowler v. Shearer, 7 Mass. 14; Jackson v. Gilchrist, 15 Johns. 288; (N. Y.) 89, 110.

3. 1 Stimson's Am. St. Law, § 6500, where the statutory provisions are summarized

an express grant of the power of disposition in the instrument creating the estate.<sup>4</sup>

The later decisions, under the influence, more or less direct, of the statutes enlarging the powers of married women, uphold conveyances made in her behalf by a person holding her power of attorney;<sup>5</sup> and the fact that her attorney is her husband, and that he executes the conveyance in his own right, as well as in her behalf, does not render it invalid.<sup>6</sup>

At common law the husband could dissent, and so invalidate, a transfer made to the wife.<sup>7</sup> The modern statutes excluding the husband's rights in her property, and his control thereover, are, however, inconsistent with the existence of any such right in him.

—**Conveyances between husband and wife.** At common law, a conveyance by a married woman directly to her husband was void, they being regarded in law as

4. 2 Story, Eq. Jur. § 1392 *et seq.*; 2 Pomeroy, Eq. Jur. §§ 1104, 1105; *ante*, § 206.

5. In such cases, the power of attorney has usually been executed by the husband jointly with the wife. *Williams v. Paine*, 169 U. S. 55, 42 L. Ed. 658; *Hull v. Glover*, 126 Ill. 122, 18 N. E. 198; *Ellison v. Branstator*, 153 Ind. 146, 54 N. E. 453; *Fulweiler v. Baugher*, 15 Serg. & R. (Pa.) 45; *Linton v. National Life Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54. Except when the husband himself is appointed attorney, as to which see cases in next note. In a number of states there is a statutory provision authorizing the wife to convey by attorney. 1 Stimson's Am. St. Law, § 6506. *Contra*, to the effect that the wife cannot convey an interest in land by attorney, see *Dawson v. Shirley*,

6 Blackf. (Ind.) 531; *King v. Nutall*, 7 Baxt. (Tenn.) 221; *Batte v. McCaa*, 44 Ark. 398; *Earle's Adm'rs v. Earle*, 20 N. J. Law, 347; *Sumner v. Conant*, 10 Vt. 9; *Mott v. Smith*, 16 Cal. 533; *Louisville Bank v. Gray*, 84 Ky. 565.

6. *Weisbrod v. Chicago & N. W. Ry. Co.*, 18 Wis. 35, 86 Am. Dec. 743; *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159; *Wronkow v. Oakley*, 133 N. Y. 505, 16 L. R. A. 209, 28 Am. St. Rep. 661, 31 N. E. 521. That the husband must not only sign but also be a party to the conveyance, see *Rushton v. Davis*, 127 Ala. 280, 28 So. 476.

7. Co. Litt. 3a; 2 Blackst. Comm. 293; 2 Kent's Comm. 150; *Schouler, Domestic Relations*, § 92; *Melvin v. Proprietors of Locks & Canals on Merrimack*



but one person, and this is still quite frequently the rule, in spite of the statutes enlarging her property rights.<sup>8</sup> Under some of the modern statutes, however, she may make such a conveyance to him as freely as to other persons.<sup>9</sup> She might, even at common law, convey land to a third person, to be conveyed to the husband, in the absence of any coercion or undue influence on the husband's part.<sup>10</sup>

At common law, the husband could not convey to the wife, and this rule still exists in some jurisdictions.<sup>11</sup> In others it has been changed by the modern statutes with reference to married women.<sup>12</sup> Land could, how-

River, 16 Pick. (Mass.) 161, 167; Baxter v. Smith, 6 Binn. (Pa.) 427.

8. 1 Roper, *Husb. & Wife*, 53; Trawick v. Davis, 85 Ala. 342, 5 So. 83; Rico v. Brandenstein, 98 Cal. 465, 20 L. R. A. 702, 35 Am. St. Rep. 192, 33 Pac. 702; Brooks v. Kearns, 86 Ill. 547; Johnson v. Jouchert, 124 Ind. 105, 8 L. R. A. 795, 24 N. E. 580; Vicroy v. Vicroy, 20 Ky. Law Rep. 47, 45 S. W. 75; Preston v. Fryer, 38 Md. 221; White v. Wager, 25 N. Y. 328; Alexander v. Shalala, 228 Pa. 297, 77 Atl. 554; Riley v. Wilson, 86 Tex. 240, 24 S. W. 394; Kelley v. Dearman, 65 W. Va. 49, 63 S. E. 693. That such a conveyance passes the equitable title, see Mathy v. Mathy, 88 Ark. 56, 113 S. W. 1012.

9. Osborne v. Cooper, 113 Ala. 405, 59 Am. St. Rep. 117, 21 So. 320; Wells v. Caywood, 3 Colo. 487; Despain v. Wagner, 163 Ill. 598, 45 N. E. 129; Robertson v. Robertson, 25 Iowa, 350; Savage v. Savage, 80 Me. 472, 15 Atl. 43; Glascock v. Glascock

—(Mo.)—, 117 S. W. 67.

10. Scarborough v. Watkins, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; Gebb v. Rose, 40 Md. 387; Jackson v. Stevens, 16 Johns. (N. Y.) 110; Jasper v. Maxwell, 16 N. C. 357; Garvin v. Ingram, 10 Rich. Eq. (S. C.) 130; Riley v. Wilson, 86 Tex. 240, 24 S. W. 394; Shepperson v. Shepperson, 2 Grat. (Va.) 501.

11. 1 Blackst. Comm. 442; 2 Kent, Comm. 129; Carrington v. Richardson, 79 Ala. 101; Loomis v. Brush, 36 Mich. 40; Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49; Frissell v. Rozier, 19 Mo. 448; Johnson v. Vandervort, 16 Neb. 144, 19 N. W. 461, 20 N. W. 122; Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57; Crooks v. Crooks, 34 Ohio St. 610; Coates v. Gerlach, 44 Pa. St. 43; Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410.

12. Booker v. Worrill, 55 Ga. 332; Merchants & Laborers' Building Ass'n v. Scanlan, 144 Ind. 11, 42 N. E. 1008; Sproul v. Atchison Nat. Bank, 22 Kan. 336; Burdeno v. Amperse, 14 Mich. 91;

ever, always be transferred indirectly from the husband to the wife by making use of a third person as a conduit of title,<sup>13</sup> and a conveyance directly from the husband to the wife, not in fraud of his creditors, and otherwise meritorious in character, has usually been upheld in equity as a settlement on the wife<sup>14</sup>

—**Transfer by will.** Under the English Statute of Wills, as declared by a statute passed two years later, a married woman had no power to dispose of her legal interest in lands,<sup>15</sup> nor could she so dispose at common law of her legal personal property, since this belonged to the husband.<sup>16</sup> In most of the states she can, at the present day, dispose of her real or personal property by will without her husband's consent, as if sole,<sup>17</sup> and she can, in all jurisdictions, so dispose of her equitable separate estate.<sup>18</sup>

§ 594. **Infants.** At common law, any person under the age of twenty-one is an infant, but by statute in a

Baygents v. Beard, 41 Miss. 531; Currier v. Teske, 84 Neb. 60, 120 N. W. 1015; Walker v. Long, 109 N. C. 510, 14 S. E. 299; Reagle v. Reagle, 179 Pa. 89, 36 Atl. 891.

13. Jewell v. Porter, 31 N. H. 34; McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404. And this could be effected, under the Statute of Uses, by a conveyance to a third person of the legal title, to the use of the wife, the use being executed by the statute in the latter. 1 Roper, *Husb. & Wife*, 53.

14. Jones v. Clifton, 101 U. S. 225, 228, 25 L. Ed. 908; Moore v. Page, 111 U. S. 117, 28 L. Ed. 373; Powe v. McLeod, 76 Ala. 418; Wilder v. Brooks, 10 Minn. 50, 88 Am. Dec. 49; Wells v. Wells, 35 Miss. 638; Turner

v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897; Furrow v. Athey, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. 208; Vought's Ex'rs v. Vought, 50 N. J. Eq. 177, 27 Atl. 489; Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57, 11 Am. Dec. 396; Crooks v. Crooks, 34 Ohio St. 610; Coates v. Gerlach, 44 Pa. St. 43; Humphrey v. Spencer, 36 W. Va. 11, 14 S. E. 410; Albright v. Albright, 70 Wis. 528, 36 N. W. 254.

15. 34 & 35 Hen. VIII. c. 5, § 14.

16. 1 Jarman, *Wills*, 39, Bigelow's note.

17. 1 Stimson's *Am. St. Law*, § 6460; 1 Woerner, *Administration*, § 21.

18. 1 Jarman, *Wills*, 41; 2 Perry, *Trusts*, § 668.

number of states the period of infancy is, in the case of females, reduced to eighteen years, and, in some, the marriage of a female infant gives her the powers of an adult married woman.<sup>19</sup>

A transfer *inter vivos* of an estate or interest in land by an infant is voidable, though not void, that is, it is effective to transfer title unless it is repudiated by him after attaining his majority;<sup>20</sup> and it may be repudiated by him, although the grantee has conveyed to a purchaser for value without notice.<sup>21</sup> The right to avoid a conveyance made by an infant does not, however, extend to conveyances made by him in the execution of a trust, or as the holder of a bare legal title.<sup>22</sup>

19. 1 Blackst. Comm. 463; 2 Kent's Comm. 233; 1 Stimson's Am. St. Law, § 6601.

20. *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. Ed. 800; *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463; *Green v. Wilding*, 59 Iowa, 679, 44 Am. Rep. 696; *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906, and note; *Englebert v. Troxell*, 40 Neb. 195, 26 L. R. A. 177, 42 Am. St. Rep. 665, 58 N. W. 858; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Baggett v. Jackson*, 160 N. C. 26, 76 S. E. 86; *Logan v. Gardner*, 136 Pa. 588, 20 Am. St. Rep. 939, 20 Atl. 625; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. Though a conveyance of land by an infant is thus subject to avoidance by him, a binding sale and conveyance of his land may, as before stated, in most jurisdictions, be effected by a judicial proceeding. See *ante*, § 553.

That if the joinder of a husband in his wife's deed, as required by statute is repudiated by him on account of his infancy, the deed is wholly void, see *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6; *Barker v. Wilson*, 4 Heisk. (Tenn.) 268.

21. *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Sims v. Smith*, 86 Ind. 577; *Jenkins v. Jenkins*, 12 Iowa, 195; *Brantley v. Wolf*, 60 Miss. 420; *Jackson v. Beard*, 162 N. C. 105, 78 S. E. 6; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. 372; *Mustard v. Wohlford's Heirs*, 15 Gratt. (Va.) 329, 340, 76 Am. Dec. 209.

22. *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 67, 9 L. Ed. 345; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268, 26 Pac. 599; *Prouty v. Edgar*, 6 Iowa, 353; *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. 302; *Starr v. Wright*, 20 Ohio St. 97.

In some cases the courts have regarded the grantor as estopped to assert his infancy when he induced one to pay a consideration for the land by false representations as to his age;<sup>23</sup> a view which is, however, not adopted in most jurisdictions.<sup>24</sup>

An infant married woman stands, in respect to her right to avoid any conveyance made by her, upon the same footing as any other infant, and her disability of infancy is not removed by a statute authorizing married women to make conveyances.<sup>25</sup>

—**Avoidance of conveyance.** At common law, an infant's conveyance by livery of seisin could be avoided only by an act of equal solemnity, such as an entry, and it has sometimes been stated that the avoidance of any conveyance must be by entry or some other act of equal notoriety with the conveyance.<sup>26</sup> The modern

23. *Patterson v. Lawrence*, 90 Ill. 174; *Asher v. Bennett*, 143 Ky. 361, 136 S. W. 879; *Ostrander v. Quin*, 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 257; *Ryan v. Growney*, 125 Mo. 474, 28 S. W. 189, 755; *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511. See *Vogelsang v. Null*, 67 Tex. 465, 3 S. W. 451; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089; 1 Story, Eq. Jur. § 385; 2 Pomeroy, Eq. Jur. § 945.

24. *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N. S.) 659, 119 S. W. 75; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *Studwell v. Shapter*, 54 N. Y. 249; *International Text Book Co. v.*

*Connelly*, 206 N. Y. 188, 99 N. E. 722; *Carolina Interstate Building & Loan Ass'n v. Black*, 119 N. C. 323, 25 S. E. 975. In some states the statute prohibits the disaffirmance of a contract by an infant if the action of the other party in entering therein was induced by the infant's representations. 1 *Stimson's Am. St. Law* § 6602(D).

25. *Greenwood v. Coleman*, 34 Ala. 150; *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Law v. Long*, 41 Ind. 586; *Hoyt v. Swar*, 53 Ill. 134; *Walsh v. Young*, 110 Mass. 396; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Epps v. Flowers*, 101 N. C. 158, 7 S. E. 680; *Hughes v. Watson*, 10 Ohio, 127; *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629.

26. *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am.

view generally is, however, that any act indicative of an intention to repudiate the conveyance is sufficient.<sup>27</sup> Accordingly, an avoidance of the conveyance has been held to have been effected, not only by an entry upon the land,<sup>28</sup> but also by an action of ejectment by the infant to recover the land,<sup>29</sup> a suit by him to set aside the conveyance,<sup>30</sup> a conveyance to another person inconsistent with the former conveyance,<sup>31</sup> or a notice to his grantee of an intention to disaffirm the conveyance.<sup>32</sup>

Dec. 285; *Rogers v. Hurd*, 4 Day (Conn.) 57; *O'Donohue v. Smith*, 130 N. Y. App. Div. 214, 114 N. Y. Supp. 536. See *Irvine v. Irvine*, 9 Wall. (U. S.) 617, 19 L. Ed. 800.

27. *McCarty v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Long v. Williams*, 74 Ind. 115; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *State v. Plaisted*, 43 N. H. 413; *Drake's Lessee v. Ramsay*, 5 Ohio, 252.

28. *Inhabitants of Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Shrock v. Cowl*, 83 Ind. 243; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. Ed. 345.

29. *Cole v. Pennoyer*, 14 Ill. 158; *Chadbourne v. Rackliff*, 30 Me. 354; *Conn v. Boutwell*, 101 Miss. 353, 58 So. 105; *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906; *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381. But occasionally it has been held that there must be a disaffirmance before suit. *Law v. Long*, 41 Ind. 586; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Voorhies v. Voorhies*, 24 Barb.

(N. Y.) 150; *Tomeczek v. Wieser*, 58 N. Y. Misc. 46, 108 N. Y. Supp. 784.

30. *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Slater v. Rudderforth*, 25 App. Cas. (D. C.) 497; *Tunison v. Chamblin*, 88 Ill. 378; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. *Contra*, *O'Donohue v. Smith*, 136 N. Y. App. Div. 214, 114 N. Y. Supp. 536.

31. *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. Ed. 345; *Black v. Hills*, 36 Ill. 376, 87 Am. Dec. 224; *Ison v. Cornett*, 116 Ky. 92, 75 S. W. 204; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Ridgeway v. Herbert*, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040; *State v. Plaisted*, 43 N. H. 413; *Mustard v. Wohlford's Heirs*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209. See notes 18 Am. St. Rep. 665, 3 Ann. Cas. 593.

32. *Seranton v. Stewart*, 52 Ind. 68; *Schroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *McCarty v. Woodstock Iron Co.*, 92 Ala. 463, 12 L. R. A. 136, 8 So. 417. That a denial in a pleading of the exe-

The conveyance cannot ordinarily be avoided by the infant until after he arrives at the age of majority.<sup>33</sup> His infancy may however, even before that time, be asserted by him as a defense to an action to foreclose a mortgage made by him,<sup>34</sup> and it has been said that if an infant makes a conveyance he may, even during infancy, enter and enjoy the profits.<sup>35</sup> If he dies before either repudiating or affirming the conveyance, his heirs or personal representatives, whichever would be otherwise entitled to the land, may repudiate it.<sup>36</sup>

In order that one may avoid a conveyance made by him during infancy, it is not necessary that he return the consideration received by him, unless he still has the specific consideration received.<sup>37</sup>

cution of a deed involves a repudiation thereof, see *Ricks v. Wilson*, 154 N. C. 282, 70 S. E. 476.

33. *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 75, 9 L. Ed. 345; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Welch v. Bunce*, 83 Ind. 382; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Shipley v. Bunn*, 125 Mo. 445, 28 S. W. 754; *Emmons v. Murray*, 16 N. H. 385; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Zouch v. Parsons*, 3 Burrows, 179.

34. *Watson v. Renderman*, 79 Conn. 687, 66 Atl. 515; *Schneider v. Staihr*, 20 Mo. 269.

35. *Zouch v. Parsons*, 3 Burrows, 1794, 1808; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Cummings v. Powell*, 8 Tex. 80.

36. *Bozeman v. Browning*, 31 Ark. 364; *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Gillen-*

*waters v. Campbell*, 142 Ind. 529, 41 N. E. 1041; *Austin v. Trustees of Charlestown Female Seminary*, 8 Metc. (Mass.) 196, 41 Am. Dec. 497; *Harvey v. Briggs*, 68 Miss. 60, 10 L. R. A. 62, 8 So. 274; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Blake v. Hollandsworth*, 71 W. Va. 387, 43 L. R. A. (N. S.) 714, 76 S. E. 814.

37. *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292; *Stull v. Harris*, 51 Ark. 294; *Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N. S.) 33, 55 So. 844; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Brantley v. Wolf*, 60 Miss. 420; *Ridgeway v. Herbert*, 150 Mo. 606, 70 Am. St. Rep. 464, 51 S. W. 1040; *Englebert v. Troxell*, 46 Neb. 195, 26 L. R. A. 177, 42 Am. St. Rep. 665, 58 N. W. 853; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Bullock v. Sprowls*, 93 Tex. 188, 47 L. R. A. 326, 77 Am. St. Rep. 849, 54 S. W. 661. In *Mac Greal v. Taylor*, 167 U.

—**Ratification.** If the infant, after arriving at majority, affirms or ratifies the conveyance by unequivocally recognizing it as valid, he is thereafter precluded from repudiating it.<sup>38</sup> The effect of such a ratification is to take from the conveyance the infirmity therein arising from the infancy of the grantor,<sup>39</sup> and a decision to the effect that, in spite of such ratification, the grantor can render the conveyance invalid by making a conflicting conveyance to a *bona fide* purchaser for value,<sup>40</sup> would seem to be open to serious question, in the absence of any statutory requirement that the ratification of a conveyance by an infant shall appear on the records.

—**Acquiescence.** It has been quite frequently said that the grantor must repudiate or disaffirm his conveyance within a reasonable time after his arrival at majority, and that his failure so to do involves a ratification of the conveyance,<sup>41</sup> a view which is based on the possible hardship upon the grantee involved in the

S. 688, 42 L. Ed. 326 an infant having, by his trust deed, procured money which he applied to improving the property and paying off incumbrances, it was held that, on disaffirmance of the deed, the lender could follow the money into the property, in so far as this did not place the grantor in a worse position than when he made the deed.

38. Davidson v. Young, 38 Ill. 145; Ward v. Ward, 143 Ky. 91, 136 S. W. 137; Keegan v. Cox, 116 Mass. 289; Allen v. Poole, 54 Miss. 323; Lacy v. Pixler, 120 Mo. 383, 25 S. W. 206; Emmons v. Murray, 16 N. H. 385; Cox v. Gowan, 116 N. C. 131, 21 S. E. 108; Tolar v. Marion County Lumber Co., 93 S. C. 274, 75 S. E. 545.

3 R. P.—5

39. See 18 Am. St. Rep. 700, note to Craig v. Van Bebber.

40. Black v. Hills, 36 Ill. 376, 87 Am. Dec. 224.

41. Hastings v. Dollarhide, 24 Cal. 196; Kline v. Beebe, 6 Conn. 494; Bentley v. Greer, 100 Ga. 35, 27 S. E. 974; Kell v. Healey, 84 Ill. 104, 25 Am. Rep. 434; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Goodnow v. Empire Lumber Co., 31 Minn. 468, 47 Am. Rep. 798, 18 N. W. 283; Ward v. Laverty, 19 Neb. 429, 27 N. W. 393; Weeks v. Wilkins, 134 N. C. 516, 47 S. E. 24; Dolph v. Hand, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114; Scott v. Buchanan, 11 Humph. (Tenn.) 468; Ferguson v. Houston, E. & W. T. Ry. Co., 73 Tex. 344, 11 S. W. 347; Bigelow v. Kinney, 3

continued possibility of disaffirmance, and perhaps, to some extent, upon the desirability, as a matter of public policy, of removing, so far as possible, any uncertainty as to titles. A contrary view has, however, been asserted by a number of courts, to the effect that the grantor's mere failure to act does not, in the absence of other circumstances, affect his right to repudiate the conveyance, and that there is no restriction in this regard as to the time within which he must repudiate it, other than that imposed by the statute of limitations.<sup>42</sup> In a few states there is a statutory provision requiring the repudiation to take place within a reasonable time.<sup>43</sup> Apart from any question of intentional ratification, or of repudiation within a reasonable time, it has been recognized that if the grantor, after arriving at majority, stands by without asserting any claim, though knowing that his grantee or another is expending money on the supposition that the conveyance is valid, he may be estopped thereafter to deny its validity.<sup>44</sup>

If one is under the disability of coverture at the time of her arrival at the age of majority, she cannot,

Vt. 353, 21 Am. Dec. 589; *Tormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

42. *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N. S.) 33, 55 So. 844; *Syck v. Hellier*, 140 Ky. 388, 131 S. W. 30; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Donovan v. Ward*, 100 Mich. 601, 59 N. W. 254; *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616, 31 So. 197; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Emmons v. Murray*, 16 N. H. 385; *McMurray v. McMurray*, 66 N. Y. 175; *Cres-*

*inger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565. See notes 18 Am. St. Rep. 675, 15 Harv. Law Rev. 749, 9 Columbia Law Rev. 362.

43. 1 *Stimson's Am. St. Law*, § 6602 (C).

44. *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939, 20 Atl. 625; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. 114; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251. See *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94, 13 So. 429; *Burkhard v. Crouch*, 169 N. Y. 399, 62 N. E. 431.



by her failure, during the continuance of her coverture, to avoid a conveyance made by her during infancy, be regarded as affirming it.<sup>45</sup>

—**Statute of limitations.** The right to disaffirm a conveyance made by an infant may be barred by the statute of limitations.<sup>45</sup> Occasionally the courts have referred to the statute limiting the time for the recovery of land as controlling in this regard,<sup>46</sup> but the character of the proceeding by which the right of disaffirmance is asserted would presumably, in some jurisdictions, be regarded as the controlling consideration.<sup>47</sup>

Since the grantor cannot disaffirm his conveyance until his arrival at majority,<sup>48</sup> it would seem that his right of action to assert his rights cannot be regarded as accruing until then, and that consequently the case is not one of the accrual of a cause of action during infancy, within the provision of the statute giving an infant in favor of whom a right of action has accrued a limited period after his arrival at majority in which to sue.<sup>49</sup> In accord with this view are occasional statements that the statute begins to run against the grantor only upon his arrival at majority.<sup>50</sup> There are, however, decisions

45. *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Stull v. Harris*, 51 Ark. 294; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Linville v. Greer*, 165 Mo. 380, 65 S. W. 579; *Epps v. Flowers*, 101 N. C. 158, 7 S. E. 680; *Gaskins v. Allen*, 137 N. C. 426, 49 S. E. 919.

45a. *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Prout v. Wiley*, 28 Mich. 164; *Donovan v. Ward*, 100 Mich. 601, 59 N. W. 254; *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616, 32 So. 281; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206.

46. *Sims v. Bardoner*, 86 Ind.

44 Am. Rep. 263; *Hughes v. Watson*, 10 Ohio, 127; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115.

47. As in *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; *O'Donohue v. Smith*, 130 N. Y. App. Div. 214, 114 N. Y. Supp. 536.

48. *Ante*, this section, note 33.

49. See *O'Donohue v. Smith*, 130 N. Y. App. Div. 214, 114 N. Y. Supp. 536; note 9 *Columbia Law Rev.* at p. 362.

50. *Wells v. Seixas* (C. C.) 24 Fed. 82; *Bozeman v. Browning*, 31 Ark. 364; *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447; Compare *Shipp v. McKee*, 80 Miss. 741, 92 Am. St. Rep. 616, 32 So. 281.

in which the grantor's right of action to assert his rights is regarded as limited by the statute defining the period within which one can sue after attaining his majority on a cause of action which accrued during his minority.<sup>51</sup> And occasionally it has been decided that such statute should be referred to, as covering an analogous case, for the purpose of ascertaining the "reasonable time"<sup>52</sup> within which the conveyance must be disaffirmed.<sup>53</sup>

—**Purchase money mortgage.** While a mortgage by an infant is ordinarily voidable, his right to avoid a purchase money mortgage made by him to his vendor is dependent upon his relinquishment of his right to the land, that is, the conveyance to him and his mortgage thereon constitute in legal effect but one transaction, and he cannot claim the benefit of the conveyance and at the same time repudiate the mortgage.<sup>54</sup> Consequently if, after majority, he ratifies his acquisition of the land by disposing of it to another<sup>55</sup> or by retaining possession of the land,<sup>56</sup> he thereby ratifies the mortgage. Likewise, if at the time of the acquisition of the property by an infant he makes a mortgage to a person other than the vendor, to secure money loaned to him, and the conveyance to him and the mortgage can be regarded as parts of one transaction, the mortgage cannot be repudiated so long as the property is retained.<sup>57</sup> And if an

51. *Kountz v. Davis*, 34 Ark. 590; *Putnal v. Walker*, 61 Fla. 720, 36 L. R. A. (N. S.) 33, 55 So. 844; *Robinson v. Allison*, 192 Mo. 366, 91 S. W. 115.

52. *Ante*, this section, note 41.

53. *Blankenship v. Stout*, 25 Ill. 132; *Weeks v. Wilkins*, 134 N. C. 516, 47 S. E. 24.

54. *Heath v. West*, 28 N. H. 101; *Hubbard v. Cummings*, 1 Me. 11; *Kenedy v. Baker*, 159 Pa. St. 146, 28 Atl. 252; *Callis v. Day*, 38 Wis. 643; *Richardson v. Boright*, 9 Vt. 368.

55. *Hubbard v. Cummings*, 1 Me. 11; *Uecker v. Koehn*, 21 Neb. 559, 59 Am. Rep. 849, 32 N. W. 583.

56. *Robbins v. Eaton*, 10 N. H. 561; *Dana v. Coombs*, 6 Me. 89; *Boody v. McKenney*, 23 Me. 517; *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 187, 56 Am. St. Rep. 38, 18 So. 292.

57. *Thurstan v. Nottingham, etc., Society* (1902) 1 Ch. 1, (1903) App. Cas. 6; *Ready v. Pinkham*, 181 Mass. 351, 63 N.

infant mortgages his land in order to procure money with which to relieve the land of an existing lien, the person lending the money may occasionally, even though the mortgage is disaffirmed, assert a lien as against the land, on the theory of subrogation.<sup>58</sup>

—**Conveyance to infant.** A conveyance to an infant, like a conveyance by him, is voidable merely, and must be repudiated by him within a reasonable period after his arrival at full age.<sup>59</sup>

—**Transfer by will.** The English Statute of Wills, with its explanatory act passed two years later, excluded persons under twenty-one years of age from those authorized to transfer lands by will, though males over fourteen and females over twelve could at that time transfer personalty.<sup>60-61</sup> In this country, the statutes of the various states are not uniform in regard to the age at which one may make a will, a distinction sometimes existing between wills of real and personal property in this regard, and sometimes not, and the required age of a female being in some states less than that of a male. In a majority of the states, however, a testator of either sex must be twenty-one years of age.<sup>62</sup>

E. 887; *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194. See notes, 14 Harv. Law Rev. at p. 388; 15 Id. at p. 494. Compare *Citizens' Building & Loan Ass'n v. Arvin*, 207 Pa. 293, 56 Atl. 870.

58. See *Mac Greal v. Taylor*, 167 U. S. 688, 42 L. Ed. 326; *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *United States Investment Corporation v. Ulrickson*, 84 Minn. 14, 87 Am. St. Rep. 326, 86 N. W. 613; *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292.

59. *Ketsey's Case*, Cro. Jac. 320; *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38, 18 So. 292; *Boody v. McKenney*, 23 Me. 517; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Ellis v. Alford*, 64 Miss. 8, 1 So. 155; *Baker v. Kennett*, 54 Mo. 82; *Robbins v. Eaton*, 10 N. H. 561; *Henry v. Root*, 33 N. Y. 526; *Dewey v. Burbank*, 77 N. C. 259; *Johnston v. Furnier*, 69 Pa. St. 449.

60-61. 1 Jarman. Wills (5th Ed.) 33, and note.

62. 1 Stimson's Am. St. Law.

§ 595. **Persons mentally incapacitated.** In determining whether a person has the mental capacity to make a valid and binding conveyance, the only question is whether he is able to clearly understand the nature and consequences of the conveyance, and the fact that his mental powers are impaired, or that he is subject to a delusion, if this is not such as to influence him in making the conveyance, does not impair its validity.<sup>63</sup> One who, at the time of making a conveyance, is unable to understand its nature and effect by reason of intoxication, stands, it seems, upon the same footing in this regard as one who is otherwise mentally incapacitated.<sup>64</sup>

The authorities are not in accord as to the effect of a conveyance *inter vivos* by a person mentally incapacitated. According to some decisions, such a conveyance is, like that of an infant, merely voidable,<sup>65</sup> unless a

§ 2602; 1 Woerner, Administration, § 20.

63. Stanfill v. Johnson, 159 Ala. 546, 49 So. 223; Doe d. Guest v. Beerson, 2 Houst. (Del.) 246; Clarke v. Hartt, 56 Fla. 775, 47 So. 819; Lindsey v. Lindsey, 50 Ill. 79, 99 Am. Dec. 489; Saffer v. Mast, 223 Ill. 108, 79 N. E. 32; Burgess v. Pollock, 53 Iowa, 273, 36 Am. Rep. 218, 5 N. W. 179; Altig v. Altig, 137 Iowa, 420, 114 N. W. 1056; Dennett v. Dennett, 44 N. H. 531; Blakely v. Blakely, 33 N. J. Eq. 502; Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058; Corporation of Members Church of Jesus Christ Latter Day Saints v. Watson, 30 Utah, 126, 83 Pac. 731; Stewart v. Flint, 59 Vt. 144, 8 Atl. 801; Whittaker v. Southwest Virginia Improvement Co., 34 W. Va. 217, 12 S. E. 507.

64. Dulany v. Green, 4 Har.

(Del.) 285; Harmon v. Johnston, 1 McArth. (Dist. Col.) 139; Shackleton v. Sebree, 8 Ill. 616; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; Warnock v. Campbell, 25 N. J. Eq. 485; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845; French's Heirs v. French, 8 Ohio 214, 31 Am. Dec. 441; Burnham v. Burnham, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176.

65. Langley v. Langley, 45 Ark. 392; Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. E. 1079; Nichol v. Thomas, 53 Ind. 42; Downham v. Holloway, 158 Ind. 626, 92 Am. St. Rep. 330, 64 N. E. 82; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh (Ky.) 236; Campbell v. Kerrick, 142 Ky. 279, 134 S. W. 186; Hovey v. Hobson, 53 Me. 451; Ruley v.

guardian has been appointed for the grantor and his property after judicial inquisition into his sanity, in which case a conveyance subsequently made by him is ordinarily regarded as absolutely void.<sup>66</sup> By other decisions, a conveyance by one of unsound mind is absolutely void,<sup>67</sup> the logical result of which view would be that it can be attacked not only by the grantor and persons in privity with him, but also by third persons generally, and, further that it can be ratified by the grantor only by making another conveyance after his restoration to sanity.

It has occasionally been asserted that the conveyance cannot be repudiated as against a *bona fide* pur-

Carter, 76 Md. 581, 19 L. R. A. 489, 35 Am. St. Rep. 443, 25 Atl. 667; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Jamison v. Culligan, 151 Mo. 410. 52 S. W. 226; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Blinn v. Schwarz, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115; French Lumbering Co. v. Thenault, 107 Wis. 627, 51 L. R. A. 910, 83 N. W. 927. But, even when this view was adopted, a conveyance by a married woman was held to be absolutely void if the statute required the husband's joinder, and he was insane at the time. Leggate v. Clark, 111 Mass. 308.

66. Griswold v. Hunter, 3 Conn. 227; New England Loan & Trust Co. v. Spittler, 54 Kan. 560, 38 Pac. 799; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Wait v. Maxwell, 5 Pick. (Mass.) 217; Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1; Elston

v. Jasper, 45 Tex. 409. An adjudication merely that the grantor is insane, and a fit subject for custody in a hospital for the insane, does not have this effect. Dewey v. Allgire, 37 Neb. 3, 46 Am. St. Rep. 468, 55 N. W. 276; Knox v. Haug, 48 Minn. 58, 50 N. W. 934; Leggate v. Clark, 111 Mass. 308. It has been decided that, if the guardianship has been in effect abandoned, the grantor having recovered his sanity, the conveyance will be supported, though the guardian has not been discharged by judicial action. Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1; Elston v. Jasper, 45 Tex. 409; Lower v. Schumacher, 61 Kan. 625, 60 Pac. 538; Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

67. Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73; German Sav. & Loan Soc. v. De Lashmuth (C. C.) 67 Fed. 399; Galloway v. Hendon, 131 Ala. 280, 31 So. 693; Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Sullivan v.

chaser for value from the grantee,<sup>68</sup> but there are also decisions to the effect that if the conveyance can be avoided as against the original grantee, it can as against any subsequent purchaser without reference to his ignorance of the infirmity therein.<sup>69</sup> It appears to be agreed that the ignorance of the grantee at the time of the transaction, although he paid a valuable consideration, does not affect the right of the grantor to repudiate the conveyance,<sup>70</sup> except as, in some states, the grantee is entitled to a return of the consideration paid by him.<sup>71</sup>

—**Avoidance.** In states where the conveyance is regarded as voidable only, it may be avoided either by the grantor after he has reacquired his mental capacity, or by his heirs or personal representatives after his death,<sup>71a</sup> or by his committee or guar-

Flynn, 20 Dist. Col. 396; Farley v. Parker, 6 Ore. 105; *In re De Silver's Estate*, 5 Rawle (Pa.) 111; Thompson v. Leach, Comb. 468, Carth. 435. See editorial note, 6 Columbia Law Rev. 115.

68. Coburn v. Raymond, 76 Conn. 484, 100 Am. St. Rep. 1000, 57 Atl. 116; Arnett's Committee v. Owens, 23 Ky. L. Rep. 1409, 65 S. W. 151; Campbell v. Kerrick, 142 Ky. 279, 134 S. W. 186; Burch v. Nicholson, 157 Iowa, 502, 137 N. W. 1066; Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 7 L. R. A. 118, 10 S. E. 609. See New England Loan & Trust Co. v. Spittler, 54 Kan. 560, 38 Pac. 799.

69. German Sav. & Loan Soc. & De Lashmutt (C. C.) 67 Fed. 399; Galloway v. McLain, 131 Ala. 280, 31 So. 603; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405, 10 N. E. 270; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec.

705; Rogers v. Blackwell 49 Mich. 192, 13 N. W. 512; McKenzie v. Donnell, 151 Mo. 461, 52 S. W. 222; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; Valentine v. Lunt, 51 Hun. (N. Y.) 544, 3 N. Y. Supp. 906.

70. Galloway v. Hendon, 131 Ala. 280, 31 So. 603; Sullivan v. Flynn, 20 D. C. 396; Gibson v. Am. Dec. 414; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Mitchell v. Inman,—Tex. Civ. App.—, 156 S. W. 290.

71. *Post*, this section, note 76.

71a. 2 Blackst. Comm. 292; Langley v. Langley, 45 Ark. 392; Brown v. Freed, 43 Ind. 253; Turner v. Rusk, 53 Md. 65; Allis v. Billings, 6 Metc. (Mass.) 415 39 Am. Dec. 744; Valpey v. Rea, 130 Mass. 384; Brigham v. Fayerweather 144 Mass. 48, 10

dian.<sup>72</sup> By ratifying the conveyance when mentally capable of acting, provided it is not regarded as absolutely void, the grantor precludes any subsequent avoidance thereof.<sup>73</sup> Even though the conveyance is voidable only, it does not seem that an equitable proceeding is necessary to avoid it.<sup>74</sup>

It has been decided that one to whom the grantor, after recovering his sanity, transfers the property, has the same right to avoid a conveyance made by his grantor while insane, in favor of another person, as has the grantor himself.<sup>75</sup> But in such case it might seem that, as in the case of a conveyance by an infant,<sup>76</sup> the mere execution of an inconsistent conveyance by the grantor involves in itself a repudiation of the voidable conveyance.

—**Return of consideration.** According to perhaps the weight of authority, one cannot assert the invalidity of his conveyance by reason of mental incapacity, as against his grantee who took the conveyance in the reasonable belief that the grantor was mentally capable, unless such grantee is placed *in statu quo* by a return of the consideration.<sup>76a</sup> By other authorities the right to

N. E. 735 (devisee); Hunt v. Rabitoay, 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59; Judge of Probate v. Stone, 44 N. H. 593.

72. See Domling v. Domling, 128 Mich. 588, 87 N. W. 788; Tolson v. Garner, 15 Mo. 494; Hinchman v. Ballard, 7 W. Va. 152.

73. Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Arnold v. Richmond Iron Works, 1 Gray (Mass.) 434; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

74. Smith v. Ryan, 191 N. Y. 452, 19 L. R. A. (N. S.) 461,

123 Am. St. Rep. 609, 14 Ann. Cas. 505, 84 N. E. 402; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Brown v. Freed, 43 Ind. 253; Fitzgerald v. Shelton, 95 N. C. 519. See editorial note, 20 Harv. Law Rev. at p. 419.

75. Breckenridge's Heirs v Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Langley v. Langlay, 45 Ark. 392; Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352.

76. *Ante*, § 594, note 31.

76a. Coburn v. Raymond, 76 Conn. 484, 100 Am. St. Rep.

avoid the conveyance is regarded as not dependent on the return of the consideration.<sup>76b</sup> Even in states where ordinarily the right of the grantor to disaffirm his conveyance, in case of the grantee's ignorance of his incapacity at the date of the execution thereof, is dependent on the return of the consideration, a different view may be taken in case the consideration enured, not to the benefit of such insane grantor, but to another.<sup>77</sup>

—**Conveyance to lunatic.** A conveyance or devise may be made in favor of a person wanting in mental capacity, and the title is thereby vested in him subject to his right, upon regaining his faculties, to repudiate it.<sup>78</sup>

- 1600, 57 Atl. 116; Eldredge v. Palmer, 185 Ill. 618, 76 Am. St. Rep. 770, 57 N. E. 770; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Behrens v. McKenzie, 23 Iowa, 333; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; Rusk v. Fenton, 14 Bush. (Ky.) 490, 29 Am. Rep. 413; Jamison v. Culligan, 151 Mo. 410, 52 S. W. 224; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Smith v. Ryan 191 N. Y. 452, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505, 84 N. E. 402; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; National Metal Edge Box Co. v. Vanderveer, 85 Vt. 488, 42 L. R. A. (N. S.) 343, Ann. Cas. 1914D 865, 82 Atl. 837. And see Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766. Such seems to be the English rule. Molton v. Camroux, 2 Exch. 487, 4 Exch. 17; Elliot v. Ince, 7 De Gex, M. & G. 475; Wood-Renton, Lunacy, 13; 19 Halsbury's Laws of Eng-land 398.
76. Henry v. Fine, 23 Ark. 417; Nichol v. Thomas, 53 Ind. 42; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Brigham v. Fayerweather 144 Mass. 48, 10 N. E. 735; Bates v. Hyman,—(Miss.)—, 28 So. 567; Dewey v. Allgire, 37 Neb. 6, 40 Am. St. Rep. 468, 55 N. W. 276; Crawford v. Scoville, 94 Pa. St. 48, 39 Am. Rep. 766; Williams v. Sapieha, 94 Tex 430, 61 S. W. 115 (unless consideration still in grantor's hands).
77. See Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. E. 1079; Physio-Medical College of Indiana v. Wilkinson, 108 Ind. 314, 9 N. E. 167; Smith's Committee v. Forysthe, 28 Ky. Rep. 1034, 90 S. W. 1075; Woolley v. Gaines, 114 Ga. 122, 88 Am. St. Rep. 22, 39 S. E. 892.
78. Co. Litt. 2b; 2 Blackst. Comm. 291; Concord Bank v. Bellis, 10 Cush. (Mass.) 276; Campbell v. Kuhn, 45 Mich. 513, 40 Am. Rep. 479, 8 N. W. 523.



—**Testamentary capacity.** The mental capacity necessary for the making of a will has been the subject of an immense number of decisions, in which the subject is considered with reference to the facts of the particular case. The rule now quite generally approved in this respect is to the effect that it is sufficient if the testator knows the extent and value of his property, the number and names of the persons who are the proper objects of his bounty, their deserts as measured by their conduct towards him, their capacities and necessities, and he has sufficient memory to retain these facts in his mind until the execution of the will. Accordingly, the fact that testator was subject to insane delusions does not necessarily show incapacity to make a will. Nor is a will invalid because, at the time of making it, the testator was under guardianship as an insane person, though this fact usually, if not always, raises a presumption of insanity.<sup>79</sup>

§ 596. **Corporations.** A corporation has, in the absence of an express prohibition, the same power as a private individual to transfer its land, as well as its other property, provided only that the transfer is for an object consistent with the purpose of its creation.<sup>80</sup>

At common law, a corporation has power to acquire such land as may be necessary for or reasonably incidental to carrying out the purposes of its creation.<sup>81</sup> This principle is, in most of the states, confirmed by

79. 1 Woerner, Administration, § 23 *et seq.*; Page, Wills, § 97 *et seq.*; Bigelow, Wills, 72.

80. 2 Kent's Comm. 381; 1 Clark & Marshall Corporations, § 152; Aurora Agricultural & Horticultural Soc. v. Paddock, 80 Ill. 264; Levering v. Bimel, 146 Ind. 545, 45 N. E. 775; State v. Western Irrigating Canal Co., 40 Kan. 96, 10 Am. St. Rep. 166, 19 Pac. 349; Treadwell v. Salis-

bury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. 831; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280.

81. 1 Bl. Comm. 478; 2 Kent's Comm. 281; 1 Clark & M. Corp. §§ 132, 138.

statutory provision, while in a few states there seems to be no limit upon the power to acquire land.<sup>82</sup>

The common-law right of a corporation to acquire land was greatly circumscribed by the enactment of the various statutes of "mortmain," which, while directed chiefly at ecclesiastical bodies, applied in terms to all corporations, and prohibited their acquisition of land without license from the crown, and, during certain periods, from the mesne lord also.<sup>83</sup> These statutes appear to have been adopted in but one state.<sup>84</sup> There are, however, in a number of states, special statutory restrictions upon the power of religious corporations to acquire and hold land, and the United States statutes contain a provision to this effect applicable to corporations in any of the territories.<sup>85</sup> In a few states, moreover, a testamentary provision in favor of a religious or charitable body is invalid if in excess of a certain amount, or if the will is not executed a certain length of time before the testator's death.<sup>86</sup>

Restrictions as to the quantity of land which a corporation may acquire, or the purposes for which it may acquire the land, do not usually invalidate a transfer to the corporation in violation thereof, so as to permit the transfer to be questioned by any private person, but the state only may assert the illegality of the transfer, and consequently, if the state fails so to do, the corporation

82. 2 Stimson's Am. St. Law, § 8204.

83. See, as to these statutes, 2 Bl. Comm. 268; 2 Kent's Comm. 282.

84. Pennsylvania. See *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; 2 Kent's Comm. 283; 8 Harv. Law Rev. at p. 17.

85. 5 Thompson Corp. § 5774. See Rev. St. U. S. § 1890; *In re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233; *Church Extension of M. E.*

*Church v. Smith*, 56 Md. 392.

86. 1 Stimson's Am. St. Law, § 2618; *Lancaster v. Amsterdam Improvement Co.*, 140 N. Y. 576, 586, 24 L. R. A. 322, 35 N. E. 964; *Beasley v. Aberdeen & R. R. Co.*, 145 N. C. 272, 59 S. E. 60; *Fayette Land Co v. Louisville & N. R. Co.*, 93 Va. 274, 24 S. E. 1016; *Milton v. Crawford*, 65 Wash. 145, 118 Pac. 32; See 8 Harv. Law Rev. at p. 15 *et seq.*, 23 Id. 495 *et seq.*

may retransfer the land to another.<sup>87</sup> Occasionally, however, it has been decided that a transfer by will to a corporation stands on a different footing in this respect from a transfer *inter vivos*, and that such a transfer may be attacked by the heirs of the testator.<sup>88</sup>

While it is frequently said or implied that the state can object to the acquisition by a corporation of property in excess of its powers, the courts do not ordinarily indicate the method by which the state can assert such objection. The statement occasionally made that the state can claim such property by way of escheat appears, in the absence of a statute so providing, to be most questionable.<sup>89</sup> Ordinarily, it would seem, the state can

87. 1 Clark & Marshall, Corp. § 228 *et seq.*; 3 Thompson, Corp. (2nd Ed.) § 2390 *et seq.*; Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401; Long v. Georgia Pac. Ry. Co., 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706; Kohlruss v. Zachery, 139 Ga. 625, 77 S. E. 812; Alexander v. Tolleston Club, 110 Ill. 65; Louisville School Board v. King 32 Ky. L. Rep. 687, 107 S. W. 247; Farrington v. Putnam, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652; Hanson v. Little Sisters of the Poor of Baltimore, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052; Nantasket Beach S. S. Co. v. Shea, 182 Mass. 147, 65 N. E. 57.

88. Gromie v. Home Soc., 3 Bush (Ky.) 865; *In re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 337, 19 N. E. 233; Davidson College v. Chambers, 3 Jones Eq. (N. C.) 253; Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; House of Mercy of New York v. Davidson, 90 Tex. 529, 39 S. W. 924. See Starkweather v. American Bible Soc. 72 Ill. 50;

DeCamp v. Dobbins, 31 N. J. Eq. 690; *Contra*, Brigham v. Peter Bent. Brigham Hospital, 126 Fed. 796, 801, 134 Id. 513, 527; Jones v. Habersham, 107 U. S. 174, 27 L. Ed. 401; Hamsher v. Hamsher 132 Ill. 273, 8 L. R. A. 556, 23 N. E. 1123; Hayward v. Davidson, 41 Ind. 212 (*semble*); Farrington v. Putnam, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652; Hanson v. Little Sisters of the Poor of Baltimore, 79 Md. 434, 32 L. R. A. 293, 32 Atl. 1052; *In re Stickney's Will*, 85 Md. 79, 35 L. R. A. 693, 60 Am. St. Rep. 308, 36 Atl. 654; Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490; Chambers v. St. Louis, 29 Mo. 543. The matter is discussed in 9 Harv. Law Rev. at p. 350, 11 Id. at p. 62, 20 Id. at p. 561, 24 Id. 546; 12 Columbia Law Rev. at p. 754.

89. See People v. Stockton Savings & Loan Society, 133 Cal. 611, 85 Am. St. Rep. 225, 65 Pac. 1078; Lancaster v. Amsterdam Improvement Co.,

assert its objection merely by a proceeding in the nature of *quo warranto*, to compel the corporation to relinquish the illegal holding, or perhaps to effect a forfeiture of the corporate franchise by reason of the abuse thereof.

§ 597. **Aliens.** At common law, an alien might take land by purchase, that is, by transfer *inter vivos* or devise, and hold the same until a forfeiture in favor of the state was enforced by a proceeding of "office found,"<sup>90</sup> and a like view, that only the state can object in such a case, has been applied in connection with modern statutes precluding an alien, or a non resident alien, from holding land.<sup>91</sup>

By the rule of the common law, which still exists in so far as it has not been changed by statute, an alien

140 N. Y. 576, 24 L. R. A. 322, 35 N. E. 964; Walsh v. Bouton, 24 Ohio St. 28; Com. v. New York, L. E. & W. R. Co., 132 Pa. St. 591, 596, 605, 7 L. R. A. 634, 19 Atl. 291; Com. v. Wisconsin Chair Co., 119 Ky. 500, 84 S. W. 535; 8 Harv. Law Rev. p. 15 *et seq.*, article by A. M. Alger, Esq.

90. Co. Litt. 2b, 42b; 1 Bl. Comm. 371; 2 Bl. Comm. 249, 274, 293; 3 Bl. Comm. 258; 2 Kent's Comm. 54; Doe d. Governor's Heirs v. Robertson, 11 Wheat. (U. S.) 332, 6 L. Ed. 488; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741; Doe d. Rouche v. Williamson, 25 N. C. 141; Sands v. Lynham, 27 Grat. (Va.) 291, 21 Am. Rep. 348.

The disability, or approximate disability of an alien, as it existed at common law, to hold land, has ordinarily been re-

ferred to as a matter of feudal or national policy, arising from the inability of one who owes allegiance to a foreign sovereign to perform the military services incident to the ownership of land, but in 1 Pollock & Maitland, Hist. Eng. Law 446, it is suggested that "the King's claim to seize the lands of aliens is an exaggerated generalization of his claim to seize the lands of his French enemies."

91. Madden v. State, 68 Kan. 658, 75 Pac. 1023; Pembroke v. Huston, 180 Mo. 627, 79 S. W. 470; Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Wright v. Saddler, 20 N. Y. 320; Smith v. Smith, 70 N. Y. App. Div. 286, 74 N. Y. Supp. 967; Oregon Mortgage Co. v. Carstens, 16 Wash. 165, 35 L. R. A. 841, 47 Pac. 421. Compare Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195.

cannot acquire an estate in land by operation of law, as by descent,<sup>92</sup> or under the law in relation to dower and curtesy,<sup>93</sup> for the reason, as it is stated by the common law writers, that the law will not do a vain thing by giving to a man that which he cannot keep. In case the next of kin or some of them cannot take by descent because they are aliens, the land passes, not to the state, but to others related in the same or in the next degree, to the exclusion of the aliens,<sup>94</sup> in the absence of a statute which declares a different rule.<sup>95</sup>

If an alien who acquires land dies before the state enforces its right of forfeiture, the land *ipso facto* escheats, without any proceeding on the part of the state, as in the case of one who dies without heirs, the theory being that an alien who has no right to hold the land as against the state has no heritable blood for the purpose of determining rights of descent.<sup>96</sup> On the

92. Litt, § 198; Co Litt, 42b; 2 Blackst. Comm. 249, 293, and Chitty's note; Orr v. Hodgson, 4 Wheat (U. S.) 453, 4 L. Ed. 613; Crossgrove v. Crossgrove, 69 Conn. 416, 38 Atl. 219; Utassy v. Giedinghagen, 132 Mo. 53, 33 S. W. 444; Glynn v. Glynn, 62 Neb. 872, 87 N. W. 1052; Montgomery v. Dorion, 7 N. H. 475; Luhrs v. Enner, 80 N. Y. 171; Jackson's Lessee v. Burns, 3 Binn. (Pa.) 75; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188; Barzinzas v. Hopkins, 2 Rand. (Va.) 276.

93. Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546; Buchanan v. Deshon, 1 Har. & G. (Md.) 280; Foss v. Crisp, 20 Pick. (Mass.) 121; Sutliff v. Forgey, 1 Cow. (N. Y.) 89; Priest v. Cummings, 20 Wend. (N. Y.) 338; Quinn v. Ladd, 37 Ore. 261; 59 Pac. 457; Reese v. Waters, 4 Watts & S. (Pa.) 145; Bennett v.

Harms, 51 Wis. 251, 8 N. W. 222. See Cooke v. Doron, 215 Pa. 393, 7 L. R. A. (N. S.) 659, 7 Ann. Cas. 502, 64 Atl. 595.

94. Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195; Jackson v. Jackson, 7 Johns. (N. Y.) 214; Luhrs v. Eimer, 80 N. Y. 171; McKellar v. McKellar, 1 Speer (S. C.) 536; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188; Hardy v. De Leon, 5 Tex. 211.

95. See *In re Pendergast's Estate*, 143 Cal. 135, 76 Pac. 962; State v. Stevenson, 6 Idaho, 367, 55 Pac. 886.

96. Co. Litt. 2b; 2 Kent's Comm. 54; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. Ed. 453; Donaldson v. State, 182 Ind. 615, 101 N. E. 485; Fry v. Smith, 2

same theory, that an alien has no heritable blood, one cannot claim land as by descent from a citizen, if the relationship can be traced only through an alien.<sup>97</sup> And, on a like theory, the native wife or husband of an alien has been regarded as not entitled to claim dower or curtesy.<sup>98</sup>

Dana (Ky.) 38; Slater v. Nason, 15 Pick. (Mass.) 345; Farrar v. Dean, 24 Mo. 16; Montgomery v. Dorion, 7 N. H. 475; Jackson v. Adams, 7 Wend. (N. Y.) 368, McCormack v. Coddington, 184 N. Y. 467, 77 N. E. 979; Rubeck v. Gardner, 7 Watts (Pa.) 455; Barrett v. Kelly, 31 Tex. 476; Sands v. Lynham, 27 Gratt (Va.) 291, 21 Am. Rep. 348. But see Abrams v. State, 45 Wash. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 88 Pac. 327, discussed in 5 Mich. Law Rev. 462. By 11 & 12 Wm. III. c. 6, the disability to inherit by reason of the alienage of one through whom descent is claimed was removed, and a similar statute has been adopted in a number of states. But these statutes do not enable one to claim by descent if the alien through whom he claims is still alive. McCreery v. Somerville, 9 Wheat. (U. S.) 354, 6 L. Ed. 109; McLean v. Swanton, 13 N. Y. 535.

97. Levy v. M'Cartee, 6 Pet. (U. S.) 102, 8 L. Ed. 334; Beavan v. Went, 155 Ill. 592, 31 L. R. A. 85, 41 N. E. 91; Meadowcroft v. Winnebago County, 181 Ill. 504, 54 N. E. 949; Furenes v. Mickelson, 86 Iowa, 508, 53 N. W. 416; Meier v. Lee, 106 Iowa, 303, 76 N. W. 712; Smith v. Lynch, 61 Kan. 609, 60 Pac. 324; Cramer v. McCann, 83 Kan. 719, 112 Pac. 832; Jackson v. Green, 7

Wend. (N. Y.) 333; McLean v. Swanton, 13 N. Y. 535; Stewart v. Russell, 91 N. Y. App. Div. 310, 86 N. Y. Supp. 625, affirmed 184 N. Y. 601, 77 N. E. 983. This doctrine is not recognized in Connecticut. Campbell's Appeal from Probate, 64 Conn. 277, 24 L. R. A. 667, 29 Atl. 494.

It has been decided that a brother traces descent from his brother directly, and not through their father, and that hence the alienage of the father will not affect the right of one brother to inherit from the other if both are citizens. Collingwood v. Pays, Sid. 193, 1 Vent. 413, Bridg. 414; Wilcke v. Wilcke, 102 Iowa, 173, 71 N. W. 201; Luhrs v. Eimer, 80 N. Y. 171. And so grandsons of one grandfather have been held to inherit directly, so that the alienage of the grandfather is immaterial. McGregor v. Comstock, 3 N. Y. 408. On the other hand, it has been held that the alienage of the claimant's father prevents inheritance from a paternal uncle or great uncle. Jackson v. Fitz Simmons, 10 Wend. (N. Y.) 10; Furenes v. Mickelson, 86 Iowa, 508, 53 N. W. 416. See Levy v. M'Cartee, 6 Pet. (U. S.) 102, 8 L. Ed. 334. The distinctions asserted in this respect are, as remarked by Chancellor Kent (2 Comm 55), "very subtle."

98. Congregational Church at Mobile v. Morris, 8 Ala. 182;

In this country the common-law restrictions upon the right of aliens to acquire and hold lands and transfer them have been considerably relaxed; in many states they having the same rights in this regard as native citizens, and in some the prohibition extending only to nonresident aliens.<sup>99</sup> Occasionally they are required to dispose of the property within a certain number of years of its acquisition. In many cases, the right of an alien in a particular case to acquire and retain land has been upheld by force of treaty provisions between the United States government and the country to which the alien owes allegiance.<sup>1</sup>

So far as the statutes of any state may prohibit the acquisition or holding of lands by an alien, they have usually been construed as operating, like the common-law prohibition, differently in respect to rights acquired by descent and those acquired by purchase.<sup>2</sup> In a number of states, moreover, it is provided that no title to real estate shall be invalid on account of the alienage of a former owner, and in many it is declared that, when one claiming by descent is otherwise entitled, the fact that the father, mother, or other ancestor through whom the descent is derived was an alien shall not bar the claim.<sup>3</sup>

**§ 598. Criminals.** At common law, while one attainted of treason and felony could not, by alienation of any estate vested in him, deprive the crown of the right to enforce a forfeiture, he could, it seems, make and receive transfers subject to such right in the crown.<sup>4</sup> That a

Coxe v. Gulick, 10 N. J. L. 328.

99. 1 Stimson's Am. St. Law, §§ 6010-6015.

1. See e. g. Harden v. Fisher, 1 Wheat. (U. S.) 300, 4 L. Ed. 96; Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; Wilcke v. Wilcke, 102 Iowa, 173, 71 N. W. 201. *In re Stixrud's Estate*, 58 Wash. 339, 33 L. R. A. (N. S.)

3 R. P.—6

632, Ann. Cas. 1912A 850, 109 Pac. 343.

2. *Ante*, this section, notes 90-92.

3. 1 Stimson's Am. St. Law, § 6016.

4. Sheppard's Touchstone, 232; Doe d. Griffith v. Pritchard, 5 Barn. & Adol. 765; Avery v. Everett, 110 N. Y. 317, 1 L. R.

conviction of crime does not affect the capacity of a person to take or transfer land seems true *a fortiori* in this country, where forfeiture for crime is not generally recognized.<sup>5</sup> A statutory provision, however, suspending the civil rights of one sentenced to life imprisonment, would seem to destroy his power of making a transfer *inter vivos*.<sup>6</sup>

The question has arisen in a number of cases in this country whether one who intentionally causes the death of another is entitled to take by descent or devise from the latter. The cases have more generally taken the view that, in such case, the devisee or heir is entitled to take as in any other case, and that a contrary view would involve a forfeiture of property for crime, such as is not recognized in this country.<sup>7</sup> These decisions, though no doubt correct in so far as they decide that the legal title to the property of the deceased passes to the murderer, are probably incorrect in that they fail to apply or recognize the principle that a court of equity will intervene to compel one who acquires property by the commission of a wrong to hold it as a trustee *ex maleficio* for the persons rightfully entitled,<sup>8</sup> a view

A. 264, 6 Am. St. Rep. 368, 18 N. E. 148.

5. Avery v. Everett, 110 N. Y. 317, 1 L. R. A. 264, 6 Am. St. Rep. 368, 18 N. E. 148; Rankin's Heirs v. Rankin's Ex'rs, 6 T. B. Mon. (Ky.) 531. See editorial note, 14 Columbia Law Rev. 592.

6. Williams v. Shackelford, 97 Mo. 322, 11 S. W. 222. And see *In re Nerac's Estate*, 35 Conn. 396, 95 Am. Dec. 211. But see to the contrary Byers v. Sun Savings Bank, 41 Okla. 728, 52 L. R. A. (N. S.) 320, Ann. Cas. 1916 D 222, 139 Pac. 948.

7. Wall v. Pfanschmidt, 265 Ill. 180, 106 N. E. 785; McAllister

v. Fair, 72 Kan. 533, 3 L. R. A. (N. S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112; Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487; Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. A. 564, 59 N. W. 935; Owens v. Owens, 100 N. C. 240, 6 S. E. 794; Deem v. Milliken, 53 Ohio St. 668, 44 N. E. 1134, affirming 6 Ohio Cir. Ct. R. 357; Carpenter's Estate, 170 Pa. St. 203, 29 L. R. A. 145, 50 Am. St. Rep. 765, 32 Atl. 637.

8. As first presented by Professor James Barr Ames, in 36 Am. Law Reg. 225, article reprinted, Lectures on Legal History 310. See also, as favoring this view, editorial notes, 11



which has been approved by the highest court of one state.<sup>9</sup> Occasionally one has been held incompetent to take under the will of him whose death he has caused on the broad principle that one shall not be allowed to profit by his own crime.<sup>10</sup> And in one or two decisions the courts have shown a disposition to distinguish between the case when the death was caused for the purpose of acquiring decedent's property, and the case when that was not the purpose of the crime.<sup>11</sup>

Columbia Law Rev. 180, 30 Harv. Law Rev. 622, 16 Mich. Law Rev. 561, 64 Univ. of Penn. Law Rev. 307, 27 Yale Law Journ. 964.

9. Ellerson v. Westcott, 148 N. Y. 149, 42 N. E. 540, commenting on Riggs v. Palmer, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188.

10. In the estate of Hall L. R. (1914) Prob. 1; Lundy v. Lundy, 24 Can. Sup. Ct. 650. See also Box v. Lanier, 112 Tenn. 393, 64 L. R. A. 458, 79 S. W. 1042; Perry v. Strawbridge, 209 Mo. 621, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 510, 14 Ann. Cas. 92, 108 S. W. 641; and ar-

ticle by J. Chadwick, Esq. in 30 Law Quart. Rev. 211.

11. Gollnik v. Mengel, 112 Minn. 349, 128 N. W. 292; *In re* Wolf, 88 N. Y. Misc. 433, 150 N. Y. Supp. 738. These cases are cited in an editorial note in 30 Harv. Law Rev. 622, where all the authorities bearing on the general subject appear to be referred to, accompanied by a discriminating discussion. The English and Canadian courts make no distinction with regard to the purpose of the killing, if it was felonious. Estate of Hall (1914) Prob. 1; Lundy v. Lundy, 24 Can. Sup. Ct. 650.

## PART VI.

### LIENS.

## CHAPTER XXXV.

### MORTGAGES.

#### I. THE NATURE AND ESSENTIALS OF A MORTGAGE.

- § 599. Historical considerations.
- 600. Title and lien theories.
- 601. The right of redemption.
- 602. Interests which may be mortgaged.
- 603. The form and execution of a mortgagee.
- 604. Necessity of acceptance.
- 605. Conveyance absolute in form.
  - (a) Separate written defeasance.
  - (b) Oral evidence that mortgage intended.
  - (c) Considerations determining character of transaction.
  - (d) Conveyance with right of repurchase.
  - (e) Protection of *bona fide* purchaser.
  - (f) Conveyance by third person.
  - (g) Trust deed to secure debt.
- § 606. Necessity of consideration.
- 607. The obligation secured.
  - (a) Character of obligation.
  - (b) Personal liability.
  - (c) Bond or note.
  - (d) Description in mortgage.
- § 608. Legality of purpose of mortgage.

#### II. RIGHTS AND LIABILITIES INCIDENT TO THE MORTGAGE RELATION.

- § 609. Nature of the mortgagor's interest.
- 610. Nature of the mortgagee's interest.
- 611. The relation not fiduciary.
- 612. The right to possession of the land.
- 613. Rents and profits.
  - (a) Mortgagor in possession.
  - (b) Crops.

- (c) Mortgagee in possession.
  - (d) Sequestration by receiver.
- § 614. Effect of a lease of the land.
  - (a) Lease before mortgage.
  - (b) Lease after mortgage.
- § 615. Expenditures by mortgagee.
- 616. Taxes.
- 617. Insurance.
- 618. Injuries to the land.
- 619. Execution sale of mortgagor's interest.

### III. TRANSFER OF MORTGAGED LAND.

- § 620. General considerations.
- 621. Transfer to mortgagee.
- 622. Transfer subject to mortgage.
- 623. Assumption of mortgage debt.
- 624. Transferor becoming surety.
- 625. Transfer of part of land.
- 626. Transferor's conduct as affecting bar of limitations.

### IV. TRANSFER OF MORTGAGEE'S RIGHTS.

- § 627. General considerations.
- 628. Method of transfer.
  - (a) Transfer of the debt.
  - (b) Formal assignment.
  - (c) Assignment omitting reference to debt.
  - (d) Transfer of land or legal title thereto.
  - (e) Delivery and acceptance.
- § 629. Consideration for transfer.
- 630. Transfer as subject to equities.
  - (a) In favor of debtor.
  - (b) In favor of others than debtor.
- § 631. Record and priorities.
- 632. Transfer of part of debt.

### V. PRIORITY OF LIEN.

- § 633. General considerations.
- 634. Contemporaneous mortgages.
- 635. "Waiver" of priority.
- 636. Purchase money mortgage.
- 637. Mortgage for future advances.
- 638. Right to question prior mortgage.
- 639. Tacking and consolidation.

### VI. EXTINCTION OF THE MORTGAGE.

- § 640. Discharge of obligation secured.

- (a) General considerations.
  - (b) Payment.
  - (c) Payment to assignor after assignment.
  - (d) Tender.
  - (e) Merger.
  - (f) Bar of obligation by limitations.
  - (g) Recovery of personal judgment.
  - (h) Change in note or bond.
- § 641. Effect of new mortgage.
642. Express release or certificate of satisfaction.
- (a) General considerations.
  - (b) Conveyance by mortgage creditor as release.
  - (c) Power or authority to execute.
  - (d) Execution by assignor.
  - (e) Conclusiveness of release or satisfaction.
- § 643. Subsequent reissue of mortgage.
644. Release of principal debtor.
645. Right to extinguish by payment (Right to redeem).
- (a) Persons entitled.
  - (b) Amount to be paid.
  - (c) Loss of right.
  - (d) Enforcement of right.
- § 646. Subrogation on payment.
647. Marshalling of securities.

## VII. FORECLOSURE.

- § 648. Accrual of right to foreclose.
649. Bar by lapse of time.
650. Strict foreclosure in equity.
651. Foreclosure by entry.
652. Foreclosure by writ of entry.
653. Foreclosure by scire facias.
654. Equitable proceeding for sale.
655. Parties to proceeding.
656. Power of sale.
657. Enforcement of personal liability.
658. Stipulation for attorney's fee.

## I. THE NATURE AND ESSENTIALS OF A MORTGAGE.

§ 599. **Historical considerations.** Transfers of land as security for a debt assumed, in early times in England, various forms, among which was the *mortuum vadium*, from which has been derived the term "mort-

gage.” The *mortuum radium* was so called, it seems, owing to the fact that, upon its creation, the beneficiary became entitled to the rents and profits of the land, and consequently the land was “dead” to the debtor, while by the form of transaction known as the *vivum radium*, the profits of the land were applied on the debts. Both these forms of security eventually gave place to what is known as the “common law mortgage,” consisting of a feoffment subject to a condition that, on payment by the feoffor (the debtor) of a sum named, at a certain time, he might re-enter, thereby terminating the feoffee’s estate.<sup>1</sup>

A strict compliance with the condition of a common law mortgage was insisted upon by the courts of law, which refused to consider that the conveyance was intended merely as security for a debt, and they treated the estate of the mortgagee as indefeasible if the condition was not promptly performed by the mortgagor. Consequently, land was often forfeited for a debt much less than its value.<sup>2</sup> The court of chancery, however, quite early showed a disposition to relieve against this hardship, and about the middle of the seventeenth century it became the settled doctrine of that court that the debtor, by paying the debt even after it became due, could recover the ownership of the land, that is, could “redeem,” his right so to do being known as his “equity of redemption.”<sup>3</sup>

1. Litt. §§ 332-344. See Digby, Hist. Real Prop. 282; Coote, Mortgages, (8th Ed.) 1-3.

The early “gage” of land had much more the characteristics of the modern mortgage, as developed in equity, than the common-law mortgage of the time of Littleton. See Glanville, bk. 10, c. 6; 2 Pollock & Maitland Hist. Eng. Law, 117-123; The Story of Mortgage

Law, by H. W. Chaplin, Esq., 4 Harv. Law Rev. 1; The Gage of Land in Mediaeval England, by Harold D. Hazeltine, 17 Harv. Law Rev. 549, 18 Id. 36, reprinted 3 Select Essays Anglo-American Legal History, 646.

2. Litt. §§ 332, 337; 4 Kent’s Comm. 140; Williams, Real Prop. (21st Ed.) 546.

3. How v. Vigneres, 1 Rep. Ch.

Since, unless some restriction in respect of time was placed on this right of redemption, the creditor to whom the mortgage was made, known as the "mortgagee," might be forever deprived of the right to recover his money, the court of chancery allowed this right of redemption to be put an end to by a decree of "foreclosure," granted upon the bringing of proceedings for the purpose, the right of redemption being thereby cut off or "foreclosed," unless the debt was paid by a time named in the decree.<sup>4</sup>

Somewhat later, chancery, regarding the real purpose of the transaction, adopted the view that the mortgagor, in spite of his conveyance by way of mortgage, is still the owner of the property, with all the rights of an owner, so far as this may be consistent with the security of the mortgagee, and that the latter has, for most purposes, merely a lien or charge upon the land to secure his debt.<sup>5</sup> After the position of the mortgagor as owner was thus established in equity, the term "equity of redemption," which had previously and most appropriately been applied to his right to redeem, was applied, somewhat inappropriately, to this entirely distinct right of ownership, and at the present day the term, though used in both senses, more frequently describes the interest of the mortgagor in the land than his right to redeem after default.

**§ 600. Title and lien theories.** While, as just stated, the courts of equity have, from a quite early

32; Emanuel College v. Evans, 1 Rep. Ch. 18; Manning v. Burges, 1 Ch. Cas. 291; 1 Spence, Equitable Jurisdiction, 603; 4 Kent's Comm. 158.

4. 2 Cruise, Dig. tit. 15 c. 1, § 13; 4 Kent's Comm. 181; 2 Blackst. Comm. 159.

At the present day, in this country, the decree, instead of

giving the property to the mortgagee, ordinarily provides for its sale, and payment of his debt out of the proceeds, or there is a sale without decree. See *post* §§ 652-654.

5. Casborne v. Scarfe, 1 Atk. 603. See 4 Kent's Comm. 160 and *post* § 607.

period, regarded the mortgagee as having a lien or charge merely, the common law view that, by the making of the mortgage, the legal title to the land is transferred to the mortgagee, as in the case of any other conveyance on condition subsequent, is still retained in courts of law in England and in some of the states. This difference of view on the part of the courts of equity and law does not involve any conflict between the two jurisdictions, since courts of law recognize, though they do not usually enforce, the rights given to the mortgagor by courts of equity, while these latter recognize that the legal title is in the mortgagee, and assent to the enforcement by courts of law, so far as necessary for the protection of the mortgagee, of rights based on his legal title.<sup>6</sup> This view, thus adopted in some states, that the legal title is in the mortgagee for certain purposes, may conveniently be termed the "title theory" of a mortgage.<sup>7</sup> In other states the view that the mortgagee has the legal title is entirely superseded, both at law and in equity, by the view which has always prevailed in equity, that he has merely a lien to secure his debt.<sup>8</sup> In a number of states there is a statutory

6. 4 Kent's Comm. 160; 3 Pomeroy, Eq. Jur. § 1184.

7. This theory is adopted in Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia. 1 Jones, Mortgages (5th Ed.) §§ 17-59; 3 Pomeroy, Eq. Jur. (3d Ed.) §§ 1186-1191. See Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679; Kannady v. McCarron, 18 Ark. 166; Chamberlain v. Thompson, 10 Conn. 243, 26 Am.

Dec. 390; Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; Blaney v. Bearce, 2 Me. 132; Jamieson v. Bruce, 6 Gill & J. (Md.) 72, 26 Am. Dec. 557; Ewer v. Hobbs, 5 Metc. (Mass.) 1; Howard v. Robinson, 5 Cush. (Mass.) 119; Buck v. Payne, 52 Miss. 271; Hobart v. Sanborn, 13 N. H. 226, 38 Am. Dec. 483; Hogan v. Utter, 175 N. C. 332, 35 S. E. 565; Tryon v. Munson, 77 Pa. St. 250; Simmons v. Brown, 7 R. I. 427; Faulkner's Adm'r v. Brockenbrough, 4 Rand. (Va.) 245.

8. This view prevails in Cali-

provision confirmatory of this lien theory of a mortgage, in the shape of a declaration that the mortgage shall constitute a lien merely<sup>9</sup> or that it shall not operate as a conveyance of the legal title.<sup>10</sup> And the not infrequent provisions denying the mortgagee a right of possession until foreclosure<sup>11</sup> have also been referred to as an indication of legislative intention that the mortgagee shall have merely a lien.

The fact that the lien theory of a mortgage had its inception in courts of equity does not indicate that, in states where it is accepted in courts of law as well as in those of equity, the mortgagee has an equitable lien only, in the nature of a right *in personam*.<sup>12</sup> He has it seems clear, a legal lien, a right *in rem*.<sup>13</sup>

Even in those states which have adopted the English or title theory of a mortgage, the courts have not con-

fornia, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Utah. 1 Jones, Mortgages, §§ 17-59; 3 Pomeroy, Eq. Jur. §§ 1186-1191. See *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Drake v. Root*, 2 Colo. 685; *Malsberger v. Parsons*, 24 Del. 254, 100 Atl. 786; *McMahon v. Russell*, 17 Fla. 698; *Burnside v. Terry*, 45 Ga. 621; *Hannah v. Vensel*, 19 Idaho 796, 116 Pac. 105; *Grable v. McCulloh*, 27 Ind. 472; *Chick v. Willetts*, 2 Kan. 384; *Taliaferro v. Gay*, 78 Ky. 496; *Carruthers v. Humphrey*, 12 Mich. 270; *Adams v. Corrison*, 7 Minn. 456 (Gil. 365); *Rogers v. Ben-*

ton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 70 L. R. A. 94, 81 S. W. 193; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Page v. Turk*, 43 Okla. 637, 143 Pac. 1047; *Bredenburg v. Landrum*, 32 S. C. 215, 40 S. E. 956; *Wright v. Henderson*, 12 Tex. 43; *Gerber v. Heath*, 92 Wash. 519, 159 Pac. 691.

9. Florida Comp. Laws 1914, § 2495; Georgia Code 1911, § 3255.

10. Minnesota Gen. St. 1913, § 8077; Nebraska Ann. St. 1911, § 10855; Nevada Rev. Laws 1912, § 5518; Oregon Lord's Laws, § 335; Utah Laws 1907, § 3517.

11. *Post*, § 616.

12. *Post*, chapter 36.

13. See two excellent articles by Professor Edgar N. Durfee, 19 Mich. Law Rev. 587, 11 Id. 495.



sistently followed it out to all its logical consequences; a tendency to regard the mortgage according to its real nature as a mere security being constantly at work, even in courts of law, a tendency which has been increased and strengthened by the various statutes admitting equitable defenses in legal actions, or otherwise obscuring the line between equity and law.<sup>14</sup> The extension of the view that a mortgage is merely a lien marks a distinct advance in legal ideas, and it is to be expected that, with the passage of time, the crude conception of an estate on condition in the mortgagee will entirely disappear.<sup>15</sup>

**§ 601. The right of redemption.** After the court of chancery established the doctrine that the mortgagor might redeem after default, persons lending money on mortgage security naturally attempted to defeat the right of redemption in the mortgagor by obtaining from him a written waiver of the right, or contract not to assert it; but chancery, recognizing that such a contract was extorted from the necessities of the borrower, decided that the right of redemption constituted an integral part of every mortgage, and could not be waived or restricted by a provision in the mortgage or other contemporaneous agreement, and this rule, frequently, though somewhat obscurely, expressed in the phrase, "once a mortgage, always a mortgage," has invariably been strictly enforced.<sup>16</sup> And so a provision in the

14. See 3 Pomeroy, Eq. Jur., § 1186 and *post* § 605(b).

15. Holland, Jurisprudence, (9th Ed.) 218; Digby, Hist. Real Prop. (4th Ed.) 305; 2 Pollock & Maitland, Hist. Eng. Law 124; Pollock, Land Laws (3rd Ed.) 134.

16. Howard v. Harris, 1 Vern. 190; Jason v. Eyres, 2 Ch. Cas. 33; Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Stoutz v. Rouse, 34

Ala. 309, 4 So. 170; Bradbury v. Davenport, 114 Cal. 593, 55 Am. St. Rep. 92, and note, 46 Pac. 1062; Jackson v. Lynch, 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; McGuire v. Halloran (Iowa), 160 N. W. 363; Bayley v. Bailey, 5 Gray (Mass.) 505; Batty v. Snook, 5 Mich. 231; Reilly v. Callen, 159 Mo. 322, 60 S. W. 126;

mortgage instrument that the right of redemption shall be confined to a particular time<sup>17</sup> or shall be exercisable by a particular person only,<sup>18</sup> has been held to be nugatory.

Not only is a contemporaneous agreement excluding the right of redemption void, but even a subsequent agreement which, without affecting the existence of the mortgage, provides that there shall be no right of redemption in case of non payment at maturity, is also void, as seeking to deprive the mortgage of one of its essential features.<sup>19</sup> In this respect the statement, not infrequently found, that the mortgagor may relinquish his right of redemption by a subsequent agreement on a good and sufficient consideration<sup>20</sup> is misleading. It means merely that the mortgagor may convey his interest in the land, the so called "equity of redemption," to the mortgagee. It does not mean that the parties to the mortgage can, by a subsequent agreement, divest the mortgagor of the right of redemption after default. Occasional statements to be found that the right of redemption may be waived refer to a right other than

First Nat. Bank of David City v. Sargeant, 65 Neb. 594, 59 L. R. A. 296, 91 N. W. 595; Henry v. Davis, 7 Johns, Ch. (N. Y.) 40; McCauley v. Smith, 132 N. Y. 524, 30 N. E. 997; Johnston v. Gray, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; Hyndman v. Hyndman, 19 Vt. 9, 46 Am. Dec. 171; Plummer v. Ilse, 41 Wash. 5, 2 L. R. A. (N. S.) 267, 111 Atl. St. Rep. 997, 82 Pac. 1009. It was decided, however, that the right of redemption may be restricted in the case of a mortgage intended as a family settlement or provision. Bonham v. Newcomb, 1 Vern. 231, reversing Newcomb v.

Bonham, 1 Vern. 7. See Coote, Mortgages, 23.

17. Stover v. Bounds, 1 Ohio St. 107; Salt v. Northampton, (1892) App. Cas. 1; Youle v. Richards, 1 N. J. Eq. 534, 23 Am. Dec. 722.

18. Howard v. Harris, 1 Vern 33.

19. Tennery v. Nicholson, 87 Ill. 464; Batty v. Snook, 5 Mich. 231; Holden Land & Live Stock Co. v. Interstate Trading Co. 37 Kan. 221, 123 Pac. 733; See Editorial note, 13 Columbia Law Rev. at p. 170.

20. Post, § 621.

the equitable right, such as the statutory right to redeem,<sup>21</sup> or to a right created by express contract.<sup>22</sup>

— **Clog on right.** Not only have the courts decided that the equitable right of redemption cannot be waived or excluded by agreement, but they have also decided that any contemporaneous,<sup>23</sup> as distinguished from a subsequent<sup>24</sup> agreement, the effect of which may be to prevent the mortgagor, on paying the debt secured, from enjoying the land as freely as before the mortgage was created, is invalid as constituting a "clog" on the right of redemption. It has accordingly been held that a contemporaneous contract by the mortgagor to purchase a particular class of commodity exclusively from the mortgagee,<sup>25</sup> or to employ the mortgagee in a certain way,<sup>26</sup> is not enforceable after payment of the debt secured. And a stipulation giving to the mortgagee an option to purchase the mortgaged property has also been regarded as invalid, as putting it in the power of the mortgagee, by exercising the option, to prevent the mortgagor from recovering the property on paying the amount of the debt secured.<sup>27</sup>

21. See *Commercial Real Estate & B. Ass'n v. Parker*, 84 Ala. 298, 4 So. 268; *Cook v. McFarland*, 78 Iowa, 528, 43 N. W. 519.

In Canada, at one time, it appears, there was no process by which foreclosure could be effected, and the mortgagor might lose his right of redemption by his course of conduct, and laches in asserting his claim. *Smyth v. Simpson*, 7 Moore, P. C. 205; *Clute v. McCaulay*, 4 Grant Ch. 416; *Roach v. Lundy*, 19 Grant Ch. 243.

22. See, *e. g.*, *Herald v. Jardine*, (N. J. Ch.) 21 Atl. 586.

23. *Noakes v. Rice*, (1902) App. Cas. 24; *Bradley v. Carritt*,

(1903) App. Cas. 253.

24. *Reeves v. Lisle*, (1902) App. Cas. 461.

25. *Noakes & Co. Ltd. v. Rice*, (1902) App. Cas. 24.

26. *Bradley v. Carritt*, (1903) App. Cas. 253.

27. *Samuel v. Jarrah Timber Corp.*, (1904) App. Cas. 323; *Re Edwards' Estate*, 11 Ir. Ch. 367; *Wilson v. Fisher*, 148 N. C. 535, 52 S. E. 622; See *Kreglinger v. New Patagonia Meat & Cold Storage Company, Limited*, App. Cas. (1914) 25; *Wynkoop v. Cowing*, 21 Ill. 570; Article by Bruce Wyman, Esq. in 21 Harv. Law Rev. 459; editorial note in 12 Columbia Law Rev. at p. 628.

There are in England recent decisions to the effect that, under particular circumstances, a provision in the mortgage instrument precluding redemption by the mortgagor, that is, extinction of the mortgage by payment of the debt secured, for a considerable period of years, may be invalid.<sup>28</sup> In that country the debt is ordinarily made payable in terms at the end of six months, with a tacit recognition of the fact that it will probably not be paid at that time, but will be allowed to run on until the mortgagor wishes to pay the debt, or the mortgagee wishes it to be paid, and the fact that such is the custom might well influence the attitude of the courts with reference to a provision of the character referred to. In this country the universal practice is to name a date at which the mortgagee expects the debt to be paid, and at which the mortgagor expects, or at least hopes, to pay it, and the fact that the parties name a distant date has never been regarded as involving any interference with the equitable right of redemption. Indeed it is difficult to see how the right to redeem after default can be interfered with by a provision the effect of which is to postpone the possibility of default.<sup>29</sup>

— **Collateral advantage.** There are, in decisions rendered in England and Ireland, *dicta* to the effect that if the making of a mortgage is accompanied by an agreement in reference either to the mortgaged premises or to another subject, by which the mortgagee obtains some "collateral advantage," such agreement is void.<sup>30</sup> This theory has, however, been more or less exploded by more recent decisions, and the rule appears to be established that any agreement between the mortgagor

28. *Morgan v. Jeffreys*, (1910) Law Rev. at p. 471.

1 Ch. 620; *Fairclough v. Swan Brewery Co.*, (1912) A. C. 565.

30. *Jennings v. Ward*, 2 Vern. 520; *In re Edwards' Estate*, 11 Ir. Ch. 367; *Broad v. Selfe*, 11 Wkly.

29. See editorial notes 12 *Columbia Law Rev.* 628; 21 *Harv. Rep.* 1036.

and mortgagee, however advantageous to the latter, if not attended with fraud or oppression, is valid, provided it does not interfere with the right of redeeming from the mortgage.<sup>31</sup> So in this country it has been decided, in at least one case, that any agreement made at the time of executing the mortgage, if not affecting the right of redemption, and not intended for the purpose of evading the usury laws, is valid.<sup>32</sup>

**§ 602. Interests which may be mortgaged.** Any interests in land which may be the subject of sale, grant, or assignment, may be mortgaged.<sup>33</sup> Accordingly there may be a mortgage of a rent,<sup>34</sup> an estate in remainder or reversion,<sup>35</sup> an estate tail,<sup>36</sup> an estate for life,<sup>37</sup> including a widow's dower estate,<sup>38</sup> and an estate for years.<sup>39</sup> An heir or devise may mortgage his in-

31. *Biggs v. Hoddinott* [1898] 2 Ch. 307; *Santley v. Wilde* [1899] 2 Ch. 474; *Kreglinger v. New Patagonia, Meat and Cold Storage Co. Limited*, App. Cas. (1914) 25. See *Noakes v. Rice*, (1902) App. Cas. 24, and 21 Harv. Law Rev. 595, at p. 459, Article by Bruce Wyman Esq.

32. *Gleason's Adm'x v. Burke*, 20 N. J. Eq. 300. See also, *Uhlfeldar v. Carter*, 64 Ala. 527.

33. 2 Story, Equity Jur. § 1021, 4 Kent's Comm. 144; *Wright v. Shumway*, 1 Biss. (U. S.) 23, 20 Fed. Cas. No. 18693; *Curtis v. Root*, 20 Ill. 518; *Miller v. Tipton*, 6 Blackf. (Ind.) 238; *Dorsey v. Hall*, 7 Neb. 460; *Neligh v. Michenor*, 11 N. J. Eq. 539; *Mortenson v. Morse*, 153 Wis. 389, 141 N. W. 273.

34. 4 Kent's Comm. 144; *Van Rensselaer v. Dennison*, 35 N. Y. 393.

35. *In re John & Cherry Streets*, 19 Wend. (N. Y.) 659; *Curtis v. Root*, 20 Ill. 518; *Flanders v. Greely*, 64 N. H. 357, 10 Atl. 686.

36. *Hosmer v. Carter*, 68 Ill. 98.

37. *Penny v. Weems*, 139 Ala. 270, 35 So. 883; *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505; *Lanfair v. Lanfair*, 18 Pick. (Mass.) 304.

38. *Mutual Life Ins. Co. of New York v. Shipman*, 119 N. Y. 324, 24 N. E. 177.

39. 4 Kent's Comm. 144; *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924; *Rogers v. Heron*, 92 Ill. 583; *French v. Prescott*, 61 N. H. 27; *Hagar v. Brainerd*, 44 Vt. 294; 1 Tiffany, *Landlord & Ten.*, pp. 976 977. But in Pennsylvania it has been said that a leasehold estate can be mortgaged only by authority of statute. *Stock v. German Catholic Press Co.*, 230 Pa. 127, 79 Atl. 414.

terest in the estate of the deceased, subject to the payment of the latter's debts.<sup>40</sup>

A mortgage may be made of improvements on land apart from the land itself,<sup>41</sup> and growing crops may be mortgaged by the owner of the land.<sup>42</sup>

Equitable interests, as well as legal, may be mortgaged.<sup>43</sup> A quite usual instance of such a mortgage occurs in the case of a mortgage by a vendee of land of his interest under the contract of sale.<sup>44</sup> In such a case the mortgage covers the equitable right of the vendee to demand a conveyance of the land in accordance with the contract, upon payment of the stipulated consideration.<sup>45</sup>

— **Future acquisitions.** A mere possibility of acquiring property is not the subject of mortgage, as it is not the subject of grant, and consequently one cannot, at law, mortgage interests in land to be acquired by him in the future.<sup>46</sup> In equity, however, a

40. *Flanders v. Greely*, 64 N. H. 357, 10 Atl. 686; *Drake v. Paige*, 127 N. Y. 562, 28 N. E. 407; *Horst v. Dague*, 34 Ohio St. 371.

41. *Mitchell v. Black*, 64 Me. 48; *Manwaring v. Jenison*, 61 Mich. 117, 27 N. W. 899; *Gooding v. Riley*, 50 N. H. 400; *Fletcher v. Kelly*, 88 Iowa, 475, 21 L. R. A. 347, 55 N. W. 474.

42. *Briggs v. United States*, 143 U. S. 346, 36 L. Ed. 10; *Butt v. Ellett*, 19 Wall. (U. S.) 544, 22 L. Ed. 183; *Luce v. Moorehead*, 73 Iowa, 498, 5 Am. St. Rep. 695, 35 N. W. 598; *Cotten v. Willoughby*, 83 N. C. 75 35 Am. Rep. 564; *Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614.

43. *Christian v. American Freehold Land Mortgage Co.*, 92 Ala. 136, 9 So. 219; *Morgan v. Field*, 35 Kan. 162, 10 Pac. 448; *Toledo*,

*D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 33 L. Ed. 905.

44. *Davis v. Milligan*, 88 Ala. 523, 6 So. 908; *Holbrook v. Betton*, 5 Fla. 99; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Laughlin v. Braley*, 25 Kan. 147; *Bank of Louisville v. Garner*, 87 Ky. 6, 7 S. W. 170; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164; *Balen v. Mercier*, 75 Mich. 42, 42 N. W. 666; *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Attorney General v. Purmort*, 5 Paige (N. Y.) 620; *Simonson v. Wenzel*, 27 N. D. 283, 147 N. W. 804; *Scott v. Farnam*, 55 Wash. 336, 104 Pac. 639; *Bull v. Shepard*, 7 Wis. 449.

45. See editorial note, 17 Columbia Law Rev. 323.

46. 4 Kent Comm. 144; 2 Story, Eq. Jur. § 121; *Purcell's Adm'r*

mortgage which in terms covers things thereafter to be acquired creates a lien or charge on such things, upon their acquisition by the mortgagor, this being an application of a general equitable principle that if one, by contract, undertakes to create a lien or charge, the lien or charge will be regarded as actually existing, upon the acquisition by such person of the thing sought to be charged.<sup>47</sup> This principle has been frequently applied in the case of railroad mortgages in terms including property thereafter to be acquired by the railroad company.<sup>48</sup>

To the rule prohibiting such mortgages at law there are a few apparent exceptions, which are, however, explained by the application of other principles not inconsistent therewith. A thing which is added to another thing by way of accession, natural or artificial, so as to become a part thereof in view of the law, is subject to a previous mortgage upon the thing to which it is added. This occurs when a house is built upon

v. Mather, 35 Ala. 570, 76 Am. Dec. 307; Emerson v. European, & N. A. Ry. Co., 67 Me. 387, 24 Am. Rep. 39; Jones v. Richardson, 10 Mete. (Mass.) 481; Looker v. Peckwell, 38 N. J. L. 253; Knickerbocker Trust Co. v. Carteret Steel Co., 79 N. J. Eq. 501, 82 Atl. 146; Bayler v. Com., 40 Pa. St. 37; Minnesota Loan & Trust Co., v. Peteler Car Co., 132 Minn. 277, 156 N. W. 255; Sillers v. Lester, 48 Miss. 513; Daly v. New York & G. L. R. Co., 55 N. J. Eq. 595, 38 At. 202; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811; Hickson Lumber Co. v. Gay Lumber Co., 150 N. C. 282, 21 L. R. A. (N. S.) 843, 63 S. E. 1045.

47. Holroyd v. Marshall, 16 H. L. Cas. 191; Pennock v. Coe, 23 How. (U. S.) 117, 16 L. Ed. 426; Mitchell v. Winslow, 2 Story, 630,

3 R. P.—7

Fed. Cas. No. 9,673; Brett v. Carter, 2 Lowell, 458, Fed. Cas. No. 1844; Apperson v. Moore, 30 Ark. 56; Borden v. Croak, 131 Ill. 68, 19 Am. St. Rep. 23, 22 N. E. 793; Brady v. Johnson, 75 Md. 445, 20 R. A. 737, 26 Atl. 49. This is an example of an equitable lien. See *post* § 659 *et seq.* and article by Professor Samuel Williston in 19 Harv. Law Rev. 557.

48. Central Trust Co. v. Kneeland, 138 U. S. 414, 34 L. Ed. 1614; Phillips v. Winslow, 18 B. Mon. (Ky.) 484; Pierce v. Emery, 32 N. H. 484; Platt v. New York & S. B. Ry. Co., 9 N. Y. App. Div. 87, 41 N. Y. Supp. 42, 13 N. Y. 670, 48 N. E. 1106; Philadelphia, W. & B. R. Co., v. Woelpper, 64 Pa. St. 366; Pierce v. Milwaukee & St. P. R. Co., 24 Wis. 551.

mortgaged land, or articles or machinery are attached to a mortgaged building, so as to become part thereof, these being applications of the principle of fixtures, previously treated.<sup>49</sup> So, one may mortgage things which are the natural increase of any things which he owns at the date of the mortgage, he being said to have such increase "potentially."<sup>50</sup> Accordingly, it is held that the owner of land may mortgage crops to be grown thereon, "for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant."<sup>51</sup> In some states, however, it is held that a mortgage of annual crops (*fructus industriales*), which have not yet been planted, is invalid, especially as against attaching creditors, since such crops cannot be regarded as having even a potential existence, they being distinguished in this respect from the spontaneous product of the earth, or the increase of that which is already in existence.<sup>52</sup>

49. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627; *Winslow v. Merchants Ins. Co.*, 4 Metc. (Mass.) 314, 38 Am. Dec. 368; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 6 L. R. A. 249, 15 Am. St. Rep. 235, 23 N. E. 327. See *ante*, § 270.

50. *Philadelphia, W. & P. R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596; *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39.

51. *Hobart, C. J.*, in *Grantham v. Hawley*, Hob. 132, To the same effect, see *Jones v. Webster*, 48 Ala. 109; *Arques v. Wasson* 51 Cal. 620, 21 Am. Rep. 718; *Ever-*

*man v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Cotten v. Willoughby*, 33 N. C. 75; *Cudworth v. Scott*, 41 N. H. 456; *Moore v. Byrum* 10 Rich. (S. C.) 452, 30 Am. Rep. 58. But the crops must be clearly identified in the mortgage by reference to the land on which, and the year or years within which, they are to be grown, *Emerson v. European & N. A. Ry. Co.*, 67 Me. 387, 24 Am. Rep. 39; *Shaw v. Gilmore*, 81 Me. 396, 17 Atl. 314; *Stephens v. Tucker*, 55 Ga. 543.

52. *Hutchinson v. Ford*, 9 Bush (Ky.) 318, 15 Am. Rep. 711; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, 37 N. E. 632; *Gittings v. Neison*, 86 Ill. 591; *Long v. Hines*, 40 Kan.



— **Mortgage of equity.** Even in jurisdictions in which a mortgage ordinarily involves a transfer of the legal title, it cannot have that effect if the mortgagor has not the legal title as, for instance, when a *cestui que trust* mortgages his interest under the trust, and so it is recognized in England that a junior mortgage, that is, a mortgage of land already subject to a mortgage, vests no legal title in the junior mortgagee, such title being already vested in the prior mortgagee.<sup>53</sup> It does not appear, however, that even in that jurisdiction the lack of legal title in the mortgagor at the time of making the mortgage substantially affects the rights of the mortgagee as against the mortgagor. There a second mortgagee,<sup>54</sup> as well as the mortgagee of a beneficial estate under a trust,<sup>55</sup> has been regarded as entitled to possession as against the mortgagor. And a second mortgagee is entitled to strict foreclosure, as is an ordinary legal mortgagee.<sup>56</sup> There is in one state a decision that, though a first mortgagee has the legal title for the purpose of enforcing his security, a third person cannot assert this as an outstanding title as against the second mortgagee.<sup>57</sup>

**§ 603. The form and execution of a mortgage.** In the states which have adhered to the title theory of a mortgage, a mortgage instrument still takes the form

226, 10 Am. St. Rep. 192, 19 Pac. 796. That such a mortgage is good even against creditors, see *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Butt v. Elett*, 19 Wall. (U. S.) 544, 22 L. Ed. 183; *Wheeler v. Becker*, 68 Iowa, 723, 28 N. W. 40. The decisions in the different states are collected in 11 *Corpus Juris*. 443.

53. This is the basis of the English doctrine of "tacking" See *post* § 639.

54. *Re Gordon* 61 Law Times 299. See *Ocean Accident & Guarantee Corp v. Ilford Gas Co.* (1905) 2 K. B. 493.

55. *Langton v. Langton*, 7 DeG. M. & G. 30; *Antrim County Land Building and Investment Co. v. Stewart* (1904) 2 Ir. Rep. 445.

56. *Fisher, Mortgages* (6th Ed.) 1002; *Halsbury, Laws of England* vol. 21, p. 272.

57. *Savage v. Dooley*, 28 Conn, 411, 73 Am. Dec. 680.

of a conveyance on condition subsequent, and, singularly enough, the same form is utilized in many of the states which have adopted the lien theory. In some of the latter states the statute provides a concise and simple form, omitting any words of conveyance.

It has occasionally been said in effect that if the purpose of the transaction is to secure the payment of a debt or the performance of some other obligation, the instrument in which the terms of the transaction are incorporated will constitute a mortgage,<sup>58</sup> and that this is so, to some extent at least, appears from the numerous cases in which a conveyance absolute in form has been regarded as a mortgage.<sup>59</sup> In states, however, which have retained the title theory of a mortgage, an instrument which, while showing an intention to secure the payment of a debt, omits all words of conveyance, since it would appear to be ineffective to vest the legal title in the mortgagee, may properly be distinguished from a mortgage instrument in the ordinary form, which transfers the legal title, by the designation of "equitable mortgage"<sup>60</sup> or "equitable lien."<sup>61</sup> It creates a mortgage or lien, but not a mortgage of the ordinary character.

In jurisdictions in which the common law conception of a mortgage as involving a transfer of the legal title is still retained, the mortgage is evidently within the requirement of the English Statute of Frauds, or its equivalents in the various states, requiring an estate or interest in land to be created by writing. And even in jurisdictions where the mortgage is regarded as

58. *Stryker v. Hershey*, 33 Ark. 264; *De Leon v. Higuera*, 15 Cal. 483; *Jackson v. Carswell*, 34 Ga. 279; *Howe v. Austin*, 40 La. Ann. 323; *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375; *National Bank of Columbus v. Tennessee Coal, Iron, & Railroad Co.*, 62 Ohio St. 564, 57 N. E. 450; *Thacker v.*

*Morris*, 52 W. Va. 220, 94 Am. St. Rep. 928, 43 S. E. 141.

59. *Post*, § 605.

60. See *Newlin, Finley & Co. v. McAfee*, 64 Ala. 357; *Ward v. Stark Bros.*, 91 Feb. 268, 121 S. W. 382.

61. *Post*, § 661.

creating merely a lien on the mortgagor's interest in the land, the mortgage would presumably be regarded as involving the creation or transfer of an interest in land within the meaning of such statutory requirements.<sup>62</sup> In other words, it does not seem that in any state an oral mortgage of an interest in land would be upheld except in so far as an absolute conveyance of the same interest would be upheld.

In states where the title theory of a mortgage still obtains, the instrument must comply with the requirements existing as to the execution of an absolute conveyance, in order that it may be sufficient to vest the legal title in the mortgagee,<sup>63</sup> unless, the statute provides some other mode of execution. In most, if not all the states, there is at the present day an express statutory provision as to the mode of executing a mortgage of land. But even in those states, as in others, an instrument which is not so executed as to receive recognition as a mortgage in a court of law may occasionally be upheld in equity as an equitable lien or charge. Such is the case of a mortgage which is defective for lack of a seal,<sup>64</sup> or a witness.<sup>65</sup> In one state it has even been held that an unsigned mortgage, if acknowledged, was valid in equity,<sup>66</sup> a view which appears to be open to serious question.<sup>67</sup>

62. See *Bogert v. Bliss*, 148 N. Y. 194, 51 Am. St. Rep. 684, 42 N. E. 582; *Roberts Trustee v. Terry*, 161 Ky. 397, 170 S. W. 965; *Thomas Appeal*, 30 Pa. 378.

63. See *Dunn v. Raley*, 58 Mo. 134; *Peckham v. Haddock*, 36 Ill. 38; *Goodman v. Randall*, 44 Conn. 321; Article by H. W. Chaplin, Esq. in 4 Harv. Law Rev. 1.

64. *Racouillat v. Sansevain*, 32 Cal. 376.

65. *Longdon v. Wakeley*, 62 Fla. 530, 56 So. 408; *Stelts v. Mar-*

*tin*, 90 So. Car. 14, 72 S. E. 559; *Courtner v. Etheredge*, 149 Ala. 78, 43 So. 368; *Atkinson v. Miller*, 34 W. Va. 115, 11 S. E. 1607, 9 L. R. A. 544.

66. *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503.

67. See *Goodman v. Randall*, 44 Conn. 321; *Shepherd v. Burkhalter*, 13 Ga. 443; *Gabel Lumber Co. v. West*, 95 Neb. 394, 145 N. W. 849; *American Savings Bank & Trust Co. v. Helgesen*, 67 Wash. 572, 122 Pac. 26.

Applying the common law view that a mortgage involves a conveyance of the legal title, it has occasionally been decided that, if the law requires the presence of words of inheritance for the transfer of an estate in fee simple,<sup>68</sup> a mortgage by one having an estate in fee simple, if it omits such words, is effective to give the mortgagee a right of recourse against the mortgaged property to the extent of a life estate only.<sup>69</sup> While the propriety of this requirement for the purpose of transferring a legal estate in fee simple to the mortgagee appears sufficiently clear, it is difficult to see why a court of equity, regarding the instrument as creating a lien merely, should insist upon the presence of the word "heirs" in order that the lien may cover the whole interest of the mortgagor. And there is a decision to this effect, that if an intention to subject the whole fee simple interest of the mortgagor can be gathered from the language of the instrument, the omission of words of inheritance is immaterial.<sup>70</sup> And it has been decided, in a jurisdiction where the lien theory of a mortgage is adopted, that no words of inheritance are necessary.<sup>71</sup>

The mortgaged land must always be described in the mortgage with sufficient particularity to enable it to be identified, as in the case of any conveyance, but a reference to another instrument, in which the property is described, is sufficient for this purpose.<sup>72</sup> An acknowledgment is usually requisite, as in the case of absolute transfers of land, as a preliminary to the

68. *Ante*, § 21 (a).

69. *Wilson v. King*, 27 N. J. Eq. 374; *Allendorff v. Gaugengigl*, 146 Mass. 542, 16 N. E. 283; *Smith v. Haskins*, 22 R. I. 6, 45 Atl. 741; *Clearwater v. Rose*, 1 Blackf. (Ind.) 137.

70. *Brown v. National Bank*, 44 Ohio St. 269, 6 N. E. 648.

71. *Bredenberg v. Landrum*, 32

S. C. 915, 10 S. E. 956.

72. *Wilson v. Boyce*, 92 U. S. 320, 23 L. Ed. 608; *Freed v. Brown*, 41 Ark. 495; *De Leon v. Higueras*, 15 Cal. 483; *Atkins v. Paul*, 67 Ga. 97; *Cochran v. Utt*, 42 Ind. 267; *Stead v. Grosfield*, 67 Mich. 289, 34 N. W. 871; *Tucker v. Field*, 51 Miss. 191; *Boon v. Pierpont*, 28 N.

record of the conveyance.<sup>73</sup> But a mortgage, like an absolute conveyance, though not acknowledged, is ordinarily effective as between the parties, and as against subsequent purchasers with notice thereof.<sup>74</sup>

There are in all the states provisions requiring the recording of mortgages, but these have been regarded, almost invariably, as not rendering the record of a mortgage instrument necessary to its validity.<sup>75</sup> The effect of a failure to record the instrument as against third persons is elsewhere considered.<sup>76</sup>

The mortgage instrument must be delivered,<sup>77</sup> as must an absolute conveyance,<sup>78</sup> that is, the mortgagor must show, by act or word, his intention that the instrument shall take effect.<sup>79</sup> The requisites of a valid and effective delivery are no doubt the same in the case of a mortgage as in the case of an absolute conveyance, a matter which has previously been discussed.

J. Eq. 7; 1 Jones, Mortgages, §§ 66, 67.

73. *Ante*, § 460.

74. Johnson v. Graham Bros. Co., 98 Ark. 274, 135 S. W. 853; Roane v. Baker, 120 Ill. 368, 11 N. E. 246; Perdue v. Aldridge, 19 Ind. 290; Carleton v. Byington, 18 Iowa 482; Straeffer v. Rodman, 146 Ky. 1, 141 S. W. 742; Hannah v. Davis, 112 Mo. 593, 20 S. W. 686; Prout v. Burke, 51 Neb. 24, 70 N. W. 512; Lynch v. Cade, 41 Wash. 216, 83 Pac. 118.

75. See, *e. g.*, Khea v. Planters' Mut. Ins. Ass'n, 77 Ark. 57, 90 S. W. 850; Downing v. Le Du, 82 Cal. 471, 23 Pac. 202; Howard Mut. Loan & Fund Ass'n v. McIntyre, 3 Allen (Mass.) 571; Eley v. Norman, 175 N. C. 294, 95 S. E. 543; Gill v. Pinney's Adm'r, 12 Ohio St. 38; Moore v. Thomas, 1 Ore. 201;

Cavanaugh v. Peterson, 47 Tex. 197; Wilder's Ex'r. v. Wilder, 82 Vt. 123, 72 Atl. 203; Claridge v. Evans, 137 Wis. 218, 25 L. R. A. (N. S.) 144, 118 N. W. 198.

76. *Ante*, §§ 567, 563.

77. Freeman v. Peay, 23 Ark. 439; Knapstien v. Tinnette, 156 Ill. 322, 40 N. E. 947; Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325; Bell v. Farmers' Bank of Kentucky, 11 Bush (Ky.) 84, 21 Am. Rep. 205; Gabel Lumber Co. v. West, 95 Neb. 394, 145 N. W. 849; Shirley v. Burch, 16 Ore. 83, 8 Am. St. Rep. 273, 8 Pac. 351; Farmers' & Mechanics' Bank v. Drury, 38 Vt. 426; Garner v. Martin, 73 W. Va. 407 80 S. E. 495 (deed of trust).

78. *Ante*, § 461.

79. Hawes v. Hawes, 177 Ill. 409, 53 N. E. 78; Nazro v. Ware,

§ 604. **Necessity of acceptance.** We have before considered the question whether an absolute conveyance of land must be accepted by the grantee, and a like question arises as to a mortgage. By the decided weight of authority in this country, an acceptance of the mortgage is necessary, and until such acceptance other persons may acquire rights in the premises, as by judgment or attachment liens, or conveyances, which will take precedence of the mortgage.<sup>80</sup> In other jurisdictions a different view is adopted, to the effect that no acceptance is necessary,<sup>81</sup> it being sometimes said that the mortgagee's consent to the mortgage, as being for his benefit, will be presumed until he indicates his non-consent.<sup>82</sup> As remarked in connection with the question of the acceptance of an absolute conveyance,<sup>83</sup> the recognition of such a presumption appears to be equivalent to the adoption of the view that no acceptance is necessary. It has been said, however, that there is no presumption of acceptance, if the mortgage is in any way prejudicial to the mortgagee.<sup>84</sup> The

38 Minn. 443, 38 N. W. 359; Terhune v. Oldis, 44 N. J. Eq. 146, 14 Atl. 638; Flint v. Phipps, 16 Ore. 437, 19 Pac. 543; Gorham's Adm'r v. Meacham's Adm'r, 63 Vt. 231, 13 L. R. A. 676, 22 Atl. 572; *In re* Goldville Mfg. Co., 118 Fed. 892.

80. Woodbury v. Fisher, 20 Ind. 387, 83 Am. Dec. 325; Wadsworth v. Barlow, 68 Iowa, 599; Bell v. Farmers' Bank of Kentucky, 11 Bush (Ky.) 34, 21 Am. Rep. 205; Dole v. Bodman, 3 Metc. (Mass.) 139; Oxnard v. Blake, 45 Me. 602; Field v. Fisher, 65 Mich. 606; Adams v. Johnson, 41 Miss. 258; Kuh v. Garvin, 125 Mo. 547, 28 S. W. 847; Munoz v. Wilson, 111 N. Y. 295, 18 N. E. 855; Alliance Milling Co. v.

Eaton, 86 Tex. 401, 24 L. R. A. 369, 25 S. W. 614; Griswold v. Case, 13 Wash. 623, 43 Pac. 876; Welsh v. Sackett, 12 Wis. 243.

81. Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315; Elsberry v. Boykin, 65 Ala. 336; Whitney v. Hale, 67 N. H. 385, 30 Atl. 417; Bundy v. Ophir Iron Co., 38 Ohio St. 300. Compare Lewis v. Farrell, 51 Conn. 216.

82. Breathwit v. Bank of Fordyce, 60 Ark. 26, 28 S. W. 511; Rhea v. Planter's Mut. Ins. Co., 77 Ark. 57, 90 S. W. 850; Washington v. Ryan, 5 Baxt. (Tenn.) 622; Atwood v. Marshall, 52 Neb. 173, 71 N. W. 1064.

83. *Ante*, § 463.

84. Reagan v. First Nat. Bank, 157 Ind. 623, 61 N. E. 575, 62 N. E.

courts of the various states would usually, it may be assumed, adopt the same rule as regards the necessity of acceptance in the case of a mortgage as in the case of an absolute conveyance, and the considerations bearing upon the matter have been referred to in the latter connection.

In one state in which acceptance by the mortgagee is ordinarily regarded as necessary as against attaching creditors and other incumbrancers, it has been decided that if at the time of making a loan the lender asks that security be given, a mortgage subsequently made to secure the loan will be presumed to be accepted by the creditor when informed of it.<sup>85</sup> And in the same state a mortgage has been regarded as sufficiently accepted when the instrument was handed to an attorney as representative of the mortgagee, in pursuance of a prior arrangement with the latter, though the particular attorney was not designated by the mortgagee.<sup>86</sup> In another state acceptance, by one of several mortgagees, of a mortgage securing a separate claim in favor of each, has been regarded as sufficient in behalf of all.<sup>87</sup>

**§ 605. Conveyance absolute in form.— (a) Separate written defeasance.** As before stated, in many jurisdictions, some even in which the lien theory of a mortgage is accepted, the language of the common law conveyance upon condition subsequent is still utilized for the purpose of creating the mortgage relation. The condition or proviso, by which, in such case, it is provided that the mortgagee's estate shall come to an end, or that the conveyance shall be void, is ordinarily

701; *Whitney v. Hale*, 67 N. H. 385.

85. *Mills v. Miller*, 109 Iowa, 688, 81 N. W. 169.

86. *In re Guyer* 69 Iowa, 585, 29 N. W. 826; *Reynolds v. Black*, 91 Iowa, 1, 58 N. W. 922.

87. *Shelden v. Erskine*, 78 Mich. 627, 44 N. W. 146. *Contra*, when the interests of the various mortgagees were antagonistic. *Bell v. Farmers Bank*, 11 Bush (Ky.) 34, 21 Am. Rep. 205.

contained in the instrument by which the conveyance is made to the mortgagee, but occasionally it is in a separate instrument, and the validity of such a separate instrument of "defeasance," is well recognized.<sup>88</sup>

In order that two instruments together constitute a mortgage with a separate defeasance, it is necessary that they be delivered at approximately the same time, or at least that they be parts of the same transaction.<sup>89</sup> And oral evidence is admissible to show that such is the case.<sup>90</sup> Moreover, in order to create a mortgage valid at law as well as in equity, the defeasance must, it has been decided, be of as high a nature as the conveyance itself, that is, if the latter is under seal, the defeasance must be under the seal of the grantee, so that it may be regarded as part of the same instrument, and it must be executed with the other formalities required in the case of a conveyance of land.<sup>91</sup>

88. 4 Kent Comm. 141; *Teal v Walker*, 111 U. S. 242, 28 L. Ed. 415; *Kelley v. Leachman*, 2 Idaho, 1112; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; *Edrington v. Harper*, 3 J. J. Marsh (Ky.) 353, 20 Am. Dec. 145; *Bunker v. Barron*, 79 Me. 62, 1 Am. St. Rep. 282; *Chase's Case*, 1 Bland's Ch. (Md.) 206, 17 Am. Dec. 277; *Ferris v. Wilcox*, 51 Mich. 105, 47 Am. Rep. 551, 16 N. W. 252; *Shepherd v. Wagner*, 240 Mo. 409, 144 S. W. 394, 145 S. W. 426; *Smith v. Hoff*, 23 N. D. 37, Ann. Cas., 1914 C 1072, 135 N. W. 722; *Worley v. Carter*, 30 Okla. 642, 121 Pac. 669; *Colwell v. Woods*, 3 Watts (Pa.) 188, 27 Am. Dec. 345; *Van Oelhsen v. Brown*, 148 Wis. 236, 134 N. W. 377.

89. *Cosby v. Buchanan*, 81 Ala. 574, 1 So. 898; *Sears v. Dixon*, 33 Cal. 326; *Gunn's Appeal from Commissioners*, 55 Conn. 149, 10

Atl. 498; *Bearss v. Ford*, 108 Ill. 16; *Radford v. Folsom*, 58 Iowa, 473, 12 N. W. 536; *Bennoch v. Whipple*, 12 Me. 346, 28 Am. Dec. 186; *Nugent v. Riley*, 1 Mete. (Mass.) 117, 35 Am. Dec. 355; *Lund v. Lund*, 1 N. H. 39, 8 Am. Dec. 29; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Waters v. Crabtree*, 165 N. C. 394, 11 S. E. 240. See *Wilson v. Shoenberger's Ex'rs*, 31 Pa. St. 295.

90. *First Nat. Bank of Florida v. Ashmead*, 23 Fla. 379, 2 So. 657, 665; *Cotten v. McKee*, 68 Me. 486; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; and see cases cited in preceding note.

91. *Baker v. Wind*, 1 Ves. Sr. 160; *Lund v. Lund*, 1 N. H. 39, 8 Am. Dec. 29; *Kelleran v. Brown*, 4 Mass. 443; *Flag v. Mann*, 14 Pick. (Mass.) 467; *Warren v. Lovis*, 53 Me. 463.



In equity, however, no such strictness as to the execution of the instrument of defeasance exists, and any agreement, however informally expressed or executed, showing an intention that a conveyance absolute in form shall operate merely as a security for the repayment of money, is sufficient to make the transaction a mortgage.<sup>92</sup>

The defeasance should be recorded with the absolute conveyance. In some states it is provided by statute that, if the defeasance is not recorded, the grantee shall take nothing under the conveyance, or shall derive no benefit from the record of the conveyance,<sup>93</sup> while in others it is provided that, in such case, the conveyance shall pass an absolute title, except as against the maker of the instrument, his heirs and devisees, and, usually, persons having actual notice of the instrument of defeasance.<sup>94</sup> In the first class of states, therefore, it is to the advantage of the mortgagee to see that the defeasance is recorded, while in the latter class, the mortgagor or those claiming under him can alone suffer from the absence of the defeasance from the record. In the absence of a statute on the subject, the failure to record the defeasance will not ordinarily prejudice the mortgagee, since the record of the conveyance to him is sufficient to charge third persons with notice that he has rights in the

92. 4 Kent's Comm. 142; Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; Eaton v. Green, 22 Pick. (Mass.) 526; James v. Carey, 2 Cow. (N. Y.) 246; Brinkman v. Jones, 44 Wis. 498; Den d. Skinner v. Cox, 15 N. C. 59; Lewis Small, 71 Me. 552. See Kyle v. Hamilton, 136 Cal. XIX, 68 Pac. 484.

93. Stimson's Am. Stat. Law § 1860. See Harrison v. Morton,

87 Md. 671, 40 Atl. 879; Clark v. Condit, 18 N. J. Eq. 358; Brown v. Dean, 3 Wend. (N. Y.) 208.

94. 1 Stimson's Am. Stat. Law. § 1860. See Carpenter v. Lewis, 119 Cal. 18, 50 Pac. 925; Smith v. Monmouth Fire Co., 50 Me. 96; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792. In Pennsylvania, under the statute, an unrecorded defeasance cannot be con-

land, and they cannot complain that his actual interest in the land is less than that which he appears from the record to have.<sup>95</sup>

— (b) **Oral evidence that mortgage intended.** It has been decided, in most jurisdictions, that oral evidence is admissible in a court of equity to show that a conveyance absolute in form, unaccompanied by a written defeasance, was intended as security merely, and the conveyance, if shown to be so intended, will be regarded as a mortgage with a right of redemption in the grantor.<sup>96</sup>

sidered for any purpose, *Lohrer v. Russell*, 207 Pa. 105, 56 Atl. 333.

95. *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; *Equitable Building & Loan Ass'n v. King*, 48 Fla. 252, 37 So. 181; *Christie v. Hale*, 46 Ill. 117; *Koons v. Grooves*, 20 Iowa, 373; *Knight v. Dyer*, 57 Me. 174, 99 Am. Dec. 765; *Marston v. Williams*, 45 Minn. 116, 22 Am. St. Rep. 719, 47 N. W. 644; *Bank of Mobile v. Tishomingo Sav. Inst.*, 62 Miss. 256; *Frink v. Adams*, 36 N. J. Eq. 485; *Security Savings & Trust Co. v. Loewenberg*, 38 Ore. 159, 62 Pac. 647. But in *Ives v. Stone*, 51 Conn. 446; *Freedman v. Avery*, 89 Conn. 439, 94 Atl. 969, the record of the conveyance alone was regarded as insufficient to protect the grantee as against attaching creditors, on the ground that the real nature of the transaction should appear of record. And see *Gulley v. Macy*, 84 N. C. 434; *Friedley v. Hamilton*, 17 Serg. & R. (Pa.) 70, 17 Am.

Dec. 638, to the effect that the record of an absolute conveyance intended as security is nugatory as against creditors.

96. *Morton v. Allen*, 180 Ala. 279, L. R. A. 1916B, 11, 60 So. 866; *Scott v. Henry*, 13 Ark. 112; *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482; *Brown v. Follette*, 155 Ind. 316, 58 N. E. 197; *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289, 24 Pac. 477; *Leibel v. Tandy*, 146 Ky. 101, 141 S. W. 183; *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295, 9 Atl. 122; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *Cobb v. Day*, 106 Mo. 278, 17 S. W. 323; *Horn v. Keteltas*, 36 N. Y. 605; *Plumer v. Guthrie*, 76 Pa. St. 441; *Hannay v. Thompson*, 14 Tex. 142; *Hills v. Loomis*, 42 Vt. 562; *McNeel's Ex'rs v. Auldridge*, 34 W. Va. 748, 12 S. E. 851; *Ross v. Howard*, 31 Wash. 393, 72 Pac. 74.

In a number of jurisdictions it has been decided that oral evidence to show that a conveyance was intended as security is admissible in equity only,<sup>97</sup> while in others such evidence has been decided to be admissible at law as well as in equity.<sup>98</sup> This difference of view is to a great extent the result of the different views adopted in reference to a mortgage in ordinary form. In those states in which a conveyance with a clause of defeasance is, though intended for purposes of security only, regarded as vesting the legal title in the grantee, that is, the mortgagee, a conveyance omitting the clause of defeasance must necessarily have the same effect, and a court of law being concerned only with the legal title, and having usually no occasion to consider whether one to whom the legal title has been transferred holds it as mortgagee or otherwise, evidence that he so holds it is irrelevant to any issue before such court.

Whether, in a jurisdiction in which the lien theory of a mortgage is adopted, an absolute conveyance can, in a court of law as well as of equity, be shown to have been intended as a mortgage, has been the subject of lengthy discussion in several cases, the opinions usually favoring the admissibility of evidence for this purpose. So far as equitable defenses are made admissible at law in the particular jurisdiction, evidence to

97. *Cotterell v. Purchase*, Cas. temp. Talb. 61; *Jones v. Trawick*, 31 Ala. 253; *Inhabitants of Reading v. Weston*, 8 Conn. 117, 20 Am. Dec. 97; *Finlon v. Clark*, 118 Ill. 32, 7 N. E. 475; *Stinchfield v. Milliken*, 71 Me. 567; *Flint v. Sheldon*, 13 Mass. 443; *McClane v. White*, 5 Minn. 178; *Reilly v. Cullen*, 159 Mo. 322, 60 S. W. 126; *Abbott v. Hanson*, 24 N. J. L. 493; *Webb v. Rice*, 6 Hill (N. Y.) 219; *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96.

98. *Jackson v. Lodge*, 36 Cal. 28; *Walls v. Endel*, 20 Fla. 86; *McAnnulty v. Seick*, 59 Iowa, 586, 13 N. W. 743; *Flynn v. Holmes*, 145 Mich. 606, 11 L. R. A. (N. S.) 209, 108 N. W. 685; *Swart v. Service*, 15 N. Y. 374; *Murray v. Walker*, 31 N. Y. 399; *Kent v. Agard*, 24 Wis. 378. That such evidence is admissible at law when the title is not directly in issue, see *German Ins. Co. of Freeport v. Gibe*, 162 Ill. 251, 44 N. E. 490.

show the purpose of the conveyance might be admissible as constituting such a defense.<sup>99</sup> Whether it is otherwise admissible at law, by reason of the fact that the lien theory of a mortgage is adopted in the particular state, would seem to depend on whether this theory applies to a mortgage in the form of an absolute conveyance without any defeasance, as well as to a mortgage in the ordinary form. If a conveyance absolute in form, when intended as security only, creates, even in the view of a court of law, a lien only, and does not vest the legal title in the grantee, it would seem proper, and even necessary, in such a court, in order to show where the legal title lies, to introduce evidence that the conveyance was intended as security only. To this question, whether an absolute conveyance, intended as a mortgage, passes the legal title in a jurisdiction in which a mortgage instrument in ordinary form does not have that effect, the cases give no uniform answer. There are in several states decisions to the effect that, though a mortgage in ordinary form creates a lien merely, a conveyance intended as security transfers the legal title,<sup>1</sup> while in others it has been decided that such a conveyance has no more effect as transferring

99. *Walls v. Endel*, 20 Fla. 86; *Despard v. Walbridge*, 15 N. Y. 374; *Dobbs v. Kellogg*, 53 Wis. 448, 10 N. W. 623.

1. *Hawkins v. Elston*, 58 Colo. 400, 146 Pac. 254; *Woodson v. Veal*, 60 Ga. 562; *Gibson v. Hough*, 60 Ga. 588; *Shumate v. McLendon*, 120 Ga. 396, 48 S. E. 10; *Burdick v. Wentworth*, 42 Iowa, 440; *Baxter v. Pritchard*, 122 Iowa, 590, 101 Am. St. Rep. 282, 98 N. W. 372; *Wilber v. Sanderson*, 43 Cal. 496; *First Nat. Bank of Plattsmouth v. Tighe*, 49 Neb. 299, 68 N. W. 490; *First Nat. Bank of*

*David City v. Spelts*, 94 Neb. 387, 143 N. W. 218. The California rule to this effect, as originally established (*Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, 40 Cal. 58), was subsequently changed by a statute providing that a mortgage shall transfer no title in spite of an agreement to the contrary. See *Hyde v. Mangan*, 88 Cal. 319, 26 Pac. 180; *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763; *Allen v. Allen*, 95 Cal. 184, 197, 16 L. R. A. 646, 30 Pac. 213; *Shirley v. All Night & Day Bank*, 166 Cal. 50, 134 Pac. 1001.

the legal title than has a mortgage in ordinary form.<sup>2</sup> The former view is open to the criticism that it puts it in the power of the parties to a mortgage transaction to change its legal effect by employing the device of an absolute conveyance. So far as it may be asserted that, by the making of an absolute conveyance, an intention to convey the legal title is indicated, and that this intention should be given effect, the same might be said of a conveyance with a defeasance, a form of mortgage which is still frequently utilized even in jurisdictions in which the lien theory is adopted. It has, however, never been decided that the intention to convey the legal title, to be inferred from the use of the common law form of a defeasible conveyance, requires the legal title to be regarded as vested in the mortgagee.

In some states there is a statutory provision requiring a conveyance intended as security to be treated as a mortgage,<sup>3</sup> and when this is the case the right to show the true character of the transaction can evidently not be confined to courts of equity.<sup>4</sup>

In New York oral evidence has been decided to be inadmissible to show that a conveyance absolute in form was intended as a mortgage, when a written instrument accompanying the conveyance appeared to

2. *Fehringer v. Martin*, 22 Colo. App. 634, 126 Pac. 113; *Hulsman v. Deal*, 90 Kan. 716, 136 Pac. 220; *Flynn v. Holmes*, 145 Mich. 606, 11 L. R. A. (N. S.) 209, 108 N. W. 685; *Odell v. Montross*, 68 N. Y. 499; *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1, 17 N. E. 405; *Security Savings & Trust Co. v. Lowenburg*, 38 Ore. 159, 62 Pac. 647; *Vincent v. First Nat. Bank*, 76 Ore. 579, 143 Pac. 1100, 149 Pac. 938; *Mustar v. McComb*, — S. D. —, 167 N. W.

232; *Snyder v. Parker*, 19 Wash. 276, 67 Am. St. Rep. 726, 53 Pac. 59; *Dobbs v. Kellogg*, 53 Wis. 448, 16 N. W. 623.

3. *Florida*, Comp. Laws 1917, § 2494; *Illinois*, Hurd's Rev. St. 1917, ch. 95, § 12; *Idaho*, Rev. Codes, § 3391; *Oklahoma*, Rev. Laws 1910, § 1156; *South Dakota* Comp. Laws 1910, § 2044.

4. See *German Ins. Co. of Freeport v. Gibe*, 162 Ill. 251, 44 N. E. 490.

contain the complete contract between the parties.<sup>4a</sup> In Georgia and Mississippi it is provided by statute that an absolute conveyance cannot, if the maker parts with the possession of the property, be shown to be intended as a mortgage, at the instance of either of the parties, unless fraud in its procurement is at issue.<sup>5</sup> And in Pennsylvania it is provided that a deed absolute can be reduced to a mortgage only by a written defeasance, signed, sealed, acknowledged and recorded,<sup>6</sup> though fraud in the procurement of the instrument in that form can, it seems, be shown.<sup>7</sup> In New Hampshire evidence of this character is excluded by a statutory provision that no estate shall be "incumbered by any agreement, unless it is inserted in the condition of the conveyance, stating the sum of money to be secured or other thing to be performed."<sup>8</sup>

The admission of evidence for the purpose of showing an absolute conveyance to be a mortgage would appear to involve an exception to the rule which excludes extrinsic evidence to vary or control a written instrument, "the parol evidence rule," so called, and there has been considerable discussion as to the principle on which the admission of such evidence can be supported. In some cases the right to introduce such evidence is stated to exist only when the written defeasance has been omitted as the result of fraud, accident, or mistake.<sup>9</sup> In others the attempt to utilize the absolute con-

4a. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961.

5. Georgia Code 1911, § 3258; Mississippi Code 1906, § 4783.

6. Act June 8, 1881. See *O'Donnel v. Vandersaal*, 213 Pa. 551, 63 Atl. 60; *Oliver v. Oliver*, 251 Pa. 574, 97 Atl. 84.

7. *Goodwin v. McMinn*, 193 Pa. 646, 74 Am. St. Rep. 703, 44 Atl. 1094.

8. Pub. St. 1901, ch. 139, § 2.

See *Benton v. Sumner*, 57 N. H. 117.

9. 4 Kent's Comm. 142; *Blakemore v. Byrnside*, 7 Ark. 505; *Washburn v. Merrills*, 1 Day (Conn.) 139; *Crutcher v. Muir*, 90 Ky. 142, 29 Am. St. Rep. 366; 13 S. W. 435; *McClane v. White*, 5 Minn. 178; *Lokerson v. Stilwell*, 12 N. J. Eq. 358; *Sprague v. Bond*, 115 N. C. 530, 20 S. E. 709.

veyance otherwise than as a mortgage, contrary to the intention of the parties, is regarded as itself constituting a fraud, authorizing the introduction of oral evidence of the real intention of the parties.<sup>10</sup> And a somewhat similar view has been expressed by a distinguished writer, to the effect that when a conveyance absolute in terms is made for purposes of security, a court of equity will not permit the grantee to retain the property in violation of the agreement by which he obtained it, but will regard him as a constructive trustee and require him to reconvey upon payment of the sum secured.<sup>11</sup> Another writer undertakes to base the admissibility of evidence to show the purpose of the conveyance upon the theory that the instrument itself was intended merely to indicate the *quantum* of the estate conveyed, and not the purpose of the conveyance, and that consequently evidence in the latter regard is merely in reference to a "collateral agreement" so called, and so within a well recognized exception to the parol evidence rule.<sup>12</sup>

Apart from any of the theories above suggested, it would seem that the recognition of the right to relief in the case of an absolute conveyance made for the purpose of security, and the consequent right to introduce evidence of such purpose, involves little more than an application of the equitable rule that any agreement or device by which it is sought to defeat the

10. *Babcock v. Wyman*, 19 How. (U. S.) 289, 15 L. Ed. 644; *Richter v. Noll*, 128 Ala. 198, 30 So. 740; *Hershey v. Luce*, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6; *Pierce v. Robinson*, 13 Cal. 116; *Bigler v. Jack*, 114 Iowa, 667, 87 N. W. 700; *O'Neill v. Capelle*, 62 Mo. 202; *Wallace v. Smith*, 155 Pa. St. 78, 35 Am. St. Rep. 868, 25 Atl. 807; *Wright v. Bates*, 13 Vt. 341. See *Ruckman v. Alwood*, 71 Ill. 155; *Hassam v. Barrett*, 3 R. P.—8

115 Mass. 256; *Jordan v. Warner's Estate*, 107 Wis. 539, 83 N. W. 946; 3 Pomeroy, Eq. Jur. § 1196.

11. Professor James Barr Ames, in 20 Harv. Law Rev. at p. 553, Lectures on Legal History 429. A like view is expressed in an able article by Professor Harlan F. Stone in 6 Columbia Law Rev. 326.

12. 4 Wignmore, Evidence, § 2437.

mortgagor's right of redemption is invalid. Such a rule affords but little protection to the mortgagor if its application can be excluded by the simple device of putting the mortgage in the form of an absolute conveyance.<sup>13</sup> To some extent in accord with this view are the cases in which the admissibility of evidence as to the purpose of the conveyance is asserted by the court without specific reference to any theory of fraud, accident or mistake, and without any suggestion that the case involves an application of the "collateral agreement" doctrine.<sup>14</sup>

In order that a conveyance absolute in form may be regarded as a mortgage on oral evidence to that effect, the evidence that it was so intended must, in the ordinary case,<sup>15</sup> be clear and convincing, the presumption being that the conveyance is what it purports to be.<sup>16</sup>

13. See *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Ruckman v. Alwood*, 71 Ill. 155; *Eckford v. Berry*, 87 Tex. 415, 28 S. W. 937.

14. See *Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256; *Gibbons v. Joseph Gibbons Consol. Mining & Milling Co.*, 37 Colo. 96, 11 Ann. Cas. 323, 86 Pac. 94; *First Nat. Bank of Florida v. Ashmead*, 23 Fla. 379, 2 So. 657, 665; *Pickett v. Wadlow*, 94 Md. 564, 51 Atl. 423; *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *Mooney v. Byrne*, 163 N. Y. 86, 57 N. E. 163; *Williams v. Purcell*, 45 Okla. 489, 145 Pac. 1151; *Mills v. Sumter Lumber Co.*, — S. C. —, 95 S. E. 355; *Gibson v. Hopkins*, 80 W. Va. 756, 93 S. E. 826.

15. A different rule prevails when there is an agreement in terms that the grantor may re-

purchase the property. See *post*, this section, note 27.

16. *Coyle v. Davis*, 116 U. S. 108, 29 L. Ed. 583; *Reeves v. Abercrombie*, 108 Ala. 535, 19 So. 41; *Prickett v. Williams*, 110 Ark. 632, 161 S. W. 1023; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Perot v. Cooper*, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; *Keithley v. Wood*, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; *Rasch v. Rasch*, 278 Ill. 261, 115 N. E. 871; *Betts v. Betts*, 132 Iowa, 72, 106 N. W. 928; *Winston v. Burnell*, 44 Kan. 367, 21 Am. St. Rep. 289, 24 Pac. 477; *Jackson v. Maxwell*, 113 Me. 366, 94 Atl. 116; *Kellogg v. Northrup*, 115 Mich. 327, 73 N. W. 230; *Young v. Bake*, 128 Minn. 398, 151 N. W. 132; *Brightwell v. McAfee*, 249 Mo. 562, 155 S. W. 820; *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76; *Hogan v.*



— (c) **Considerations determining character of transaction.** In determining the question whether an absolute conveyance is a mortgage, the fact that an indebtedness on the part of the grantor to the grantee is created by the transaction, or that a former indebtedness is thereby continued in force, is usually conclusive that it is a mortgage.<sup>17</sup> And conversely, the fact that no indebtedness exists, which the conveyance can be regarded as intended to secure, is conclusive that it is not a mortgage.<sup>18</sup> The absence, however, of a covenant or other express agreement to pay is not conclusive evidence that the conveyance is not a mortgage, there

Jaques, 19 N. J. Eq. 123, 97 Am. Dec. 644; Beall v. Beall, 67 Ore. 33, 128 Pac. 835, 135 Pac. 185; Wallace v. Smith, 155 Pa. St. 78, 35 Am. St. Rep. 868, 25 Atl. 807; Bryan v. Boyd, 100 S. C. 397, 84 S. E. 992; Commercial & Savings Bank v. Cassem, 33 S. D. 294, 145 N. W. 551; McLean v. Ellis, 79 Tex. 389, 15 S. W. 394; Motley's Adm'r. v. Carstairs, 114 Va. 429, 76 S. E. 948; Nutter v. Cowley Inv. Co., 85 Wash. 207, 147 Pac. 896. But a different rule appears to control in Kentucky. Castillo v. McBeath, 162 Ky. 382, 172 S. W. 669; Carr v. Morrison, 178 Ky. 683, 199 S. W. 783.

17. Conway v. Alexander, 7 Cranch (U. S.) 218, 237, 3 L. Ed. 321; Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4847; American Mortgage Co. v. Williams, 103 Ark. 484, 145 S. W. 234; Montgomery v. Spect, 55 Cal. 352; Keithley v. Wood, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; Farmers' & Merchants' Bank of Scandia v. Kackley, 88 Kan. 70, 127 Pac. 539; Hopper v. Smyser,

90 Md. 363, 45 Atl. 206; Burns v. Hunnewell, 217 Mass. 106, 104 N. E. 494; Branham v. Peltzer, — (Mo.) —, 177 S. W. 373; Gibson v. Morris State Bank, 49 Mont. 60, 140 Pac. 76; Caro v. Wollenberg, 68 Ore. 420, 136 Pac. 866; Wallace v. Smith, 155 Pa. St. 78, 35 Am. St. Rep. 868, 25 Atl. 807; Johnson v. National Bank of Commerce of Tacoma, 65 Wash. 261, L. R. A. 1916B4, 118 Pac. 21.

18. Conway v. Alexander, 7 Cranch (U. S.) 218, 3 L. Ed. 321; Arizona Copper Estate v. Watts, 237 Fed. 585, 150 C. C. A. 467; Martin v. Martin, 1<sup>st</sup>3 Ala. 191, 26 So. 525; Stollenwerck v. Marks & Gayle, 188 Ala. 587, Ann. Cas. 1917C, 981, 65 So. 1024; Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Keithley v. Wood, 151 Ill. 566, 42 Am. St. Rep. 265, 38 N. E. 149; Hopper v. Smyser, 90 Md. 363, 45 Atl. 206; Bobb v. Wolff, 148 Mo. 335, 49 S. W. 996; Samuelson v. Mickey, 73 Neb. 852, 103 N. W. 671, 106 N. W. 461; Jones v. Jones, 20 S. D. 632, 108 N. W. 23; Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583.

being other evidence on which to base a personal liability on the part of the grantor,<sup>19</sup> and even though no personal liability exists, still the conveyance may, it seems, be regarded as a mortgage,<sup>20</sup> since such a liability does not invariably exist in the case of a mortgage.<sup>21</sup> The language ordinarily used by the judges, however, suggests that a personal indebtedness is necessary in order that the conveyance may be regarded as a mortgage.

That the grantor retains possession or control of the property tends to show that it has not passed out of his hands by an absolute conveyance.<sup>22</sup> Furthermore, whether the grantor or the grantee pays the taxes may have a bearing on the true character of the transaction.<sup>23</sup> That the grantor has for a considerable length

19. *Floyer v. Lavington*, 1 P. Wms. 268; *Russell v. Southard*, 12 How. (U. S.) 139, 13 L. Ed. 927; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847; *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Horn v. Keteltas*, 46 N. Y. 605; *Kerr v. Gilmore*, 6 Watts (Pa.) 405; *Tuggle v. Berkeley*, 101 Va. 83, 43 S. E. 199; *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 696; *Schriber v. Le Clair*, 66 Wis. 579, 29 N. W. 576, 889.

20. *Palmer v. City of Albuquerque*, 19 N. M. 285, 142 Pac. 929; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Matthews v. Sheeham*, 69 N. Y. 585; *Brown v. Dewey*, 1 Sandf. Ch. (N. Y.) 56; *Kerr v. Gilmore*, 6 Watts, (Pa.) 405; *De Camp v. Crane*, 19 N. J. Eq. 166.

21. *Post*, § 607 (b).

22. *Parks v. Parks*, 66 Ala. 326; *Prefumo v. Russell*, 148 Cal. 451, 82 Pac. 810; *Ewart v. Walling*, 42 Ill. 453; *Wilson v. Patrick*, 34 Iowa,

362; *Hopper v. Smyser*, 90 Md. 363, 45 Atl. 206; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Porter v. White*, 128 N. C. 42, 38 S. E. 24; *Pancake v. Cauffman*, 114 Pa. 113, 7 Atl. 67. But that the possession and control continues in the grantor is not conclusive that the transaction is a mortgage, since the grantor may have taken a lease back from the grantee. See *Damer Land, etc., Co. v. Stonewall Ins. Co.*, 77 Ala. 184; *Pancake v. Cauffman*, 114 Pa. 113, 7 Atl. 67; *Edwards v. Wall*, 79 Va. 321. On the other hand the fact that a lease back is taken by the grantor is not conclusive that the conveyance is not a mortgage. *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265; *Bearss v. Ford*, 108 Ill. 16; *Brickle v. Leach*, 55 S. C. 510, 30 S. E. 720; *Woodward v. Pickett*, 8 Gray (Mass.) 617.

23. *Reeves v. Abercrombie*, 108 Ala. 535, 19 So. 41; *Hart v. Randolph*, 142 Ill. 521, 32 N. E.

of time after the making of the conveyance refrained from asserting any rights as mortgagor or from seeking to have the instrument declared a mortgage tends to show that it was an absolute conveyance.<sup>24</sup> That the sum paid by the grantee at the time of the making of the conveyance was much less than the value of the property tends strongly to show that the transaction was not a conveyance made in consideration of such sum, but was a mortgage made to secure its repayment.<sup>25</sup>

— (d) **Conveyance with right of repurchase.** The fact that an absolute conveyance is accompanied by a bond to reconvey, or by an agreement that the grantor may repurchase within a given time, at the same or a different price, is not conclusive that the transaction is a mortgage. Such a transaction is perfectly valid and the right to repurchase is lost if not exercised within the stipulated time.<sup>26</sup> A difficult question, how-

517; *Fronde v. Merritt*, 99 Iowa, 410; *Hopper v. Smyser*, 90 Md. 363, 45 Atl. 206; *O'Toole v. Omlie*, 8 N. D. 444, 79 N. W. 849; *Petty v. Petty*, 52 S. C. 54, 29 S. E. 406; *Hesser v. Brown*, 40 Wash. 688, 82 Pac. 934.

24. *Downing v. Woodstock Iron Co.*, 93 Ala. 262; *Hart v. Randolph*, 142 Ill. 521, 32 N. E. 517; *Odenbaugh v. Bradford*, 67 Pa. 96; *Shriver v. Arthur*, 54 S. C. 184, 32 S. E. 310; *Hesser v. Brown*, 40 Wash. 688, 82 Pac. 934.

25. *Glass v. Hieronymus*, 125 Ala. 140, 82 Am. St. Rep. 225, 28 So. 71; *Wimberly v. Scoggin*, — Ark. —, 193 S. W. 264; *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410; *Story v. Springer*, 155 Ill. 25, 39 N. E. 570; *Fort v. Colby*, 165 Iowa, 95, 144 N. W. 393; *Smith*

*v. Berry*, 155 Ky. 686, 160 S. W. 247; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Minty v. Soule*, 182 Mich. 564, 148 N. W. 769; *Klein v. McNamara*, 54 Miss. 90; *Temple Nat. Bank v. Warner*, 92 Tex. 226, 47 S. W. 515; *Rich v. Doane*, 35 Vt. 125; *Gilchrist v. Beswick*, 33 W. Va. 168, 10 S. E. 371.

26. *Thornborough v. Baker*, 3 Swanst. 631; *Barrell v. Sabine*, 1 Vern. 268; *Conway's Exors. & Devises v. Alexander*, 7 Cranch (U. S.) 218, 3 L. Ed. 321; *Horbach v. Hill*, 112 U. S. 144, 28 L. Ed. 670; *Hubert v. Slstrunk*, — (Ala.) —, 53 So. 819; *Rue v. Dole*, 107 Oh. 275; *Bigler v. Jack*, 114 Iowa, 667, 87 N. W. 700; *Yost v. First Nat. Bank*, 66 Kan. 605, 72 Pac. 209; *Flagg v. Mann*, 14

ever, frequently arises, as to whether a transaction in form a conveyance with a right of repurchase is not in fact a mortgage, as being intended to secure the payment of money, and a court of equity will closely scrutinize the transaction to see if such is the case, and will, if it appears to be such, give the grantor the right to redeem, with any other rights which belong to a mortgagor. In case of doubt, the courts incline to consider the transaction as in legal effect a mortgage, so as to place the burden of proof on the party asserting it to be merely a conveyance with the right of repurchase.<sup>27</sup>

— (e) **Protection of bona fide purchaser.** A purchaser for value from the grantee in an absolute conveyance is not affected by the fact that it was intended to operate as a mortgage and is consequently subject to a right of redemption, unless he purchased with notice that it was so intended, while as against a purchaser with notice the grantor has the same right of redemption

Pick. (Mass.) 467, 478; Gogarn v. Connors, 188 Mich. 161, 153 N. W. 1068; Gassert v. Bogk, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281; Macaulay v. Porter, 71 N. Y. 173; Ruffier v. Womack, 30 Tex. 332, Reed v. Parker, 33 Wash. 107, 74 Pac. 61; Mankin v. Dickinson, 76 W. Va. 128, Ann. Cas. 1917D, 120, 85 S. E. 74.

27. Russell v. Southard, 12 How. (U. S.) 139, 13 L. Ed. 927; Cosby v. Buchanan, 81 Ala. 574; Morton v. Allen, 180 Ala. 279, L. R. A. 1916B, 11, 60 So. 866; Farmer v. Grose, 42 Cal. 169; Casper Nat. Bank v. Jenner, 268 Ill. 142, 108 N. E. 998; Trucks v. Lindsey, 18 Iowa, 504, McRobert v. Bridget, 168 Iowa, 28, 149 N. W. 906; Edrington v. Harper, 3 J. J. Marsh (Ky.) 354, 20

Am. Dec. 145; Niggeler v. Maurin, 24 Minn. 118, 24 N. W. 369; Phillips v. Jackson, 240 Mo. 310, 144 S. W. 112; Gassert v. Bogk, 7 Mont. 585, 1 L. R. A. 240, 19 Pac. 281; Matthews v. Sheehan, 69 N. Y. 585; Poindexter v. McCannon, 16 N. C. 373, 18 Am. Dec. 591; Smith v. Hoff, 23 N. D. 37, Ann. Cas. 1914C, 1072, 135 N. W. 772; Bickel v. Wessinger, 58 Ore. 98, 113 Pac. 34. But occasionally a contrary attitude in this regard appears to have been adopted. Wallace v. Johnstone, 129 U. S. 58, 32 L. Ed. 619; Bogk v. Gassert, 149 U. S. 17, 37 L. Ed. 631; Elling v. Fine, 53 Mont. 481, 164 Pac. 891; Johnson v. National Bank of Commerce, 65 Wash. 261, 118 Pac. 21; Beverly v. Davis, 79 Wash. 537, 140 Pac. 696.

as he has against the grantee.<sup>28</sup> In case the grantor loses his right of redemption, by reason of the sale of the property by the grantee to an innocent purchaser for value, he is entitled to an accounting by his grantee for the amount received by the latter less the amount of the debt secured,<sup>29</sup> or, in some jurisdictions, to a judgment for damages measured by the difference between the value of the land and the amount of the debt.<sup>30</sup>

— (f) **Conveyance by third person.** What is in effect the same as an absolute conveyance made by a debtor to a creditor by way of security is one so made by a third person to the creditor, at the request or with the consent of the debtor, in order to secure the performance of the latter's obligation. So when the purchaser of land, having borrowed money, in order to pay for the land or for some other purpose, has the conveyance by the vendor made directly to the lender of the money, and as security for its repayment, the borrower and the lender stand in effect in the position of mortgagor and mortgagee, extraneous evidence being admissible to show that the conveyance, though in form absolute, was intended by the real parties in interest, the grantee therein and the vendee, to be for purposes

28. *Jackson v. Lawrence*, 117 U. S. 679, 29 L. Ed. 1024; *Union Mut. Life Ins. Co. v. Slee*, 123 Ill. 57, 13 N. E. 222; *Tufts v. Tapley*, 129 Mass. 380; *Gruber v. Baker*, 20 Nev. 453, 9 L. R. A. 302, 23 Pac. 858; *Frink v. Adams*, 36 N. J. Eq. 485; *Meehan v. Forrester*, 52 N. Y. 277; *Waters v. Crabtree*, 105 N. C. 394, 11 S. E. 240; *Pancake v. Cauffman*, 114 Pa. St. 113, 7 Atl. 67; *Murphy v. Plankinton Bank*, 13 S. D. 601, 83 N. W. 575.

29. *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; *Van*

*Heuvel v. Long*. — Ala. —, 75 So. 339; *Sheldon v. Bradley*, 37 Conn. 324; *Crassen v. Swoveland*, 22 Ind. 427.

30. *Nelson v. Wadsworth*, 181 Ala. 361, 61 So. 895; *Clark v. Morris*, 88 Kan. 752, 129 Pac. 1195; *Veach v. Smith*, 32 Ky. L. Rep. 851, 107 S. W. 234; *Enos v. Sutherland*, 11 Mich. 538; *Wilson v. Dumrite*, 24 Mo. 304; *Hausknecht v. Smith*, 11 N. Y. App. Div. 185, 42 N. Y. Supp. 611; *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799; see editorial note, 13 *Columbia Law Rev.* 442.

of security only.<sup>31</sup> Such a case is to be distinguished from that in which the vendee has the conveyance made directly to the person furnishing the money, who agrees to convey the land to the vendee in case the latter is willing to pay the lender the amount of his advance, or some other amount named. In this latter case there is in effect a conveyance with a right of repurchase, as distinguished from a mortgage,<sup>32</sup> which does not, as does a mortgage, involve any existing claim or obligation in favor of the party making the advance.<sup>33</sup>

Similar in principle to the case of an absolute conveyance made by a vendor to a third person to secure a claim in favor of the latter, is the case of a purchase of land at judicial or sheriff's sale by one person on behalf of another, quite usually the owner or a junior lienor, under an agreement by the latter that he will refund the purchase price and that until this is done the nominal purchaser will hold the legal title as security.<sup>34</sup>

31. *Hughes v. McKenzie*, 101 Ala. 415, 13 So. 609; *Putnam v. Summerlin*, 168 Ala. 390, 53 So. 101; *Cramer v. Remmel*, 132 Ark. 158, 200 S. W. 811; *Campbell v. Freeman*, 99 Cal. 546; *Fleming v. Georgia Railroad Bank*, 120 Ga. 1023, 48 S. E. 420; *Stewart v. Fellows*, 128 Ill. 480, 20 N. E. 657; *Henry v. Britt*, 265 Ill. 131, 106 N. E. 455; *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265; *Stratton v. Rotrock*, 84 Kan. 198, 114 Pac. 224; *Stinchfield v. Milliken*, 71 Me. 567; *Tenvoorde v. Tenvoorde*, 128 Minn. 126, 150 N. W. 396; *Carr v. Carr*, 52 N. Y. 251; *Sandling v. Kearney*, 154 N. C. 596, 76 S. E. 942; *Balduff v. Griswold*, 9 Okla. 438, 60 Pac. 223; *Malloy v. Malloy*, 35 Neb. 224, 52 N. W. 1097; *Carr v. Carr*, 52 N. Y. 251;

*Balduff v. Griswold*, 9 Okla. 438, 60 Pac. 223; *Beebe v. Wisconsin Mortgage Loan Co.*, 117 Wis. 328, 93 N. W. 1103.

32. *Ante*, § 605(d).

33. *Hughes v. McKenzie*, 101 Ala. 415, 13 So. 609; *Lamberson v. Bashore*, 167 Cal. 387, 139 Pac. 817; *Rogers v. Davis*, 91 Iowa, 730, 59 N. W. 265; *Caprez v. Trover*, 96 Ill. 456; *Morton v. Woodford*, 13 Ky. L. Rep. 150, 16 S. W. 528; *Hill v. Grant*, 46 N. Y. 496; *Brownlee v. Martin*, 28 S. C. 364, 6 S. E. 148; *Hubby v. Harris*, 68 Tex. 91, 3 S. W. 558; *Walker's Adm'r. v. Mason*, — (Va.) —, 24 S. E. 231; *Watts v. Kellar*, 56 Fed. 1.

34. *La Cotts v. La Cotts*, 109 Ark. 335, 159 S. W. 1111; *San José Safe-Deposit Bank of Sav-*

In such a case the transaction is in effect the same as if the person in behalf of whom the purchase was made had taken the title in his own name and had then made an absolute conveyance to the person advancing the purchase price in order to secure the repayment of the loan. So if a redemption from a judicial or sheriff's sale is effected by one person at the request of another interested in the property, the former taking an assignment of the certificate of purchase or a transfer of the legal title, under an agreement that he is to hold the title as security for the reimbursement of the sums paid to effect the redemption, he is in the position of a mortgagee by absolute deed, this case differing from that previously referred to merely in the fact that the purchase money is advanced after instead of at the time of the sale.<sup>35</sup> A like relation of mortgagor and mortgagee may arise in connection with an agreement for the extension of time for redemption from an execution or judicial sale, the purchaser in the meanwhile holding the legal title as security. ..

ings v. Bank of Madera, 121 Cal. 539, 54 Pac. 83, 270; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57, 13 N. E. 222; Beatty v. Brummett, 94 Ind. 76; Barnett v. Nelson, 46 Iowa, 495; Nichols v. Marquess, 141 Ky. 642, 133 S. W. 562; Dryden v. Hanway, 31 Md. 254; Potter v. Kimball, 186 Mass. 120, 71 N. E. 308; Anderson v. Smith, 103 Mich. 446, 61 N. W. 778; McLure v. National Bank of Commerce, 252 Mo. 510, 100 S. W. 105; Dickson v. Stewart, 71 Neb. 424, 115 Am. St. Rep. 596, 98 N. W. 1085; Barkelew v. Taylor, 8 N. J. Eq. 206; Sahler v. Signer, 37 Barb. (N. Y.) 329; Lutz v. Hoyle, 167 N. C. 632, 83 S. E. 749; Wilson v. Giddings, 28 Ohio St. 554; Hiester v. Maderia, 3 Watts & S.

(Pa.) 384; Gaines v. Bockerhoff, 136 Pa. 175, 19 Atl. 958; Guinn v. Locke, 1 Head. (Tenn.) 110; Harvey v. Shipe, 78 W. Va. 216, 88 S. E. 830; Liskey v. Snyder, 56 W. Va. 610, 49 N. E. 515; Phelan v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614. To be distinguished is the case of a purchase by a third person with an agreement for resale to the former owner. See Hibernian Banking Ass'n v. Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919; Stroup v. Haycock, 56 Iowa, 729, 10 N. W. 257.

35. Nelson v. Kelly, 91 Ala. 569, 8 So. 690; Lounsberry v. Norton, 59 Conn. 170, 22 Atl. 153; Trogdon v. Trogdon, 164 Ill. 141, 45 N. E. 575; McElroy v. Allfree, 131 Iowa, 112, 117 Am. St. Rep.

— (g) **Trust deed to secure debt.** Not infrequently, instead of a mortgage in ordinary form, a conveyance is made to a trustee, to secure the payment of a debt due to another person, or to several persons, subject to a condition that it shall be void upon payment of the debt at maturity, and with a power in the trustee to sell the property in case of default. And in a few states a conveyance of this nature is used to the exclusion of a mortgage made directly to the creditor, it being desired to create a power of sale, and it being considered improper that the creditor himself should be vested with such power. A conveyance to a trustee is also used, in all the states, when it is desired to secure an indebtedness to a number of persons, or to persons whose identity is unknown, and it is ordinarily used to secure an issue of bonds by a corporation.

In jurisdictions in which a mortgage in ordinary form has the effect of transferring the legal title, a conveyance to a trustee to secure a debt must necessarily have the same effect.<sup>37</sup> In some of the jurisdictions in which a mortgage does not transfer the legal title, a deed of trust of this character is more usually regarded as technically a mortgage, and as consequently not vesting any legal title in the trustee, so called, and this apparently without reference to whether the parties intended that he should have the legal title.<sup>38</sup> In others

412, 108 N. W. 116; *Hutchings v. Clerk*, 225 Mass. 483, 114 N. E. 746; *Wilson v. McWilliams*, 16 S. D. 96, 91 N. W. 453.

36. *Barthell v. Syverson*, 54 Iowa, 160, 6 N. W. 178; *Penson-ean v. Pulliam*, 47 Ill. 58; *Wenzel v. Weigand*, 92 Minn. 152, 99 N. W. 633; *Robinson v. Lincoln Sav. Bank*, 85 Tenn. 363, 3 S. W. 656.

37. *Collier v. Alexander*, 142 Ala. 422, 38 So. 244; *Turner v.*

*Watkins*, 31 Ark. 429; *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 42; *Ware v. Schintz*, 190 Ill. 189, 60 N. E. 67; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 70 L. R. A. 94, 81 S. W. 193; *Dupee v. Rose*, 10 Utah, 305, 37 Pac. 567; *Chesapeake Beach Ry. Co. v. Washington, P. & C. R. Co.*, 23 App. Cas. (D. C.) 587, aff'd 199 U. S. 247, 50 L. Ed. 175.

38. *Brown v. Bryan*, 6 Idaho. 1, 51 Pac. 995; *Ingle v. Culbertson*,



of such jurisdictions, the grantee in the deed is regarded as actually having the legal title, for some purposes at least.<sup>39</sup> Occasionally the recognition of the legal title as being in the trustee appears to be based on the assumption that this is necessary to enable him to exercise the power of sale which the instrument undertakes to give him.<sup>40</sup>

A trust deed thus made for purposes of security will, it seems, be regarded as a mortgage, for the purpose of preserving the grantor's right of redemption, since a mortgagor should not be deprived of this right by the mere form of conveyance which may be adopted,<sup>41</sup> and the grantor retains, as does a mortgagor, the substantial ownership of the property,<sup>42</sup> he having even, according to several cases, an interest subject to execu-

43 Iowa, 265; *Lenox v. Reed*, 12 Kan. 223; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Hurley v. Estes*, 6 Neb. 386; *Thompson v. Marshall*, 21 Ore. 171, 27 Pac. 957; *Ladd v. Johnson*, 32 Ore. 195, 49 Pac. 756; *McVay v. Tousley*, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932; *Wright v. Henderson*, 12 Tex. 43; *McLane v. Paschal*, 47 Tex. 365.

39. *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *MacLeod v. Moran*, 153 Cal. 97, 94 Pac. 604; *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43; *Soutter v. Miller*, 15 Fla. 625; *Devin v. Hendershott*, 32 Iowa, 192 (*semble*); *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606 (*dictum*); *Brinkman v. Jones*, 44 Wis. 498; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837.

40. *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Bateman v.*

*Burr*, 57 Cal. 480; *Stephens v. Clay*, 17 Colo. 489, 30 Pac. 43; *Holmquist v. Gilbert*, 41 Colo. 113, 92 Pac. 232. So it is stated that title does not pass if there is no power of sale. *Driskill v. Rebbe*, 22 S. D. 242, 117 N. W. 135.

41. *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Turner v. Watkins*, 31 Ark. 429; *Coe v. Johnson*, 18 Ind. 218; *Ingle v. Culbertson*, 43 Iowa, 265; *Bell v. Carter*, 17 Beav. 11; *Locking v. Parker*, L. R. 8 Ch. 30.

42. *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813; *Flint & P. M. Ry. Co. v. Auditor General*, 41 Mich. 635, 2 N. W. 835; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 70 L. R. A. 94, 81 S. W. 193; *Wood v. Grayson*, 22 App. Cas. (D. C.) 432, 445; *In re Jersey Island Packing Co.*, 138 Fed. 625; *National Bank of Columbus v. Tennessee Coal, Iron & Railroad Co.*, 62 Ohio, St. 564, 57 N. E. 450.

tion.<sup>43</sup> Moreover, the debt secured is regarded as the principal thing, and the title or security in the trustee as merely incidental thereto, and as subject to the control of the owner of the indebtedness.<sup>44</sup>

Other purposes for which a deed of trust made to secure an obligation has been regarded as equivalent to a mortgage may be mentioned as follows: It has been decided that a corporation authorized to make or to take a mortgage may make or take a deed of trust to secure debts,<sup>45</sup> and that a guardian empowered to mortgage may make a deed of trust, this being the recognized mode in that community of securing debts.<sup>46</sup> Likewise such a deed of trust has been regarded as a mortgage within a statute providing for the recording of mortgages,<sup>47</sup> a statute providing for the release of a mortgage on the margin of the record,<sup>48</sup> a statute authorizing redemption after sale under a mortgage,<sup>49</sup> and a state insolvent law invalidating an unrecorded mortgage.<sup>50</sup> And it has been held capable of foreclosure in equity as a mortgage without resort to the power of sale expressly given.<sup>51</sup> But in some cases a distinction has been recognized between a deed of

43. *Turner v. Watkins*, 31 Ark. 429; *Pool v. Glover*, 2 Ired. L. (24 N. C.) 129; *Martin v. Alter*, 42 Ohio St. 94; *Wright v. Henderson*, 12 Tex. 43.

44. *Clark v. Wilson*, 53 Miss. 129; *Sargent v. Howe*, 21 Ill. 148; *Collier v. Alexander*, 142 Ala. 422, 38 So. 244. See *Foot v. Burr*, 41 Colo. 192, 13 L. R. A. (N. S.) 1210, 92 Pac. 236.

45. *Wright v. Bundy*, 11 Ind. 398; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612.

46. *Middletown v. Parke*, 3 App. Cas. (D. C.) 149.

47. *Wood v. Lake*, 62 Ala. 489; *Cross v. Fombey*, 54 Ark. 179, 15 S. W. 461; *National Bank of Co-*

*lumbus v. Tennessee Coal, Iron & Railroad Co.*, 62 Ohio St. 564, 57 N. E. 450; *Woodruff v. Robb*, 19 Ohio, 212; *Barth v. Deuel*, 11 Colo. 503, 19 Pac. 471. *Contra*, *Stanshope v. Dodge*, 52 Md. 483.

48. *Wolfe v. Dowell*, 13 Smedes & M. (Miss.) 103.

49. *Fitch v. Weatherbee*, 119 Ill. 475.

50. *Harriman v. Woburn Elec. Light Co.*, 163 Mass. 85, 39 N. E. 1004.

51. *Dupee v. Rose*, 10 Utah, 305, 37 Pac. 567; *Denver Brick & Manufacturing Co. v. McAllister*, 6 Colo. 261; *Blackwell v. Barnett*, 52 Tex. 326.

trust to secure and a mortgage. For instance, such a deed has in one state been held not to be a mortgage within a statute requiring an affidavit as to the sum secured,<sup>52</sup> or within a statute as to the record of mortgages,<sup>53</sup> and while it has more usually been regarded as within a statute as to the mode of foreclosing a mortgage,<sup>54</sup> in one state a different view has been taken.<sup>55</sup> And even in states where a mortgagee is ordinarily entitled to a strict foreclosure,<sup>56</sup> the language of the deed of trust may be such as to confine the trustee to a foreclosure by sale.<sup>57</sup>

In a number of cases the courts have referred to the fact that the conveyance in trust provides that it shall be void if the debt is paid at maturity as conclusive, or approximately conclusive, that the instrument is to be regarded as a mortgage,<sup>58</sup> occasionally also asserting that the absence of such a provision precludes it from being so regarded.<sup>59</sup> Why such weight should be attached to the presence or absence of a provision of this character is by no means clear. In England at the present day the condition of a mortgage is usually, not that it shall be void upon payment of the debt, but that the mortgagee shall thereupon reconvey the prop-

52. *Charles v. Clagett*, 3 Md. 82. Nor within a statute fixing the place of sale under a mortgage. *Bank of Commerce v. Lanan*, 45 Md. 483.

53. *Stanhope v. Dodge*, 52 Md. 483.

54. *Lawrence v. Farmer's Loan & Tr. Co.*, 13 N. Y. 200; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; *Brown v. Bryan*, 6 Idaho, 1, 51 Pac. 995; *Thompson v. Marshall*, 21 Ore. 171, 27 Pac. 957; *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210.

55. *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Grant v. Burr*, 54

Cal. 298.

56. *Post*, §§ 650-652.

57. *Locking v. Parker*, L. R. 8 Ch. 30; *Shepard v. Richardson*, 145 Mass. 32, 11 N. E. 738.

58. *Turner v. Watkins*, 31 Ark. 429; *De Wolff v. Sprague Mfg. Co.*, 49 Conn. 283; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162, 181; *Martin v. Alter*, 42 Ohio St. 94; *Austin v. Sprague Mfg. Co.*, 14 R. I. 453; *Wiscensin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. 837.

59. *Martin v. Alter*, 42 Ohio St. 94; *Lance's Appeal*, 112 Pa. St. 456, 4 Atl. 375.

erty, and it has never been suggested that the substitution of the latter form of provision for the former affects in any way the character of the instrument as a mortgage. After the payment of the debt the mortgagee holds the property in trust for the mortgagor, just as one to whom a deed of trust is made to secure a debt holds, after such payment, in trust for the creator of the trust.<sup>60</sup>

While it has been judicially asserted that a deed of trust to secure a debt, if made to the creditor himself, must be regarded as a mortgage,<sup>61</sup> it does not seem that a deed of trust to secure a debt should, because not made to the creditor, be regarded otherwise than as a mortgage.<sup>62</sup> An instrument in the ordinary form of a mortgage is perfectly valid as a mortgage, though made to a person other than the creditor,<sup>63</sup> and so the fact that a deed of trust is made to a person other than the creditor is no reason for not regarding it as a mortgage. A deed of trust to A to secure a debt due B is essentially a mortgage to A to secure a debt due B and the fact that in the deed A is called "trustee" is immaterial.

60. In *Lawrence v. Farmer's Trust Co.*, 13 N. Y. 260, the instrument was regarded as a mortgage, though there was no condition of defeasance, but merely a provision for reconveyance on payment.

In several cases it has been held that the fact that there was no condition of defeasance did not necessitate that the instrument be regarded as an assignment for the benefit of creditors rather than a mortgage. *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872, 42 So. 910; *Austin v. First Nat. Bank of Kalamazoo*, 100 Mich. 613, 59 N. W. 597; *Hargadine v. Henderson*, 97

Mo. 375, 11 S. W. 218.

61. *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Fox v. Channing*, 1 Rand. (Va.) 306. *Contra*, *Moore v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583.

62. But it is so decided in *Marvin v. Titsworth*, 10 Wis. 320. In this case, as in *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958, foreclosure was to be at the option of the creditor, and in the latter case this fact was regarded as conclusive that the instrument was a mortgage, though it professes to follow the case first above cited.

63. See *post*, § 607(b), note 90.

In so far as a distinction between a mortgage and a deed of trust may be sought to be based upon the fact that in that jurisdiction a mortgage is a lien merely, and a deed of trust shows an intention to convey the legal title, it is to be remarked that, in most jurisdictions in which the lien theory of a mortgage prevails, the old form of a conveyance of the property with a defeasance clause is still utilized, but the courts have not regarded this indication of an intention, appearing on the face of the instrument, to convey the legal title, as giving the mortgagee the legal title. And it does not seem that such an indication of intention, appearing on the face of a deed of trust, should have any greater effect.

A conveyance made to a trustee to secure a debt or debts is to be distinguished from one made to a trustee for the purpose of effecting the payment of debts. A conveyance of the latter character, ordinarily known as an assignment for the benefit of creditors, involves a complete divestiture of the grantor's title to the property conveyed, he having no right to redeem by paying the debts, and having merely a resulting trust as to any surplus which may possibly remain after the debts are paid, while a conveyance in trust made merely for purposes of security does not, any more than does a mortgage in ordinary form, divest the grantor or mortgagor of the rights of an owner, he having still a right to redeem by paying the indebtedness. The distinction between these two classes of conveyances in trust for creditors has been frequently asserted, especially in connection with the question whether a particular conveyance was to be regarded as an assignment for the benefit of creditors within a state law invalidating such assignments in certain cases.<sup>64</sup>

64. See *Reagan v. Aiken*, 138 U. S. 109, 34 L. Ed. 892; *Turner v. Watkins*, 31 Ark. 429; *Heath v. Wilson*, 139 Cal. 362, 73 Pac. 182; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282; *Wylly-Gabbett v. Williams*, 53 Fla. 872, 42 So. 910; *Johnson v. Brewer*,

§ 606. **Necessity of consideration.** It is quite frequently asserted or assumed that a mortgage is invalid unless supported by a consideration,<sup>65</sup> but this position is, it is conceived, of doubtful correctness. Regarding a mortgage from the purely common law point of view, as a conveyance on condition subsequent, such a conveyance is perfectly valid without any consideration, as is a conveyance not on condition.<sup>66</sup> Indeed the common law mortgage was fully recognized many years before the doctrine of consideration had been developed. Looking at a mortgage from the equitable point of view, as a mere security for the performance of an obligation, there does not seem any reason for the introduction of the doctrine of consideration, a doctrine which is properly applicable to executory

134 Ga. 828, 31 L. R. A. (N. S.) 332, 68 S. E. 590; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; McDonald & Co. v. Kellogg, 30 Kan. 170, 2 Pac. 507; Henshaw v. Sumner, 23 Pick. (Mass.) 446; Dyson v. St. Paul Nat. Bank, 74 Minn. 439, 73 Am. St. Rep. 358, 77 N. W. 236; Crow v. Beardsley, 68 Mo. 435; Muchmore v. Budd, 53 N. J. L. 369, 22 Atl. 518; Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; Woodruff v. Robb, 19 Ohio 212; Ladd v. Johnson, 32 Ore. 195, 49 Pac. 756; Johnson's Appeal, 103 Pa. St. 373; Catlett v. Starr, 70 Tex. 485, 7 S. W. 844; McGregor v. Chase, 37 Vt. 225; Wyman v. Matthews, 53 Fed. 678; Ontario Bank v. Hurst, 103 Fed. 231, 43 C. C. A. 193.

65. See, *e. g.* Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412; Duncan v. Miller, 64 Iowa, 223, 20 N. W. 161; Roberts v. Roberts, 176 Iowa, 610, 156 N. W. 399;

Fernald v. Highland Hall Co., 59 Kan. 534, 53 Pac. 861; Scrimser v. Southern Nat. Bank, 144 Ky. 781, 139 S. W. 951; Gate City Nat. Bank v. Elliott, — (Mo.) —, 181 S. W. 25; Forbes v. McCoy, 15 Neb. 632, 20 N. W. 17; Kansas Mfg. Co. v. Gandy, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569; Best v. Thiel, 79 N. Y. 15; First Nat. Bank of Hastings v. Lamont, 5 N. D. 393, 67 N. W. 145; Talley v. Buchanan, — (Tenn. Ch.) —, 46 S. W. 542; Empire State Surety Co. v. Ballou, 66 Wash. 76, 118 Pac. 923. In Thackaberry v. Johnson, 131 Ill. App. 463; Best v. Thiel, 79 N. Y. 15; Herron v. Stevenson, 209 Pa. 354, 102 Atl. 1049; Clymer v. Groff, 220 Pa. 580, 14 Ann. Cas. 256, 69 Atl. 1119, it was said that the fact that the mortgage was under seal dispensed with proof of consideration.

66. *Ante*, § 438.

contracts only, and a legal mortgage, even when regarded as a lien merely, is not an executory contract, it not in itself involving any personal obligation. That a consideration is not necessary to the validity of a mortgage would seem to be clearly indicated by the fact that a mortgage is perfectly valid though given to secure the payment of a preexisting debt,<sup>66a</sup> or to secure advances which the mortgagee may voluntarily make in the future.<sup>67</sup>

Even though a consideration is not necessary to the validity of the mortgage itself, the question whether the obligation secured is supported by a consideration may be of primary importance, since a mortgage is, in the view at least of a court of equity, a nullity, except in so far as it secures a valid obligation, and a contractual obligation, not under seal, must ordinarily be supported by a consideration. And so it has been decided in several cases that a mortgage was

66a. *Bray v. Comer*, 82 Ala. 183, 1 So. 77; *Frey v. Clifford*, 44 Cal. 335; *Usina v. Wilder*, 58 Ga. 178; *McLaughlin v. Ward*, 77 Ind. 383; *Hewitt v. Powers*, 84 Ind. 295; *Rea v. Wilson*, 112 Iowa, 517, 84 N. W. 539; *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; *Laubenheimer v. McDermott*, 5 Mont. 512, 6 Pac. 344; *Chaffee v. Atlas Lumber Co.*, 43 Neb. 224, 47 Am. St. Rep. 753, 61 N. W. 637; *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255, 59 Neb. 455, 81 N. W. 307; *Weber v. Barrett*, 125 N. Y. 18; *Lehrenkrauss v. Bonnell*, 199 N. Y. 240, 92 N. E. 637; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576; *Reeves & Co. v. Dyer*, 52 Okla. 750, 153 Pac. 850; *Moore v. Fuller*, 6 Ore. 272, 25 Am. Rep. 524. It seems clear, on principle,

that it is immaterial, in this connection, whether the pre-existing debt is that of the mortgagor or a third person, and that such is the case is apparently recognized in *Buck v. Axt*, 85 Ind. 512; *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 607, 71 N. J. Eq. 304, 71 Atl. 1135; *Lee v. Kirkpatrick*, 14 N. J. Eq. 264; *National City Bank of Chicago v. Wagner*, 216 Fed. 473, 132 C. C. A. 533. But a contrary view has occasionally been asserted. *B. C. Bynum Mercantile Co. v. First Nat Bank of Anniston*, 187 Ala. 281, 65 So. 815; *Bell v. Bell*, 133 Mo. App. 570, 113 S. W. 667; *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448, 38 Am. Rep. 370, 9 N. W. 569. And see *Ray v. Hollenbeck*, 42 Fed. 381.

67. *Post*, § 607(a), note 75.

invalid, not because it was not supported by a consideration, but because the obligation secured by it was not so supported.<sup>68</sup> Moreover, even apart from the necessity of a consideration to support a personal obligation for the debt secured, it is the settled doctrine at the present day that a mortgage purporting to secure the payment of money will be enforced only to the extent of the sum equitably due, without reference to the amount named in the mortgage instrument, or bond or note accompanying it.<sup>69</sup> And this appears to be, frequently if not ordinarily, what is meant by the assertion, either in express terms, or by implication, of the necessity of a consideration to support a mortgage, that is, that it is effective and enforceable as a lien only if, and in so far as, it secures a valid claim.<sup>70</sup>

68. *State Land Co. v. Mitchell*, 162 Ala. 469, 50 So. 117 (*semble*); *Chesser v. Chesser*, 67 Fla. 6, 64 So. 357; *Hall v. Davis*, 73 Ga. 101; *Scott v. Magloughlin*, 133 Ill. 33, 24 N. E. 1030; *Conwell v. Clifford*, 45 Ind. 392; *Adams v. Laugel*, 144 Ind. 608, 42 N. E. 1017; *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647; *Hannan v. Hannan*, 123 Mass. 441; *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 893; *Anderson v. Lee*, 73 Minn. 397, 76 N. W. 24; *Hughes v. Thweatt*, 57 Miss. 376; *Bradshaw v. Farnsworth*, 65 W. Va. 28, 63 S. E. 755. See *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; *Cawley v. Kelley*, 60 Wis. 315, 19 N. W. 65.

69. *Rue v. Dole*, 107 Ill. 275; *Bacon v. National German-American Bank of St. Paul*, 191 Ill. 205, 60 N. E. 846; *Schaepfi v. Glade*, 195 Ill. 62, 62 N. E. 874; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106; *Miexsell v. Walton*, 49

Kan. 255, 30 Pac. 410; *Fisher v. Meister*, 24 Mich. 447; *Laylin v. Knox*, 41 Mich. 40, 1 N. W. 913; *Cady v. Burgess*, 144 Mich. 523, 108 N. W. 414; *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 543; *Heller v. Groves*, — (N. J. Ch.) —, 8 Atl. 652; *Briggs v. Langford*, 107 N. Y. 680, 14 N. E. 502; *Bush v. Roberts*, 57 Ore. 169, 110 Pac. 790; *McAteer v. McAteer*, 31 S. C. 313, 9 S. E. 966; *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009; *McCourt v. Peppard*, 126 Wis. 326, 105 N. W. 809.

70. See *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106; *Rice v. Rice*, 101 Kan. 20, 165 Pac. 799; *Bigelow v. Bigelow*, 93 Me. 439, 45 Atl. 513; *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 893; *Page v. Franklin*, 214 Mass. 552, 101 N. E. 1084; *Fisher v. Meister*, 24 Mich. 447; *Welbon v. Webster*, 89 Minn. 177, 94 N. W. 550; *Kuhne*



Applying the consideration last above suggested, occasional decisions to the effect that one may make a gift by executing a mortgage in favor of the donee for a named amount, which may be enforced by the latter,<sup>71</sup> appear to be open to serious question, except in so far, at least, as a personal obligation under seal for that amount is also given. There is in such case merely a mortgage purporting to secure a debt, which debt is nonexistent. And it is immaterial that the mortgagor, at the time of executing the mortgage, also executes a note or notes for the amount named in the mortgage, since a note made as a gift is not binding on the maker.<sup>72</sup> According to common law standards, it would seem that a sealed obligation executed by way of gift from the maker to the obligee would be valid, in which case a mortgage securing such obligation might also be valid and effective.

**§ 607. The obligation secured—(a) Character of obligation.** Any contractual obligation reducible to a money value may be secured by a mortgage.<sup>73</sup> The obligation secured is ordinarily one for the payment of money, created at the time of the execution and de-

v. Gau, 138 Minn. 34, 163 N. W. 982; Catlett v. Bacon, 33 Miss. 269; Feldman v. Gamble, 26 N. J. Eq. 494; Briggs v. Langford, 107 N. Y. 680, 14 N. E. 502; First Nat. Bank v. Robinson, 188 N. Y. 45, 80 N. E. 567; Messiah Home v. Rogers, 212 N. Y. 315, 106 N. E. 59; Larson v. Butler, 26 N. D. 426, 144 N. W. 1077; Grebe v. Swords, 28 N. D. 330, 149 N. W. 126; Deming Inv. Co. v. Shannon, — Okla. —, 162 Pac. 471; Cawley v. Kelley, 60 Wis. 315, 19 N. W. 65. And see particularly the discussion in Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61

Atl. 167, 71 N. J. Eq. 304, 71 Atl. 1135.

71. Bucklin v. Bucklin, 1 Abb. Dec. 242; Fitzgerald v. Forristal, 48 Ill. 228; Campbell v. Tompkins, 32 N. J. Eq. 170; Risley v. Parker, 50 N. J. Eq. 284, 23 Atl. 424; Brigham v. Brown, 44 Mich. 59, 6 N. W. 97 (*dictum*).

72. 2 Ames, Cases on Bills & Notes, 642; Norton, Bills and Notes (3rd Ed.) 278; 3 Pomeroy, Eq. Jur., § 1148; editorial note, 16 Columbia Law Rev. 606.

73. Cook v. Bartholomew, 60 Conn. 24, 22 Atl. 444; Dover Lum-

livery of the mortgage instrument. The mortgage may however secure an obligation previously existing, an antecedent debt,<sup>74</sup> or it may secure an obligation or obligations to arise in the future, as when it is made to secure future advances, that is, loans which may subsequently be made,<sup>75</sup> or to secure indemnity to one on account of possible future losses by reason of a contract of guaranty or suretyship entered into by him. An indemnity mortgage of this character is quite frequently assumed to be invalid unless supported by a consideration.<sup>76</sup> But it may be questioned whether this ordinarily means more than that if the mortgagee subjects himself to no legal liability, a mortgage made for the sole purpose of indemnifying him against liability is nugatory.<sup>77</sup> And this appears to accord with the fact that a mortgage is valid though given merely to indemnify the mortgagee against liabilities previously assumed by him,<sup>78</sup> or which he may thereafter voluntarily assume.<sup>79</sup>

—Mortgage to secure support. Ordinarily, as

ber Co. v. Case, 31 Idaho, 276, 170 Pac. 108.

74. *Ante*, § 606, note 66a.

75. See, *e. g.*, Hamilton v. Rhodes, 72 Ark. 625, 83 S. W. 351; American Sav. Bank v. Kemp, 21 Cal. App. 571, 132 Pac. 617; Straefer v. Rodman, 146 Ky. 1, 141 S. W. 742; Miller v. Ward, 111 Me. 134, 49 L. R. A. (N. S.) 122, 88 Atl. 400; Diggs v. Fidelity & Deposit Co., 112 Md. 50, 75 Atl. 517; Collins v. Gregg, 109 Iowa, 506, 80 N. W. 562; Reed v. Rochford, 62 N. J. Eq. 186, 50 Atl. 70.

76. Duncan v. Miller, 64 Iowa, 223, 20 N. W. 161; Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; Landigan v. Mayer, 32 Ore. 245, 67 Am. St. Rep. 521,

51 Pac. 649; Williams v. Silliman, 74 Tex. 626, 12 S. W. 534; Burt v. Gamble, 98 Mich. 402, 57 N. W. 261.

77. See Peets v. Wilson, 19 La. 478; Fagan v. Thompson, 38 Fed. 467.

78. Steen v. Stretch, 50 Neb. 572, 70 N. W. 48; Empire State Surety Co. v. Ballou, 66 Wash. 76, 118 Pac. 923.

79. Rice v. Groves, 70 Hun. (N. Y.) 74, 23 N. Y. Supp. 936; *In re Essex Land, etc. Co.*, 21 Ont. 367; Stokes v. Howerton, 67 N. C. 50; Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co., 101 Fed. 699, 41 C. C. A. 614.

previously indicated,<sup>79a</sup> when the performance of a contract to support another is secured on land, it is by force of a stipulation, either in express terms or implied from circumstances, in connection with a conveyance by the person to be supported to the person undertaking to furnish the support, to which the courts give effect by rescinding the conveyance on failure to furnish the support. Occasionally, however, a mortgage is made in express terms securing the performance of the mortgagor's contract to support the mortgagee, and the validity of such a mortgage appears to be fully recognized.<sup>79b</sup> The mortgagor under a mortgage to secure support, who has failed to furnish support as agreed, will usually, it seems, be relieved from an absolute forfeiture for such failure, on paying adequate damages.<sup>79c</sup> The right of redemption may, however, be extinguished, as in the case of other mortgages, by foreclosure,<sup>79d</sup> and for that purpose, in case of necessity, the money value of the obligation assumed may be approximately estimated or computed.<sup>79e</sup>

An agreement to support is *prima facie* of a personal character, and consequently the mortgagor cannot delegate the duty to another, even though such other be one to whom he transfers his interest in the land,<sup>80</sup> and so the person who is to be supported can-

79a. *Ante*, § 89.

79b. *Cook v. Bartholomew*, 60 Conn. 24, 13 L. R. A. 452, 22 Atl. 444; *Butterfield v. Lane*, 114 Me. 333, 96 Atl. 233; *Gilson v. Gilson*, 2 Allen (Mass.) 115; *Hawkins v. Clermont*, 15 Mich. 511; *Bachmeier v. Bachmeier*, 69 Minn. 472, 72 N. W. 710; *Chase v. Peck*, 21 N. Y. 581; *Coleman v. Whitney*, 62 Vt. 123, 9 L. R. A. 517, 20 Atl. 322.

79c. *Cook v. Bartholomew*, 60 Conn. 24, 13 L. R. A. 452, 22 Atl. 444; *Bryant v. Erskine*, 55 Me.

153; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Chase v. Peck*, 21 N. Y. 581; *Henry v. Tupper*, 29 Vt. 358.

79d. *Gilson v. Gilson*, 2 Allen (Mass.) 115; *Soper v. Guernsey*, 71 Pa. St. 219.

79e. *Cook v. Bartholomew*, 60 Conn. 24, 13 L. R. A. 452, 22 Atl. 444; *Tuttle v. Burgett*, 53 Ohio St. 498, 30 L. R. A. 214, 53 Am. St. Rep. 649, 42 N. E. 427.

80. *Bryant v. Erskine*, 55 Me. 153; *Greenleaf v. Grounder*, 86 Me. 298, 29 Atl. 1082; *Bethlehem*

not transfer his rights under the mortgage, and thereby enable another to assert a forfeiture, even though the latter furnished the support.<sup>81</sup>

—(b) **Personal liability.** The obligation to secure the performance of which a mortgage is most usually given is the payment of an ascertained sum of money, and in such a case there is ordinarily executed, contemporaneously with the execution of the mortgage, a bond or note involving a personal obligation upon the part of the mortgagor, or occasionally of another person, for the payment of such sum. Such a separate instrument evidencing a personal liability is not, however, necessary to the validity of the mortgage,<sup>82</sup> and in its absence the mortgagor may be personally liable, by reason of an express covenant in the mortgage instrument, or the mortgagor or a third person may be so liable by reason of an oral contract to pay the sum secured.<sup>83</sup> And if there is no express contract, oral or written, to pay the sum secured, a contract to that effect may be inferred from the conduct of the parties.<sup>84</sup>

A mortgage is valid and effective as such only if, and in so far as, it secures a valid claim or obligation,<sup>85</sup> but there need not be a personal liability on the part

v. Annis, 40 N. H. 34, 77 Am. Dec. 700; *Flanders v. Lamphear*, 9 N. H. 201. That the heir of the mortgagor is not entitled to furnish the support after the mortgagor's death, see *Ridley v. Ridley*, 87 Me. 545, 32 Atl. 1005.

81. *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Bryant v. Erskine*, 55 Me. 153; *Daniels v. Eisenlord*, 10 Mich. 454.

82. *Post*, § 607(c).

83. *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957; *Scott v. Field*, 7 Watts (Pa.) 360.

84. *Flagg v. Mann*, 2 Sumn.

(U. S.) 486, 534, Fed. Cas. No. 4847; *Todd v. Todd*, 164 Cal. 255, 128 Pac. 413; *Twigg v. Berkeley*, 101 Va. 83, 43 S. E. 199; *Dexte Horton Nat. Bank v. Seattle Homeseeker's Co.*, 82 Wash. 480, 144 Pac. 691; *Schriber v. Le Clair*, 66 Wis. 579, 29 N. W. 570, 889; *Beebe v. Wisconsin Mortgage Loan Co.*, 117 Wis. 328, 93 N. W. 1103; *King v. King*, 3 P. Wms. 358; *Allenby v. Dalton*, 5 L. J. O. S. K. B. 312; *Yates v. Aston*, 4 Q. B. 182.

85. *Ante*, § 606, notes 69, 70.

of the mortgagor or another person. An express provision that there shall be no personal liability, while valid and effective, does not affect the validity of the mortgage,<sup>86</sup> the debt being in such case regarded as due by the land itself. So, in the majority of states, the mortgage remains valid, though an action to enforce the personal liability of the mortgagor is barred by limitations.<sup>87</sup> And the fact that the maker of the notes secured has been discharged from personal liability in a bankruptcy proceeding,<sup>88</sup> or that the note has been avoided by an alteration,<sup>89</sup> does not affect the lien of the mortgage or the right to enforce it.

A mortgage is perfectly valid though made to secure an indebtedness to a person other than the mortgagee.<sup>90</sup>

86. *Blake v. Askew & Brummett*, 112 Ark. 514, 166 S. W. 965; *Bacon v. Brown*, 19 Conn. 29; *Hoag v. Starr*, 69 Ill. 362; *Evans v. Holman*, 244 Ill. 596, 91 N. E. 723; *Gregory v. Van Vorst*, 85 Ind. 108; *Elmore v. Higgins*, 20 Iowa, 250; *Allison v. Hollembeck*, 138 Iowa, 479, 114 N. W. 1059; *Mills v. Darling*, 43 Me. 565; *Engley v. Sproul*, 115 Me. 463, 99 Atl. 443; *Rice v. Rice*, 4 Pick. (Mass.) 349; *Cook v. Johnson*, 165 Mass. 245; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369; *Seieroe v. First Nat. Bank*, 50 Neb. 612, 70 N. W. 220; *Mack v. Austin*, 95 N. Y. 513; *Mooney v. Byrne*, 163 N. Y. 86, 57 N. E. 163; *In re Nace's Estate*, 52 Pa. Super. Ct. 607; *Sappington v. Owens*, 92 Wash. 632, 159 Pac. 785; *Davis v. Demming*, 12 W. Va. 246; *South Sea Co. v. Duncomb*, 2 Strange, 919; *Mathew v. Blackmore*, 1 Hurlst. & N. 762.

87. *Post*, § 640(f).

88. *Bush v. Cooper*, 26 Miss. 599; *Brown v. Hoover*, 77 N. C. 40; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645. But see, as to the effect of a release from personal liability, *Bernheim v. Pessen*, 143 La. 609, 79 So. 23.

89. *Plyler v. Elliott*, 19 S. C. 257; *Smith v. Smith*, 27 S. C. 166, 13 Am. St. Rep. 633, 3 S. E. 78; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80.

90. See *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Chambers v. Prewitt*, 172 Ill. 615, 50 N. E. 145; *Newton Sav. Bank v. Howerton*, 163 Iowa, 677, 145 N. W. 292; *Hanrion v. Hanrion*, 73 Kan. 25, 117 Am. St. Rep. 453, 84 Pac. 381; *Albion State Bank v. Knickerbocker*, 125 Mich. 311, 84 N. W. 311; *Perkins v. Trinity Realty Co.*, 69 N. J. Eq. 723, 61 Atl. 167, 71 N. J. Eq. 304, 71 Atl. 1135; *Robbins v. Robbins*, 89 N. Y. 251; *Lawrenceville Cement Co. v. Parker*, 60 Hun (N. Y.) 586, 15 N.

— **Mortgage by married woman.** The question has occasionally arisen whether a mortgage executed by a married woman upon her separate property, to secure a debt for which she cannot be made personally liable, is valid and enforceable. In case the debt is the debt of another as well as of herself, the mortgage has, perhaps invariably, been regarded as valid, this presenting the simple case of a mortgage made by one to secure the debt of another.<sup>91</sup> If, however, the debt secured is one for which no other person is liable, a more difficult question is presented. If the debt can be regarded as non existent, because such as cannot be incurred by a married woman, it is difficult to see how the mortgage, made to secure such non existent debt, can be regarded as effective.<sup>92</sup> If, on the other hand, the debt is such as the wife has a right to incur with reference to her separate estate, and which, if so incurred, a court of equity will enforce against such estate, the debt cannot be regarded as non existent, although she is not personally liable thereon. The courts have occasionally adopted this view, to the extent of regarding the mortgage as sufficient to show that the debt was incurred with reference to the separate property which the mortgage purported to cover, so that equity would charge that property with the debt.<sup>93</sup>

Y. Supp. 577, 133 N. Y. 622, 30 N. E. 1150; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525.

91. *Johnson's Adm'r v. Ward*, 82 Ala. 486, 2 So. 524; *Kleindienst*, 18 Dist. Col. 356; *Cook v. Landrum*, 26 Ky. L. Rep. 813, 82 S. W. 585; *Bartlett v. Bartlett*, 4 Allen (Mass.) 440; *Russ v. Wingate*, 30 Miss. 440; *Conway v. Wilson*, — (N. J. Ch.) —, 11 Atl. 607; *Haffey v. Carey*, 73 Pa. St. 431.

92. To this effect see *Hodges v. Price*, 18 Fla. 342; *Heburn v.*

*Warner*, 112 Mass. 271, 17 Am. Rep. 86. The latter case is criticized at length in 10 Am. Law Rev. at p. 371. In *Burr v. Beckler*, 264 Ill. 230, 106 N. E. 206, the note of the wife being invalid by the law of the state where it was executed, the mortgage securing it in another state was regarded as nugatory.

93. *Patton v. Kinsman*, 17 Iowa, 428; *Heburn v. Warner*, 112 Mass. 271, 17 Am. Rep. 86; *Van Cott v. Heath*, 9 Wis. 516; See

It is not entirely clear why, if the debt can be regarded as existent for the purpose of being charged on the property, it should not be so regarded for the purpose of being secured by the mortgage.<sup>94</sup>

— (c) **Bond or note.** Formerly it was customary in England, for reasons connected with the enforcement of the personal claim against assets in the hands of the heir or devisee, in case of insufficiency of the mortgage security, that a bond for the payment of the sum secured be executed by the mortgagor, but such reasons are, as a result of the statutes making all assets of a decedent liable for his debts,<sup>94a</sup> no longer effective. And at the present time, in that jurisdiction, the execution of a separate instrument involving a personal liability is unusual. In this country the former English custom of the execution of a personal bond appears originally to have been adopted, and this custom still prevails in New York and Pennsylvania, and perhaps other states. Generally, however, the use of a bond for this purpose has been supplanted by the custom of signing a note, or a series of notes falling due at different times, in order to evidence a personal obligation to pay the sum secured by the mortgage.

The acceptance of the promissory note of a debtor, for the amount of the debt, contemporaneously with the creation of the debt, as when a purchaser of goods gives, at the time of purchase, a note for the price, is not usually regarded as involving a discharge of the debt.<sup>95</sup> And so, in the case of a mortgage, the fact that the debt secured is evidenced by a promissory note does not affect the existence of the debt itself, nor does it, in effect, make the mortgage operate as security for the note rather than for the debt as

Brookings v. White, 49 Me 471,  
opinion of Davis, J.

94. See 10 Am. Law Rev. at  
p. 374.

94a. *Ante*, § 552.

95. Byles, Bills (15th Ed.) ch.  
23; 22 Am. & Eng. Encyclopedia  
Law, 558; 30 Cyclopedia, Law &  
Proc. 1199.

evidence of which the note was given.<sup>96</sup> That this is so appears from the numerous decisions that a mortgage remains effective as a security although the note or notes do not remain the same.<sup>97</sup>

When a bond is given for the amount of the debt secured, as is the custom in some states, and was formerly the custom in England, the bond is, it seems, to be regarded, not as itself constituting the obligation secured by the mortgage, but rather as merely collateral security for the debt secured by the mortgage,<sup>98</sup> and a note so given has also been referred to as merely collateral security for the debt.<sup>98a</sup> Were the mortgage regarded as securing the bond or note, rather than the debt, it would result that by naming an excessive sum in the bond or note, the mortgage could be made effective as security for a much greater sum than that actually due, and opportunity for oppression and extortion would thus be presented.

In the case of a note or bond thus accompanying the mortgage, and executed contemporaneously therewith, the two instruments are, it is said, to be construed together, as constituting parts of one transaction.<sup>99</sup> In case of contradiction between the two, the

96. *Simmons Hardware Co. v. Thomas*, 147 Ind. 313, 46 N. E. 645; *Clough v. Seay*, 49 Iowa. 111; *Buck v. Wood*, 85 Me. 204, 27 Atl. 103; *Bartlett v. Bartlett*, 4 All. (Mass.) 440; *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821; *Hill v. Beebe*, 13 N. Y. 556; *Williams v. Stair*, 5 Wis. 534; *Each v. Cosby*, 26 Gratt. (Va.) 112.

97. *Post*, § 640(h).

98. Coote, *Mortgages* (8th Ed.) 82; 1 Powell, *Mortgages*, 61; *Clarke v. Abingdon*, 17 Ves. 106; *Nichols v. Briggs*, 18 S. C. 473.

98a. *Campbell v. Beach*, 60 N. Y. 218, per Andrews, J.

99. *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Taylor v. American Nat. Bank of Pensacola*, Florida, 63 Fla. 631, Ann. Cas. 1914 A 309, 57 So. 678; *Clark v. Paddock*, 24 Idaho, 142, 46 L. R. A. (N. S.) 475, 132 Pac. 795; *Boley v. Lake St. Elevated R. Co.*, 64 Ill. App. 305; *Wilson v. Reed*, 270 Mo. 400, 193 S. W. 819; *Garnett v. Meyers*, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; *Collins Inv. Co. v. Sanner*, 42 Okla. 634, 142 Pac. 318; *Green v. Frick*, 25 S. D. 342, 126 N. W. 579; *Bell v. Engvolsen*, 64 Wash. 33, 116 Pac. 456.



note or bond, it has been held, will control, as being the principal thing.<sup>1</sup>

— (d) **Description in mortgage—Definiteness required.** The degree of accuracy which is necessary in the mortgage instrument, with reference to the description of the debt secured, is a matter upon which the cases are in a state of very considerable confusion. Occasionally it has been asserted that a mortgage instrument is invalid if it fails to name a particular sum as being the amount of the debt secured, provided the amount can be regarded as ascertained at the time of execution.<sup>2</sup> But more generally a statement of the amount of the debt is not required, it being sufficient if the debt is otherwise so described that persons interested are directed to the proper sources of information as to the amount.<sup>3</sup> And in most if not all jurisdictions, a mortgage not naming any amount is valid if the indebtedness is not ascertained, or perhaps, capable of ready ascertainment, at the time of the execution of the mortgage. So a mortgage to secure future advances,<sup>4</sup> or to indemnify a guarantor or surety,<sup>5</sup> is valid, although the aggregate of the advances to be made or of the indemnity to be furnished is not

1. *Indiana & I. Cent. Ry. Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554; *Hutchinson v. Benedict*, 49 Kan. 545; *Tipton v. Ellsworth*, 18 Idaho, 207, 109 Pac. 134.

2. *Hart v. Chalker*, 14 Conn. 77; *Pearce v. Hall*, 12 Bush (Ky.) 209; *Bullock v. Battenhausen*, 108 Ill. 28. Compare *Gardner v. Cohn*, 191 Ill. 553, 61 N. E. 492, where the mortgage was upheld, though it stated the sum secured only indirectly, by naming the rate of interest and amount of interest payments.

3. *Fetes v. O'Laughlin*, 62 Iowa, 532, 17 N. W. 764; *Williams v.*

*Moniteau Nat. Bk.*, 72 Mo. 292; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Somersworth Bank v. Roberts*, 38 N. H. 22; *Burnett v. Wright*, 135 N. Y. 543, 32 N. E. 253; *Seymour v. Darrow*, 31 Vt. 122; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287.

4. *Robinson v. Williams*, 22 N. Y. 380; *Anglo-Californian Bank v. Cerf*, 147 Cal. 384, 81 Pac. 1077; *McDaniel v. Colvin*, 16 Vt. 300; *Keyes v. Bump's Adm'r*, 59 Vt. 391, 9 Atl. 598; *Campbell v. Perth Amboy Shipbuilding & Engineering Co.*, 70 N. J. Eq. 40, 62 Atl. 319, 71 N. J. Eq. 302, 71 Atl. 1133.

stated, and a mortgage may be made to secure such sum as may be found due upon a settlement of accounts between certain persons.<sup>6</sup>

In regard to this question of the necessity of stating the amount of the debt secured or at least its outside limit, it has been well said that "if the mortgage were to limit the amount of the security, as not exceeding two thousand dollars or two hundred thousand dollars in all, either of which sums might be adopted with equal propriety, when the sum really intended to be secured was less than fifty dollars, it is obvious that it could afford no security against possible fraud,"<sup>7</sup> and that it will generally be found that the interest of a mortgagor to have the amount of the incumbrance stated, with a view to his future dealings, and the interest of the mortgagee to be able to make, when needed, a transfer of the claim and the security, will induce a reasonable certainty in the condition of mortgages.<sup>8</sup>

As regards the necessity of a specific description of the debt, otherwise than in reference to amount, no particular strictness appears to exist, except perhaps in the state of Connecticut.<sup>9</sup> While in a number of cases it is said to be sufficient that the obligation secured is described in the mortgage with "reasonable certainty,"<sup>10</sup> a description in quite general terms, as in the

Citizens' Sav. Bank v. Kock, 117 Mich. 225, 75 N. W. 458.

5. Youngs v. Wilson, 27 N. Y. 351; Soule v. Albee, 31 Vt. 142; But in Connecticut the maximum amount of the obligation must be named. Bridgeport Land & Title Co. v. George Orlove Co., 91 Conn. 496, 100 Atl. 30.

6. Stoughton v. Pascoe, 5 Conn. 442, 13 Am. Dec. 72; Holley's Ex'r v. Curry, 58 W. Va. 70, 112 Am. St. Rep. 944, 51 S. E. 135.

7. Seymour v. Darrow, 31 Vt. 122, per Redfield, C. J.

8. Hurd v. Robinson, 11 Ohio St. 232, per Gholson, J.

9. See, as instances of the strictness enforced in this respect in Connecticut, Pettibone v. Griswold, 4 Conn. 158; Bramhall v. Flood, 41 Conn. 68. The course of decision in this state in this regard has been criticized in other states. See Hurd v. Robinson, 11 Ohio St. 232; Clark v. Hyman, 55 Iowa, 14, 39 Am. Rep. 160, 7 N. W. 386.

10. Winchell v. Coney, 54 Conn. 24, 5 Atl. 354; Beach v. Osborne,

case of a mortgage undertaking to secure all debts owing or which may be owing by the mortgagor to the mortgagee, has been not infrequently upheld.<sup>11</sup> And a mortgage in terms merely securing an indebtedness to a certain amount has been regarded as valid security for future advances to that amount.<sup>12</sup>

— **Application of description.** A question has frequently arisen whether a particular debt could be regarded as within the language of the mortgage instrument descriptive of the indebtedness secured, so as to entitle that particular debt to the benefit of the security. This would seem to be a question of the interpretation and application of the language used, in the light of the surrounding circumstances, as in the case of any other language of a descriptive character.<sup>12a</sup> It cannot be required that the language name all the details of the debt intended to be secured, provided enough are named to identify the debt.<sup>13</sup> That this is so appears from the decisions that the amount of the debt need not be stated.<sup>14</sup> And so when the amount of the debt was correctly stated, it was regarded as immaterial that no reference was made to the fact that the debt was

74 Conn. 405, 50 Atl. 1019, 1118; *Pearce v. Hall*, 12 Bush. (Ky.) 209; *Webb v. Stone*, 24 N. H. 282; *Gilman v. Moody*, 43 N. H. 259; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287.

11. *Curtis v. Flinn*, 46 Ark. 70; *Hoye v. Burford*, 68 Ark. 256, 57 S. W. 795; *Machette v. Wanless*, 1 Colo. 225; *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160, 7 N. W. 386; *Michigan Ins. Co. v. Brown*, 11 Mich. 266; *Hogdon v. Sharmon*, 44 N. H. 572; *Hurd v. Robinson*, 11 Ohio St. 232; *Seymour v. Darrow*, 31 Vt. 122; *Vanmeter v. Vanmeter*, 3 Gratt. (Va.) 148.

12. *Shirras v. Caig*, 7 Cranch U. S.) 54, 3 L. Ed. 260; *Moses v. Hatfield*, 27 S. C. 324, 3 S. E. 538. See *Mix v. Cowles*, 20 Conn. 420; and *post*, this section, note 35, and § 637, note 83.

12a. See *Lines v. Brandon*, 129 Ark. 27, 194 S. W. 867; *Lamoille County Sav. Bank Trust Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002.

13. *Webb v. Stone*, 24 N. H. 282; *Winchell v. Coney*, 54 Conn. 24, 5 Atl. 354; *Hill v. Banks*, 61 Conn. 25, 23 Atl. 712; See 4 Wigmore, Evidence, § 2476.

14. *Ante*, this section, note 3.

evidenced by a number of notes for different sums, aggregating the amount of the debt.<sup>15</sup>

Applying the doctrine ordinarily referred to by the maxim *falsa demonstratio non nocet*,<sup>16</sup> the fact that a particular debt does not answer to some details of the description does not have the effect of excluding it from the benefit of the security, provided those details can be regarded as non essential.<sup>17</sup> Whether particular terms of the description are thus essential or non essential is to be determined with reference to the facts of the particular case, and in considering whether a particular debt can be regarded as within the description, a considerable discrepancy between the debt and the terms of description in the mortgage instrument might suffice to exclude the debt from the benefit of the security, not only as rendering it less possible, by extrinsic evidence, to bring the debt within the scope of the description, but also for the reason that otherwise the mortgage might operate injuriously upon the interests of subsequent purchasers, mortgagees or creditors, who had no reason to suppose that the particular debt in question was secured thereby, and dealt with the mortgagor on the theory that the debt secured was no other than that described in the mortgage instrument.<sup>18</sup> Accordingly, while a slight discrepancy

15. *Wood v. Weimar*, 104 U. S. 786, 26 L. Ed. 779; *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160, 7 N. W. 386. But see *Jewett v. Preston*, 27 Me. 400.

16. 4 Wigmore, Evidence, § 2476.

17. *Aull v. Lee*, 61 Mo. 160; *Gilman v. Moody*, 43 N. H. 239; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Fowler v. Woodward*, 26 Minn. 347, 4 N. W. 231; *Nazoo v. Ware*, 38 Minn. 443, 38 N. W. 359; *Riggs v. Arm-*

*strong*, 23 W. Va. 760.

18. It has been said, in this connection, that the description of the debt must be correct so far as it goes, and full enough to direct attention to the sources of correct information in regard to it, and be such a description of the debt as not to mislead or deceive as to its nature or amount. *Bowen v. Ratchiff*, 140 Ind. 393, 49 Am. St. Rep. 203, 39 N. E. 860; *Goff v. Price*, 42 W. Va. 384, 26 S. E. 287; *Morris v. Murray*, 82 Ky. 36.

between the amount which the mortgage undertakes to secure and the amount of a debt claimed to be secured thereby will not exclude the debt from the benefit of the security,<sup>19</sup> particularly if the mortgage describes the debt as "about" a certain amount,<sup>20</sup> a very great discrepancy as regards the amount may have that effect, particularly if the amount named in the mortgage is the smaller amount, since in that case the debt can not well be regarded as a part of the entire indebtedness secured, and a third person dealing with the mortgagor has a right to assume that a mortgage for an amount named is not for a much greater amount.<sup>21</sup> And while it has been held that a debt was within the language of the mortgage instrument, and was therefore entitled to the benefit of the security, although the time of maturity of the debt was misstated,<sup>22</sup> the name of the indorsee of the note was given as that of the payee,<sup>23</sup> the name of one of the five obligors was omitted,<sup>24</sup> or the collateral bond was described as in favor of the mortgagees while in reality in favor of the mortgagees and two others,<sup>25</sup> it has on the other hand been decided that a mortgage in terms securing an absolute indebtedness could not be construed as securing a contingent indebtedness as guarantor or surety, at least as against a bona fide purchaser.<sup>26</sup>

19. *Clark v. Hyman*, 55 Iowa, 14, 39 Am. Rep. 160, 7 N. W. 386.

20. See *Booth v. Barnum*, 9 Conn. 286, 23 Am. Dec. 339; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Hightower v. Wray*, 106 Tenn. 336, 61 S. W. 83.

21. See *Storms v. Storms*, 3 Bush, 77; *Hightower v. Wray*, 106 Tenn. 336, 61 S. W. 83. The mention of a consideration for the mortgage does not control the clause stating the sum intended to be secured. *Keyes v. Bump's Adm'r*, 59 Vt. 391, 9 Atl. 598;

*Scott v. Thomas*, 104 Va. 330, 51 S. E. 829.

22. *Campbell v. Perth Amboy Shipbuilding & Engineering Co.*, 70 N. J. Eq. 40, 62 Atl. 319; *Burne v. Littlefield*, 29 Me. 302.

23. *Aull v. Lee*, 61 Mo. 160.

24. *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210.

25. *Jackson v. Bowen*, 7 Cow. (N. Y.) 19.

26. *Stearns v. Porter*, 46 Conn. 313. See *Doyle v. White*, 26 Me. 341, 45 Am. Dec. 110. In *Powell v. Huey*, 241 Ill. 132, 89 N. E. 299,

Regarding the bond or note accompanying the mortgage as merely an evidence of personal liability or as collateral security for the debt secured by the mortgage, and not as itself constituting the obligation secured,<sup>27</sup> the fact that the mortgage in terms undertakes to secure a note, which note is not executed, would seem to be immaterial if it clearly appears that the mortgage was intended to secure an actually existent debt.<sup>28</sup> And so the fact that the mortgage describes the debt as evidenced by a note, while it is actually evidenced by a bond and not by a note, has been regarded as immaterial.<sup>29</sup> And this seems a necessary consequence of the well settled rule,<sup>30</sup> that a change in the form or evidence of indebtedness does not affect the security, the debt remaining the same.<sup>31</sup>

In order to aid in the interpretation and application of the language of the mortgage instrument descriptive of the debt secured, so as to determine whether a particular debt is to be regarded as included therein, extrinsic evidence as to the surrounding circumstances and the existing pecuniary relations between the parties is freely admitted,<sup>32</sup> while in the absence of such

such discrepancy was decided to be no defense to foreclosure.

27. *Ante*, this section, notes 95, 98

28. It is so decided in *Lee v. Fletcher*, 46 Minn. 49, 12 L. R. A. 171, 48 N. W. 456; *Eacho v. Cosby*, 26 Gratt. (Va.) 112; *Murphy's Hotel Co. v. Herndon's Adm'r*, 120 Va. 505, 91 S. E. 634. But see *Ogden v. Ogden*, 180 Ill. 543, 54 N. E. 750; *Bramhall v. Flood*, 41 Conn. 68; *Leader Pub. Co. v. Grant Trust & Savings Co.*, 174 Ind. 192, 91 N. E. 498.

29. *Scott v. Bailey*, 23 Mo. 140. See *Jackson v. Bowen*, 7 Cow. (N. Y.) 13.

30. *Post*, § 640(h).

31. See *Seymour v. Darrow*, 31 Vt. 122.

32. *Gunn v. Jones*, 67 Ga. 398; *Babcock v. Lisk*, 57 Ill. 327; *Burne v. Littlefield*, 29 Me. 302; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Snow v. Pressey*, 85 Me. 408, 27 Atl. 272; *Johns v. Church*, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; *Baxter v. McIntire*, 13 Gray (Mass.) 168; *Williams v. Moniteau Nat. Bank*, 72 Mo. 392; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *State Bank of Syracuse v. Lighthall*, 46

evidence the mortgage can be regarded as security only for such debt as is clearly within the language used.<sup>33</sup> And so extrinsic evidence is admitted for the purpose of identifying the obligation secured by the mortgage, even though it conflicts with some of the terms of the description of the obligation as set forth in the mortgage instrument.<sup>34</sup> And it may thus be shown that though the mortgage secures a debt in general terms, it is in reality security for future advances.<sup>35</sup> Likewise, since a mortgage can be enforced only for the debt actually secured,<sup>36</sup> it may be shown that there is no debt as security for which it can be enforced,<sup>37</sup> or that the actual debt is less than that expressed.<sup>38</sup>

— **Extension to other debts.** A mortgage which is in terms security for a certain amount cannot, as against third persons, be extended by agreement between the mortgagor and mortgagee so as to cover a

N. Y. App. Div. 396, 61 N. Y. Supp. 794.

33. *New v. Sailors*, 114 Ind. 407, 16 N. E. 609; *Bowen v. Ratcliff*, 140 Ind. 393, 49 Am. St. Rep. 203, 39 N. E. 860.

34. *Doe d. Duval's Heirs v. McLoskey*, 1 Ala. 708; *Babcock v. Lisk*, 57 Ill. 327; *Aull v. Lee*, 61 Mo. 160; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Boody v. Davis*, 20 N. H. 140, 51 Am. Dec. 210; *Baxter v. McIntire*, 13 Gray 168; *Hall v. Tefts*, 18 Pick. (Mass.) 455.

35. *Huckaba v. Abbott*, 87 Ala. 409, 6 So. 48; *Louisville Banking Co. v. Leonard*, 90 Ky. 106, 13 S. W. 521; *Farr v. Nichols*, 132 N. Y. 327, 30 N. E. 834; *Moses v. Hatfield*, 27 S. C. 324, 3 S. E. 538. And *ante*, this section note 12.

36. *Ante*, § 606, notes 69, 70.

3 R. P.—10

37. *Hannan v. Hannan*, 123 Mass. 441; *Saunders v. Dunn*, 175 Mass. 164, 55 N. E. 893; *Baird v. Baird*, 145 N. Y. 659, 28 L. R. A. 375, 40 N. E. 222; *Lucas v. Hendrix*, 92 Ind. 54; *Miexsell v. Walton*, 49 Kan. 255, 30 Pac. 410.

38. *Vogan v. Caminetti*, 65 Cal. 438, 4 Pac. 435; *Rice v. Rice*, 101 Kan. 20, 165 Pac. 799; *Ruloff v. Hazen*, 124 Mich. 570, 83 N. W. 370; *Nazro v. Ware*, 38 Minn. 443, 38 N. W. 359; *Lee v. Fletcher*, 46 Minn. 49, 12 L. R. A. 171, 48 N. W. 456; *Burnett v. Wright*, 135 N. Y. 543, 32 N. E. 253; *Van Deventer v. Stiger*, 25 N. J. Eq. 224; *Mackey v. Brownfield*, 13 Serg. & R. (Pa.) 239; *Riggs v. Armstrong*, 23 W. Va. 761; *Heidtke v. Krause*, 97 Wis. 118, 72 N. W. 351. But see *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399.

greater sum advanced by the latter to the former.<sup>39</sup> But, as between the parties to the mortgage, an agreement, made after its execution, that it shall be security for a debt other than that which it was first intended to secure, is effective,<sup>40</sup> this constituting in effect an equitable lien on the land for such additional sum.<sup>41</sup> Such a subsequent agreement must, by a number of cases, be in writing,<sup>42</sup> though in at least two states it has been held that even if it is oral merely, the mortgagor, or a purchaser with notice, cannot redeem without repaying such other debt as well as that originally secured.<sup>43</sup> It is obvious that

39. *Schiffer v. Feagin*, 51 Ala. 335, *Fuller v. Griffith*, 91 Iowa, 632, 60 N. W. 247; *Hughes v. Worley*, 1 Bibb (Ky.) 200; *Brown v. Hardcastle*, 63 Md. 484; *McGready v. McGready*, 17 Mo. 597; *Large v. Van Doren*, 14 N. J. Eq. 208; *McCaughrin v. Williams*, 15 S. C. 505; *Whitney v. Metallic Window Screen Mfg. Co.*, 187 Mass. 557, 73 N. E. 663 (attaching creditor without notice of agreement); *Siter v. McClanahan*, 2 Gratt. (Va.) 280; *Pettis v. Darling*, 57 Vt. 647; *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1.

40. *Wylly v. Screven*, 98 Ga. 213, 25 S. E. 435; *State Mut. Building & Loan Ass'n of New Jersey v. New Jersey & Millville Improvement Co.*, 74 N. J. Eq. 721, 70 Atl. 300, 76 N. J. Eq. 336, 75 Atl. 1101. This appears to be assumed in most of the cases cited in note 42 *infra*.

When the agreement is indorsed on the original instrument, and duly executed and delivered, it may operate as a new mortgage from the date of such delivery. *Choteau v. Thompson*, 2 Ohio St.

114. As to an indorsement of such an agreement upon a separate defeasance, see *McClure v. Smith*, 115 Ga. 709, 42 S. E. 53.

41. *Post*, § 661.

42. *Morris v. Alston*, 92 Ala. 502, 9 So. 315; *Hughes v. Johnson*, 38 Ark. 285; *Johnson v. Anderson*, 30 Ark. 745; *Fleming v. Georgia Railroad Bank*, 120 Ga. 1023, 48 S. E. 420; *Merrill v. Chase*, 3 Allen (Mass.) 339; *Joslyn v. Wyse*, 5 Allen (Mass.) 62; *Parkes v. Parkes*, 57 Mich. 57, 23 N. W. 458; *Stoddard v. Hart*, 23 N. Y. 556; *Thomas' Appeal*, 30 Pa. 378; *Lindsay v. Garvin*, 31 S. C. 259, 5 L. R. A. 219, 9 S. E. 862; *O'Neill v. Bennett*, 33 S. C. 243, 11 S. E. 727. But see *Ferry v. Meckert*, 32 N. J. Eq. 38; *Esterly v. Purdy*, 50 How. Pr. (N. Y.) 350, apparently to the effect that a written agreement is unnecessary.

43. *Hayhurst v. Morin*, 104 Me. 169, 71 Atl. 707; *Joslyn v. Wyse*, 5 Allen (Mass.) 62; *Stone v. Lane*, 10 Allen (Mass.) 74; *Upton v. National Bank*, 120 Mass. 153. See *Whitney v. Metallic Window*



the mortgage creditor cannot, in the absence of any agreement to that effect, assert that the mortgage secures a debt other than that which it was made to secure.<sup>44</sup>

§ 608. **Legality of purpose of mortgage.** A mortgage is invalid if made for an illegal purpose, as, for instance, when it is the price of future cohabitation,<sup>45</sup> when it is given to obtain the suppression of a criminal prosecution,<sup>46</sup> or when it is made for the purpose of defrauding creditors,<sup>47</sup> or as part of a champertous agreement.<sup>48</sup> And so a mortgage given to secure a debt of an illegal character, such as for liquor sold in violation of law,<sup>49</sup> or a gambling debt,<sup>50</sup> will not be enforced. And a like view has been asserted as to a debt for money loaned in notes of the Confederate States.<sup>51</sup>

A mortgage which is made to secure payment of a debt consisting partly of legal and partly of illegal

Screen Mfg. Co., 187 Mass. 557, 73 N. E. 663; Brooks v. Brooks, 169 Mass. 38, 47 N. E. 448; O'Neill v. Bennett, 33 S. C. 243, 11 S. E. 727.

44. See Neumann v. Moretti, 146 Cal. 25, 79 Pac. 510; Lewter v. Price, 25 Fla. 574, 6 So. 439; Briggs v. Steele, 91 Ark. 458, 121 S. W. 754.

45. W—— v. B——, 32 Beav. 574. An obligation under seal, based on past intercourse, is not invalid, Pollock, Contracts (Williston's Ed.) 411, and a mortgage securing such an obligation would be valid.

46. Small v. Williams, 87 Ga. 681, 13 S. E. 589; Owens v. Green, 103 Ky. 342, 45 S. W. 84; Peed v. McKee, 42 Iowa 689; Atwood v. Fiske, 101 Mass. 363, 100 Am. Dec. 124; Meech v. Lee, 82 Mich.

274, 46 N. W. 383; Pearce v. Wilson, 111 Pa. St. 14, 56 Am. Rep. 243, 2 Atl. 99.

47. McQuade v. Rosecrans, 36 Ohio St. 442; Weeden v. Hawes, 10 Conn. 50; Norris v. Norris, 9 Dana (Ky.) 317, 35 Am. Dec. 138.

48. Gilbert v. Holmes, 68 Ill. 548.

49. Baker v. Collins, 9 Allen. (Mass.) 253; Ressegieu v. Van Wagenen, 77 Iowa 351, 42 N. W. 318.

50. International Bank of Chicago v. Vankirk, 39 Ill. App. 23; Ellsworth v. Mitchell, 31 Me. 257; Barnard v. Backhaus, 52 Wis. 593, 6 N. W. 252, 9 N. W. 595; Hudson v. Moon, 42 Utah 377, 130 Pac. 774.

51. Stillman v. Looney, 3 Cold. (Tenn.) 20. *Contra*, Scheible v. Eacho, 41 Ala. 423.

items has usually been regarded as valid security for the former, if these can be separated from the latter.<sup>52</sup> Occasional decisions to the effect that if the mortgage is accompanied by a single note for the amount secured, and this amount is made up of items some of which are legal and some illegal the mortgage is invalid as to the whole amount,<sup>53</sup> appear to assume that the mortgage secures the note, rather than the debt or debts evidenced by the note, a view which is not ordinarily adopted.<sup>54</sup> The legal items are recoverable by action,<sup>55</sup> and consequently, it is conceived, the mortgage is properly enforceable in so far as it secures such items.<sup>56</sup>

Decisions that a mortgage, made for the purpose of obtaining the suppression of a criminal prosecution for money embezzled and also to secure the payment of the money embezzled, is void *in toto*,<sup>57</sup> appear to involve merely an application of the rule that if any part of a single consideration for a promise is unlawful, the promise is wholly void.<sup>58</sup> In such case the indebtedness to be secured by the mortgage is non existent, and the mortgage is consequently nugatory.

## II. RIGHTS AND LIABILITIES INCIDENT TO THE MORTGAGE RELATION.

§ 609. **Nature of the mortgagor's interest.** Even in jurisdictions in which the title theory of a mortgage

52. Judd v. Flint, 4 Gray (Mass.) 557; Carradine v. Wilson, 61 Miss. 573; Feldman v. Gamble, 26 N. J. Eq. 494; Morris v. Wray, 16 Ohio, 469; Corbett v. Woodward, 5 Sawy. 403; Sheehy v. Sheehy, L. R. 1 Ir. (1901), 239.

53. McQuade v. Rosecrans, 36 Ohio St. 442; Brigham v. Potter, 14 Gray (Mass.) 522; Bick v. Seal, 45 Mo. App. 475.

54. *Ante*, § 605, notes 96, 98.

55. Pollock, Contracts (Williston's Ed.) 483 note; 1 Daniel, Neg. Inst. (5th Ed.) § 204.

56. Shaw v. Carpenter, 54 Vt. 155, is to this effect.

57. Small v. Williams, 87 Ga. 681, 13 S. E. 589; Pearce v. Wilson, 111 Pa. St. 14, 56 Am. Rep. 243, 2 Atl. 99.

58. Pollock, Contracts (Willis-

is adopted, the mortgagor is for most purposes regarded as the substantial owner of the land.<sup>59</sup> In jurisdictions in which the lien theory is adopted, there can obviously be no question that the mortgagor is the owner.

The expression "equity of redemption" is almost invariably applied to the interest of the mortgagor in the mortgaged land, even in states in which it is recognized that the mortgagee has a lien merely. In view of the fact that the mortgagor has, in all the states, much more than a mere right to go into equity to redeem, that he is, in effect, the substantial owner of the property, the expression referred to is evidently far from appropriate for the purpose of describing his interest. Even at common law, the mortgagor had a right of re-entry provided he paid the debt at the time named, and consequently it could never have been truly said that the mortgagor's only right is that, recognized by equity, to extinguish the mortgage by payment even after default, the right, that is, to redeem. It is only after default, and only in states in which the title theory of a mortgage is fully recognized, that the expression "equity of redemption" correctly describes the mortgagor's interest in the land. Its use to describe the mortgagor's interest even before default is, however, so thoroughly established, that it is not likely to be discontinued, even by

ton's Ed.) 483; Hammon, *Contracts*, 467.

59. *Casborne v. Scarfe*, 1 Atk. 603; *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29, 4 So. 670; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *City of Chicago v. Sullivan Machinery Co.*, 269 Ill. 58, 109 N. E. 696; *White v. Ritter*,

*meyer*, 30 Iowa, 268; *Wilkins v. French*, 20 Me. 111; *Annapolis & E. R. R. Co. v. Gantt*, 39 Md. 115; *Willington v. Gale*, 7 Mass. 138; *White v. Whitney*, 3 Metc. (Mass.) 81; *Trustees of Donations v. Streeter*, 64 N. H. 106; *Den d. Dimon v. Dimon*, 10 N. J. L. 156; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 590, 5 Am. Dec. 229.

the courts which go furthest in repudiating the ideas on which the expression is based.

The mortgagor may convey or devise the land, subject to the rights of the mortgagee,<sup>60</sup> and he may dispose of a less interest than his own by way of lease.<sup>61</sup> Upon the death intestate of the mortgagor or of the mortgagor's transferee, his estate in the land passes to his heirs or otherwise, in the same way as if there were no mortgage,<sup>62</sup> and the widow is entitled to dower, and the husband to curtesy.<sup>63-64</sup> The mortgagor, or his transferee, may make a second mortgage of the property, or, in fact, any number of mortgages in succession, each mortgagee taking subject to any prior mortgage of which he has notice. The owner of the property, whether the original mortgagor or his transferee, can obviously not transfer the property free of the mortgage, except to one not affected with notice thereof.<sup>65</sup> So he cannot, by a dedication of the property for a public use, affect the rights of the mortgage creditor.<sup>66</sup> Nor can he create<sup>67</sup> or abandon<sup>68</sup> a private easement, so as to affect the mortgage lien.

§ 610. Nature of the mortgagee's interest. The mortgagee has, as before stated, in some of the states,

60. *Casborne v. Scarfe*, 1 Atk. 603; *Clark v. Reyburn*, 8 Wall. (U. S.) 318, 19 L. Ed. 354; *Denham v. Kirkpatrick*, 64 Ga. 71; *Moore v. Anders*, 14 Ark. 630, 60 Am. Dec. 551; *Medley v. Elliott*, 62 Ill. 332; *White v. Whitney*, 3 Metc. (Mass.) 81. *Post*, § 618.

61. *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401; *Hutchinson v. Dearing*, 20 Ala. 798; *Kennett v. Plummer*, 28 Mo. 142. See *post*, § 614.

62. *Burgess v. Wheate*, 1 W. Bl. 123; *White v. Rittenmyer*, 30 Iowa, 268; *Packer v. Rochester & S. R. Co.*, 17 N. Y. 283.

63-64. See *ante*, §§ 216, 241.

65. *Ante*, §§ 566, 568.

66. *City of Alton v. Fishback*, 181 Ill. 396, 55 N. E. 150; *McShane v. Moberly*, 79 Mo. 41; *Hague v. West Hoboken*, 23 N. J. Eq. 354; *Walker v. Summers*, 9 W. Va. 533; *Kiernan v. Jersey City*, 80 N. J. L. 273, 31 L. R. A. (N. S.) 1023, 78 Atl. 228.

67. *Murphy v. Welch*, 128 Mass. 489; *Sims v. Field*, 66 Mo. 111; *Teachout v. Duffus* (Iowa), 115 N. W. 1010.

68. *Duval v. Becker*, 81 Md. 537, 32 Atl. 308.

as in England, the legal title to the land. This title, however, does not make him the owner of the land, except in so far as the exercise of the rights of an owner is necessary or desirable for the protection of his security.<sup>69</sup> Accordingly, his interest, as being a mere chose in action, a right to subject the land to his claim, is regarded as personal property, although the property mortgaged is freehold, and, on his death intestate, it passes to his personal representatives, and not to his heirs.<sup>70</sup> So, the mortgagee's interest before foreclosure is, as being a mere chose in action, not subject to levy under execution against him.<sup>71</sup>

In jurisdictions where the mortgagee has the legal title, he may bring ejectment against any person wrongfully in possession of the land,<sup>72</sup> and, being en-

69. *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29, 4 So. 670; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Wilkins v. French*, 20 Me. 111; *Norcross v. Norcross*, 105 Mass. 265; *Ellison v. Daniels*, 11 N. H. 274; *Shields v. Lozeur*, 34 N. J. L. 496, 3 Am. Rep. 256.

70. *Baldwin v. Hatchett*, 56 Ala. 461; *Mills v. Shepard*, 30 Conn. 98; *Stevenson v. Polk*, 71 Iowa, 278, 290, 32 N. W. 340; *Webster v. Calden*, 56 Me. 204; *Steel v. Steel*, 4 Allen (Mass.) 417; *Buckley v. Daley*, 45 Miss. 338; *Ladd v. Wiggin*, 35 N. H. 421; *Terhune v. Bray's Ex'rs*, 16 N. J. L. 54; *Collamer v. Langdon*, 29 Vt. 32. Formerly in England the mortgage passed as real property to the heir, who held it in trust for the personal representative. This was changed by statute (44 & 45 Vict. c. 41 § 30) providing that the mortgagee's in-

terest should pass to the personal representative.

71. *Morris v. Barker*, 82 Ala. 272, 2 So. 335; *Trapnall's Adm'x v. State Bank*, 18 Ark. 53; *Huntington v. Smith*, 4 Conn. 235; *Brown v. Bates*, 55 Me. 520, 92 Am. Dec. 613; *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Butman v. James*, 34 Minn. 547, 27 N. W. 66; *Brooks v. Kelly*, 63 Miss. 616; *Glass v. Ellison*, 9 N. H. 69; *Jackson v. Willard*, 4 Johns. (N. Y.) 41; *Rickert v. Madeira*, 1 Rawle (Pa.) 325. So as to the interest of one to whom the land is conveyed by an absolute deed for purposes of security. *Harman v. May*, 40 Ark. 146; *Eherke v. Hecht*, 96 Iowa, 96; *Butman v. James*, 34 Minn. 547, 27 N. W. 66.

72. 4 Kent's Comm. 164; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354; *Keith v. Swan*, 11 Mass. 216;

titled to the possession as against the mortgagor,<sup>73</sup> may sue him in that form of action.<sup>74</sup> But even in such states, a third person sued in ejectment by the mortgagor is usually not allowed to set up as a defense the outstanding legal title in the mortgagee.<sup>75</sup> In some of such states, the foreclosure of the equity of redemption is ordinarily by means of a common-law action based on the existence of a legal title in the mortgagee.<sup>76</sup>

In jurisdictions where the theory of a legal title in the mortgagee is adopted, the mortgagee of a leasehold estate has been held liable, as an assignee, upon covenants contained in the lease.<sup>77</sup> Where, however, the purely equitable conception of a mortgage prevails, the rule is otherwise, except, according to some decisions, when the mortgagee takes possession.<sup>78</sup>

**§ 611. The relation not fiduciary.** Though the mortgagee has, in those states in which the common-law theory of a mortgage is adopted, the legal title, while the mortgagor has an equitable interest, the re-

*Euckley v. Daley*, 45 Miss. 338; *Hobart v. Sanborn*, 13 N. H. 226, 38 Am. Dec. 483; *Drayton v. Marshall*, 1 Rice Eq. (S. C.) 373, 33 Am. Dec. 84.

73. See *post*, § 610.

74. *Keech v. Hall*, 1 Doug. 21; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Doe d. Shute v. Grimes*, 7 Blackf. (Ind.) 1; *Brastow v. Barrett*, 82 Me. 456, 19 Atl. 916; *Tryon v. Munson*, 77 Pa. St. 250.

75. *Allen v. Kellam*, 69 Ala. 447; *Denby v. Melligrew*, 58 Ala. 147; *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52; *Burr v. Spencer*, 26 Conn. 159, 68 Am. Dec. 379; *Hall v. Lance*, 25 Ill. 277; *Stinson v. Ross*, 51 Me. 556, 81 Am.

Dec. 591 (writ of entry); *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Ellison v. Daniels*, 11 N. H. 274 (writ of entry); *Den d. Dimon v. Dimon*, 10 N. J. L. 156.

76. See *post*, § 652.

77. *McMurphy v. Minot*, 4 N. H. 251 (compare *Trustees of Donations v. Streeter*, 64 N. H. 106); *Williams v. Bosanquet*, 1 Brod. & B. 238; *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh (Va.) 69; *Mayhew v. Hardesty*, 8 Md. 479.

78. *Astor v. Hoyt*, 5 Wend. (N. Y.) 603; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *McKee v. Angelrodt*, 16 Mo. 283. See 1 *Tiffany, Landlord & Tenant*, § 158a(2) (f).

lation is not one of trust, but is adversary, rather, in its nature.<sup>79</sup> The position of the mortgagee is, however, similar to that of a trustee, in that, having procured the title, and perhaps the right of possession, for one purpose, that is, to secure his debt, he cannot utilize it for another purpose, that is, to make profits for his own advantage. Accordingly, the mortgagee is required to account for the rents and profits received by him while in possession.<sup>80</sup> So, if the mortgagee, by reason of his position, obtains a new lease upon the land, such lease is regarded, not as belonging to him absolutely, but as a part of the interest mortgaged, and so subject to the right of redemption.<sup>81</sup>

Apart from the question as to the mortgagee's right to purchase at a tax sale,<sup>82</sup> it is generally agreed that he may purchase any outstanding title,<sup>83</sup> provided there is no actual lack of good faith on his part towards the mortgagor,<sup>84</sup> and he may accordingly purchase at a sale under a prior mortgage, judgment, or other lien.<sup>85</sup> This appears to involve merely an application of the principle that there is no relation of trust between the parties.

**§ 612. The right to possession of the land.** Under the common law view of the nature of a mortgage, the

79. *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 177; *Threlkeld v. Walker*, 141 Ky. 737, 133 S. W. 772; *King v. State Mutual Fire Ins. Co.*, 7 Cush. (Mass.) 7; *Griffin v. Marine Co. of Chicago*, 52 Ill. 130, 142; *Ten Eyck v. Craig*, 62 N. Y. 406.

80. See *post*, § 613(c).

81. *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 30; *Manlove v. Bale*, 2 Vern. 84. See *Moore v. Titman*, 44 Ill. 367.

82. *Post*, § 616, notes 11-14.

83. *Walthall's Ex'rs v. Rives*,

34 Ala. 92; *Waterson v. Devoe*, 18 Kan. 223; *Cameron v. Irwin*, 5 Hill (N. Y.) 280; *Harrison v. Roberts*, 6 Fla. 711.

84. See *Griffin v. Marine Co. of Chicago*, 52 Ill. 130; *Savings & Loan Soc. v. Davidson*, 97 Fed. 696, 38 C. C. A. 365.

85. *Kirkwood v. Thompson*, 2 De Gex, J. & S. 613; *Walthall's Ex'rs v. Rives*, 34 Ala. 92; *Harrison v. Roberts*, 6 Fla. 711; *Roberts v. Fleming*, 53 Ill. 196; *Woodlee v. Burch*, 43 Mo. 231; *Ten Eyck v. Craig*, 62 N. Y. 406.

mortgagee is, in the absence of an agreement to the contrary, entitled to the possession of the mortgaged property, and this is generally the rule in states in which the title or legal theory of a mortgage is still held.<sup>86</sup> In two or three states the mortgagor appears to be regarded as having the legal title, with the right of possession, until condition broken, when the legal title passes to the mortgagee for the purpose of enabling the latter to acquire the possession by action of ejectment.<sup>87</sup> In another state decisions in terms that the mortgagee has no right to maintain ejectment against the mortgagor until condition broken, appear to involve a like view, that until then the mortgagee has not the legal title.<sup>88</sup>

Even in states in which the mortgagee is entitled to possession, he rarely asserts this right, since he is bound, if he does take possession, to account for the rents and profits of the land,<sup>89</sup> and there is nothing to be gained by taking possession.<sup>90</sup>

86. *Brown v. Loeb*, 177 Ala. 106, 58 So. 330; *Wilson v. Rogers*, 97 Ark. 369, 134 S. W. 318; *American Agricultural Co. v. Wotton*, 116 Me. 459, 102 Atl. 297; *Campbell v. Poultney*, 6 Gill. & J. (Md.) 94, 26 Am. Dec. 559; *Lacky v. Holbrook*, 11 Metc. (Mass.) 458; *Gray v. Gillespie*, 59 N. H. 469; *Youngman v. Railroad Co.*, 65 Pa. St. 278; *Brier Hill Collieries v. Gernt*, 131 Tenn. 542, 175 S. W. 560. If the mortgage, by reason of a defect in its execution (*ante*, § 603, note 60-61) gives merely an equitable lien, the mortgagor is entitled to the possession. *McFarland v. Cornwell*, 151 N. C. 428, 66 S. E. 454.

87. *Shields v. Lozear*, 34 N. J. L. 496, 3 Am. Rep. 256 (but see *Marshall's Ex'rs v. Hadley*, 50 N.

J. Eq. 547, 25 Atl. 335); *Bradfield v. Hale*, 67 Ohio St. 316, 65 N. E. 1008; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Fontaine v. Schulenberg & Boeckler, Lumber Co.*, 109 Mo. 55, 32 Am. St. Rep. 648, 18 S. W. 1147; *Wilson v. Reed*, 270 Mo. 400, 193 S. W. 819.

88. *Kransz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239; *Ladd v. Ladd*, 252 Ill. 43, 96 N. E. 561. In Vermont the statute gives possession to the mortgagor until condition broken, upon which event the mortgagee acquires the legal title and right of possession. *Crahan v. Chittenden*, 82 Vt. 410, 74 Atl. 86.

89. *Post*, § 613(c).

90. See 4 Kent's Comm. 155.



In states in which the lien theory of a mortgage prevails, the mortgagee, having no legal estate in the land, would seem to have nothing on which to base a claim to the possession of the land as against the mortgagor, in the absence at least of a provision in the mortgage instrument giving him the possession.<sup>91</sup> In the majority of these states, moreover, there is a statutory provision so phrased as to exclude or restrict the mortgagee's right of possession. In some, for instance, it is provided that the mortgagee shall not be entitled to the possession of the property,<sup>91</sup> in some that he shall not be so entitled in the absence of an express stipulation therefor,<sup>92</sup> in some that the mortgagee cannot recover possession before foreclosure,<sup>93</sup> and in some that until then he cannot bring an action to recover the property.<sup>94</sup>

— **Effect of mortgagee's acquisition of possession.**

In spite of the express acceptance of the lien theory of a mortgage, and without reference to whatever statutory provision may exist exclusive of the mortgagee's right of possession, it has been decided in several states that if the mortgagee acquires the possession of the land in a manner which the court regards as lawful, the mortgagor, after a default on his part in the performance of the mortgage obligation, cannot recover the possession from the mortgagee ex-

91. Florida Comp. Laws 1914, § 2495 (not conveyance of right of possession); Idaho, Civ. Code, § 3390 (lien independent of possession); North Dakota, Comp. Laws 1913, § 6726.

92. Cal. Civ. Code, § 2909; Indiana, Burns Annot. St. 1914, § 1133; Iowa, Code, § 2922; Kansas, Gen. St. 1915, § 6463; Mont., Civ. Code, § 5737; Nebraska, Rev. St. 1913, § 6230; New Mexico, St. 1915, § 571; North Dak., Comp.

Laws 1913, § 6740; South Dak., Civil Code, § 2054; Vermont, Pub. St. 1906, § 1853 (until condition broken).

93. Minn., Gen. St. 1913, § 8077; Oregon, Lord's Ore. Laws, § 335; Utah, Comp. Laws 1907, § 3517.

94. Mich., Comp. Laws 1915, § 13221; N. Y., Code Civ. Proc. § 1498; South Carolina, Civ. Code, § 3460; Wis., St. 1913, § 3095.

cept by performing the obligation,<sup>95</sup> and by some cases it is apparently asserted that he cannot recover the possession from the mortgagee even before default.<sup>96</sup> This doctrine has been applied most frequently, perhaps, in connection with invalid foreclosure proceedings, the purchaser under which, whether the mortgagee or another, is regarded as standing in the place of the mortgagee,<sup>97</sup> and such purchaser, having acquired the possession on the strength of the sale to him, is in effect a mortgagee in possession of the land for the purpose of this doctrine.<sup>98</sup>

The doctrine referred to appears to have had its origin in the state of New York, before the acceptance, to its full extent, of the lien theory of a mort-

95. *Frink v. Le Roy*, 49 Cal. 314; *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357; *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55; *Pell v. Ulmar*, 18 N. Y. 139; *Caro v. Wollenberg*, 68 Ore. 420, 136 Pac. 866; *Tallman v. Ely*, 6 Wis. 244; *Brinkman v. Jones*, 44 Wis. 512; 1 Jones, Mortgages, § 715.

The fact that the mortgagee in possession may have received rents and profits from the land to an amount greater than the sum due on the mortgage does not affect his right to retain possession until they are applied by judgment of a court in satisfaction of the mortgage. *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

96. *Spect v. Spect*, 88 Cal. 437, 13 L. R. A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; *Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919; *Stouffer v. Harlan*, 84 Kan. 307, 114 Pac. 385; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Townshend v. Thomson*, 139 N. Y.

152, 34 N. E. 891; *Becker v. McCrea*, 193 N. Y. 423, 86 N. E. 463.

97. *Post*, § 646, note 22, § 656, notes 87-90.

98. *Burns v. Hiatt*, 149 Cal. 621, 117 Am. St. Rep. 157, 87 Pac. 196; *Stouffer v. Harlan*, 68 Kan. 135, 64 L. R. A. 320, 104 Am. St. Rep. 396, 74 Pac. 610; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Currier v. Teske*, 84 Neb. 60, 133 Am. St. Rep. 602, 120 N. W. 1015; *Townshend v. Thompson*, 139 N. Y. 152, 34 N. E. 891; *Boscher v. Van Beek*, 19 N. D. 104, 122 N. W. 338; *Page v. Turk*, 43 Okla. 667, 143 Pac. 1047; *Cooke v. Cooper*, 18 Ore. 142, 7 L. R. A. 273, 17 Am. St. Rep. 709, 22 Pac. 945; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Bryan v. Brasius*, 162 U. S. 415, 40 L. Ed. 1022, 3 Ariz. 433, 31 Pac. 519; *Haggart v. Wilczinski*, 74 C. C. A. 176, 143 Fed. 22. *Contra* *Lewis v. Hamilton*, 26 Colo. 263, 58 Pac. 196; *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942.

gage, and was originally based, it would seem, on the theory that after default the legal title to the property was in the mortgagee, this legal title giving to him the right to retain possession after, though not before, default.<sup>99</sup> Subsequently it was decided, in another connection, that even after default the legal title is in the mortgagor,<sup>1</sup> but this was not regarded as affecting the mortgagee's right to retain possession as against the mortgagor. This New York doctrine has, as above indicated, been adopted in other states in which the lien theory of a mortgage is expressly accepted. But it is somewhat difficult to support from the standpoint of principle, and the various suggested explanations are not entirely satisfactory.

Occasionally it has been asserted that this right of the mortgagee to retain possession is in effect a right to retain possession of a pledge, the possession thus being apparently regarded as a thing pledged, separate from the land, which is mortgaged,<sup>2</sup> it being further said that such a right in the mortgagee to retain possession is but an incident of the debt and has no relation to any title or estate in the land.<sup>3</sup> But this does not entirely solve the difficulty. The only method known to the common law of conferring the right of possession of land is by giving an estate in the land, and if the mortgagee has the right of possession he must, by common law standards, have an estate, even though it be an estate at will only. The conception of the possession of the land as an entity which may be pledged as distinct from the land itself, which may

99. *Van Duyne v. Thayre*, 14 Wend. (N. Y.) 233; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; *Mickies v. Dillaye*, 17 N. Y. 480; *Pell v. Ulmer*, 18 N. Y. 139.

1. *Trimm v. Marsh*, 54 N. Y. 599.

2. *Kortright v. Cady*, 21 N. Y.

364, 78 Am. Dec. 255; *Spect v. Spect*, 88 Cal. 437, 13 L. R. A. 137, 22 Am. St. Rep. 314, 26 Pac. 203. See articles, 26 Alb. L. J. 526, 27 Id. 6.

3. *Brinkman v. Jones*, 44 Wis. 498, 512; *Bradley v. Norriss*, 63 Minn. 156, 65 N. W. 357.

be mortgaged, appears not to have suggested itself in any other connection.<sup>3a</sup> Furthermore, if this is the theory on which the mortgagee's right to retain possession is to be regarded as based, it should apply as well before as after default, and yet such right in the mortgagee is usually restricted in terms to cases in which a default has occurred.<sup>4</sup> Moreover, in the ordinary case, when the mortgagee obtains the possession, he does not obtain it directly from the mortgagor, or under such circumstances as to indicate an intention on the part of the mortgagor, or mortgagor's transferee, to pledge the possession for the debt. This is most obviously so when the possession is obtained by force of an invalid foreclosure sale. That the mortgagor does not oppose the taking of possession by the purchaser does not indicate an intention on his part to pledge the right of possession as additional security for the debt.

Another suggested explanation of the doctrine is that since, in the particular jurisdiction, equitable defenses to actions at law are allowed, the mortgagee should be permitted to assert the existence of the mortgage, and the non payment of the mortgage debt, as a defense to any action at law by the mortgagor for possession.<sup>5</sup> But this appears to assume that in equity one who has a mere lien on the land has a right of possession, although he has no such right at law, which is not the case, and certainly, in so far as a statute may expressly give the mortgagor the right of possession as against the mortgagee, such statute should be recognized by a court of equity to the same extent as by a court of law. The most satisfactory explanation of the doctrine appears to be

3a. But see Mr. Hazeltine's discussion of the Gage of Land in Mediaeval England, 17 Harv. Law Rev. 549, 18 Id. 36, reprinted 3 Select Essays Anglo-American

History, 646.

4. *Ante*, this section, note 95.

5. *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896.

to regard it as based on the desire of the courts to suppress useless litigation, since, if the mortgagee could be dispossessed at the suit of the mortgagor, a separate proceeding would be necessary to enable him to assert his rights by foreclosure.<sup>6</sup> The doctrine nevertheless represents, it is submitted, a partial reversion to the common law conception of a mortgage.

The decisions in the state of New York, and perhaps in other states as well, have not been entirely harmonious as regards the circumstances under which the mortgagee must have acquired the possession of the property in order to be able to retain it as against the mortgagor.<sup>7</sup> In one of the later decisions in the state named, it is said that in order that the mortgagee may have this right he must have entered with the mortgagor's consent, either expressly or impliedly given, for purposes, or under circumstances, not inconsistent with their relative legal rights under the mortgage.<sup>8</sup> If the doctrine is to be thus limited, it does not appear to be applicable to the ordinary case of a mortgagee or other person taking possession under an invalid foreclosure sale, since such person does not usually enter with the mortgagor's consent, but by force of the paramount title created by the mortgage. In other states, the view that the entry must have been with the consent of the mortgagor has been expressly repudiated.<sup>9</sup>

6. See *Tallman v. Ely*, 6 Wis. 256; *Stouffer v. Harlan*, 68 Kan. 135, 104 Am. St. Rep. 396, 74 Pac. Id. 6.

7. See articles, 26 Alb. L. J. 526, 27 Id. 6; Editorial note 8 Columbia Law Rev. 486.

8. *Barson v. Mulligan*, 191 N. Y. 306, 16 L. R. A. (N. S.) 151, 84 N. E. 75. See also *Becker v. McCrea*, 193 N. Y. 423, 86 N. E. 463. In a still later case it is said mere-

ly that the entry must be lawful, not constituting a trespass. *Herrman v. Cabinet Land Co.*, 217 N. Y. 526, 112 N. E. 476.

9. *Burns v. Hiatt*, 149 Cal. 621, 117 Am. St. Rep. 157, 87 Pac. 196; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Stouffer v. Harlan*, 68 Kan. 135, 64 L. R. A. 320, 104 Am. St. Rep. 396, 74 Pac. 610; *Investment Securities Co. v. Adams*, 27 Wash. 211, 79 Pac. 625. See

In applying the doctrine above referred to, that a mortgagee in possession cannot be dispossessed at the suit of the mortgagor without the payment of the mortgage debt, the fact that limitations have run against the right to foreclose the mortgage has been regarded as immaterial.<sup>10</sup> And one's rights as mortgagee in possession, it has been held, are not lost by the hostile re-entry of the mortgagor on the land.<sup>11</sup>

— **Agreement as to possession.** Although the mortgagee, as having the legal title, is otherwise entitled to possession, it may be agreed that the mortgagor shall have it,<sup>12</sup> and such an agreement is evidenced by provisions of the mortgage instrument which obviously contemplate the mortgagor's possession,<sup>13</sup> as when the mortgagor agrees to cultivate the land.<sup>14</sup> Such an agreement is in effect a lease by the mortgagee to the mortgagor, to run until the time for payment of the principal or, ordinarily, until a default in the payment of interest.<sup>15</sup>

West v. Middlesex Banking Co., 33 S. D. 465, 146 N. W. 598. That it is necessary merely that the entry be peaceable, see Cameron v. Ah Quong, 175 Cal. 377, 165 Pac. 961; Cooke v. Cooper, 18 Ore. 142, 7 L. R. A. 273, 17 Am. St. Rep. 709, 22 Pac. 945.

10. Kelso v. Norton, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; Bryan v. Brasius, 3 Ariz. 433, 31 Pac. 519. See Burns v. Hiatt, 149 Cal. 621, 17 Am. St. Rep. 157, 87 Pac. 196; Faxon v. All Persons, etc., 166 Cal. 707, 137 Pac. 919; Tracy v. Wheeler, 15 N. D. 248, 6 L. R. A. (N. S.) 516, 107 N. W. 68; Investment Securities Co. v. Adams, 37 Wash. 211, 79 Pac. 625.

11. Townshend v. Thomson, 139 N. Y. 152, 34 N. E. 891; Finley v.

Erickson, 122 Minn. 235, 142 N. W. 198; Stouffer v. Harlan, 84 Kan. 307, 114 Pac. 385.

12. State v. Brown, 73 Md. 484, 21 Atl. 374; Youngman v. Railroad Co., 65 Pa. St. 278; Furbush v. Goodwin, 29 N. H. 321; Brundage v. Home Savings & Loan Ass'n, 11 Wash. 277, 39 Pac. 666.

13. Soper v. Guernsey, 71 Pa. St. 219; Clay v. Wren, 34 Me. 187; Kranz v. Uedelhofen, 193 Ill. 477, 62 N. E. 239; Jamieson v. Bruce, 6 G. & J. (Md.) 74; Dearborn v. Dearborn, 9 N. H. 117; Wales v. Mellen, 1 Gray (Mass.) 512.

14. Flagg v. Flagg, 11 Pick. (Mass.) 475.

15. See the discussion in Tiffany, Landlord & Ten. § 45a.

In those states in which the statute gives the right of possession to the mortgagor, in the absence of express stipulation otherwise, a provision in the mortgage instrument giving possession to the mortgagee is no doubt effective<sup>16</sup> and is substantially a lease to him.<sup>17</sup> On the other hand, where the statute provides that the mortgagor shall have possession until foreclosure, without providing for the case of an express stipulation to the contrary, such a stipulation was regarded as invalid as being contrary to the policy of the statute.<sup>18</sup> It is however somewhat difficult to harmonize such a view with the doctrine<sup>19</sup> that if the mortgagee, with the consent of the mortgagor, acquires the possession of the property, he may retain it as against the latter, until the debt secured is paid.

**§ 613. Rents and profits—— (a) Mortgagor in possession.** A mortgagor who is in possession of the land is entitled to receive and apply to his own use the rents and profits of the land;<sup>20</sup> and this is so, even when the mortgage expressly includes rents and profits.<sup>21</sup> It

16. *Dutton v. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Spect v. Spect*, 88 Cal. 437, 13 L. R. A. 137, 22 Am. St. Rep. 314, 26 Pac. 203; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Brundage v. Home Savings & Loan Ass'n*, 11 Wash. 277, 29 Pac. 666; *Edwards v. Wray*, 12 Fed. 42; *Pettit v. Louis*, 88 Neb. 496, 34 L. R. A. (N. S.) 356, 129 N. W. 1005.

17. See *Tiffany, Landlord & Ten.* § 45b.

18. *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165.

19. *Ante*, this section, notes 95-7.

20. *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Brickey v. Cotter*, 119 Ark. 543, 178 S. W. 370; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151; *Cross v. Will County Nat. Bank*, 177 Ill. 3, 52 N. E. 322; *White v. Redenbaugh*, 41 Ind. App. 580, 82 N. E. 110; *Boston Bank v. Reed*, 8 Pick. (Mass.) 462; *Killebrew v. Hines*, 104 N. C. 182, 17 Am. St. Rep. 672, 10 S. E. 159, 251; *Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786, 12 S. E. 936; *Childs v. Hurd*, 32 W. Va. 66, 87, 9 S. E. 362.

21. *Gilman v. Illinois & M. Tel.*

has been decided in one state that the mortgagor's right to rents and profits ceases in favor of the mortgagee so soon as the latter, being entitled to the possession, makes demand on him therefor,<sup>22</sup> and there are occasional *dicta* to this effect.<sup>23</sup> Such a view seems more or less in harmony with the doctrine that the mortgagee, entitled to possession, may, by making demand, acquire a right to the rent subsequently to be paid by a lessee of the premises.<sup>24</sup>

In case there is a specific pledge of the rents and profits as additional security, the mortgagee, although not in possession, is entitled to have the rents and profits applied upon the debt, through the appointment of a receiver or otherwise.<sup>25</sup>

— (b) **Crops.** The mortgagor, retaining possession of the mortgaged property, is entitled to gather the annual crops thereon.<sup>26</sup> This right ordinarily con-

Co., 91 U. S. 603, 23 L. Ed. 405; *Freeman v. Campbell*, 109 Cal. 360, 42 Pac. 35; *In re Life Ass'n of America*, 96 Mo. 632; *Mississippi Valley & W. Ry. Co. v. United States Express Co.*, 81 Ill. 534.

22. *Barron v. Whiteside*, 89 Md. 448, 43 Atl. 825.

23. *Dow v. Memphis & L. R. R. Co.*, 124 U. S. 652, 31 L. Ed. 565; *Freedman's Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 502, 32 L. Ed. 163; See *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362. But see *dicta* in *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314; *Field v. Swan*, 10 Mete. (Mass.) 112, 114.

24. *Post*, § 614, note 79.

25. *Freedman's Saving & Trust Co. v. Shepherd*, 127 U. S. 494, 502, 32 L. Ed. 163; *Pullan v. Cincinnati & C. Air-Line R. Co.*, Fed. Cas. No. 11,462, 5 Biss. 237; *Bank*

of *Woodland v. Christie*, 130 Cal. XVIII, 62 Pac. 400; *McLester v. Rose*, 104 Ill. App. 433. See *post*, § 613(d).

26. *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; *Tobey v. Reed*, 9 Conn. 216; *Perley v. Chase*, 79 Me. 519, 11 Atl. 418; *Chelton v. Green*, 65 Md. 272, 4 Atl. 271; *Reily v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621, 23 So. 435; *Monday v. O'Neill*, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32; *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133; *Hamblet v. Bliss*, 55 Vt. 535; *Gregory v. Rosenkrans*, 72 Wis. 220, 1 L. R. A. 176, 39 N. W. 378; *Laing v. Ontario Loan & Savings Co.*, 46 U. C. Q. B. 114; *Ex parte Temple*, 1 Gl. & J. 216.



tinues until foreclosure,<sup>27</sup> until a receiver is appointed to sequester the rents and profits of the property<sup>28</sup> or, in jurisdictions in which the mortgagee is entitled to assert a right to the possession of the land, until the mortgagee acquires the possession.<sup>29</sup>

It being recognized that the actual severance of the crop from the land, by the mortgagor or under his authority, takes it out of the operation of the mortgage, the question arises whether the same result may be attained by a constructive severance,<sup>30</sup> that is, whether the mortgagor may, by merely selling or mortgaging the growing crop, to that extent displace the prior mortgage on the land. The weight of authority is to the effect that a sale or mortgage of the crop, not followed by an actual severance before foreclosure of the mortgage on the land, is ineffective as against one claiming under the foreclosure,<sup>31</sup> though if there is an actual severance before foreclosure the vendee or mortgagee of the crop is, it seems, protected in his claim to the crop.<sup>32</sup> In a few states, on the other hand,

27. *Perley v. Chase*, 79 Me. 519, 11 Atl. 418. See *post*, notes 37, 38.

28. *Post*, § 613(d).

29. *Gilman v. Wells*, 66 Me. 273; *Bangor Sav. Bank v. Wallace*, 87 Me. 28, 32 Atl. 716; *Porter v. Hubbard*, 134 Mass. 233; *Hamblet v. Bliss*, 55 Vt. 535.

30. *Ante*, § 261.

31. *Thompson v. Union Warehouse Co.*, 110 Ala. 499, 18 So. 105; *Penryn Fruit Co. v. Sherman-Worrell Fruit Co.*, 142 Cal. 643, 100 Am. St. Rep. 150, 76 Pac. 484 (but see *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484); *Adams v. Beadle*, 47 Iowa 439; *Beckman v. Sikes*, 35 Kan. 120, 10 Pac. 592 (immature crop); *Wootten v. White*, 90 Md. 64, 78 Am.

St. Rep. 425, 44 Atl. 1026; *Moreland v. Strong*, 115 Mich. 211, 69 Am. St. Rep. 553, 73 N. W. 140; *Reilly v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621, 23 So. 435; *Batterman v. Albright*, 122 N. Y. 484, 11 L. R. A. 800, 19 Am. St. Rep. 510, 25 N. E. 856; *Jones v. Adams*, 37 Ore. 473, 50 L. R. A. 388, 82 Am. St. Rep. 766, 59 Pac. 811, 62 Pac. 16; *Bloomfield v. Hellyer*, 22 Ont. App. 232. So in the case of a sale of the crop under execution against the mortgagor, *Anderson v. Strauss*, 98 Ill. 485; *Shepard v. Philbrick*, 2 Denio, (N. Y.) 174.

32. *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133; *Killebrew v. Hines*, 104 N. C. 182, 17 Am. St. Rep. 672, 10 S. E. 159, 251; *Hin-*

a mortgage or sale of the crop, although not followed by an actual severance thereof, is regarded as effective as against a prior mortgage of the land.<sup>33</sup>

In case there is neither an actual or constructive severance of the crop from the land, sufficient to exclude the crop from the operation of the mortgage on the land, the crop will, in most jurisdictions, pass with the land upon the sale thereof under foreclosure,<sup>34</sup> unless it is expressly excepted<sup>35</sup> or, in two or three jurisdictions, unless it is matured at the time of the sale.<sup>36</sup> The right of the mortgagor to sever the crop has however been regarded as continuing until the confirmation of the sale<sup>37</sup> and even until he has relinquished possession to the purchaser.<sup>38</sup>

There are, in two jurisdiction, decisions to the effect that the purchaser at foreclosure sale does not acquire a right to the crops on the land. These de-

ton v. Walston, 115 N. C. 7, 20 S. E. 164.

33. Dail v. Freeman, 92 N. C. 351; Myers v. White, 1 Rawle, (Pa.) 353; (See Hershey v. Metzgar, 90 Pa. St. 217); Willis v. Moore, 59 Tex. 628, 46 Am. Rep. 284; White v. Pulley, 27 Fed. 436. So as regards an execution sale of the crop. Cooper v. Cole, 38 Vt. 185; Favorite v. Deardoff, 84 Ind. 555; Hershey v. Metzger, 90 Pa. St. 217 (*dictum*).

34. Wheeler v. Kirkendall, 67 Iowa, 112, 25 N. W. 829; Stanbrough v. Cook, 83 Iowa, 705, 49 N. W. 1010; Goodwin v. Smith, 49 Kan. 351, 17 L. R. A. 284, 33 Am. St. Rep. 373, 31 Pac. 153; Wootton v. White, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026; Dayton v. Dakin's Estate, 103 Mich. 65, 61 N. W. 349; Reed v. Swan, 133 Mo. 100, 34 S. W. 483; Reily v. Carter, 75 Miss. 798, 65 Am. St. Rep. 621,

22 So. 435; Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; Batterman v. Albright, 122 N. Y. 484, 11 L. R. A. 800, 19 Am. St. Rep. 510, 25 N. E. 856; Jones v. Adams, 37 Ore. 473, 50 L. R. A. 388, 82 Am. St. Rep. 766, 59 Pac. 811, 62 Pac. 16; White v. Pulley, 27 Fed. 436.

35. Sherman v. Willett, 42 N. Y. 150.

36. Hecht v. Dettman, 56 Iowa, 679, 41 Am. Rep. 131, 7 N. W. 495, 10 N. W. 241; Richards v. Knight, 78 Iowa, 69, 4 L. R. A. 453, 42 N. W. 584; First Nat. Bank v. Beegle, 52 Kan. 709, 39 Am. St. Rep. 365, 35 Pac. 814; Porche v. Bodin, 28 La. Ann. 761.

37. Allen v. Elderkin, 62 Wis. 627, 22 N. W. 842; Walker v. Hall, 15 Ohio St. 351 (crop sowed after sale.)

38. Monday v. O'Neil, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W.

cisions were based primarily upon local statutory provisions requiring the land to be appraised before sale, and the sale to be at a price bearing a certain proportion to its appraised value, taken in connection with the fact that the value of the annual crops was not included in the appraisal.<sup>39</sup>

Conceding that, as are the cases generally, the person who acquires the land upon foreclosure also acquires the crops which have not been severed, this must be so because such was the intention of the parties to the mortgage. The crops, present or future, could be expressly excepted in the mortgage instrument, but, in the absence of such exception, they are included in the description of the land as being a part thereof, and are consequently subject to the mortgage. Language describing land presumptively includes the crops thereon, whether it occurs in a conveyance, in a contract to convey, in a mortgage, or in any other instrument. There is nothing inconsistent with this conclusion in the fact that the mortgagor, while in possession, has the right to gather the crops. This right, like his right to take other profits of the land, is an incident of his possession, and is merely a right to utilize the land in the ordinary manner.<sup>40</sup> He has, presumably, no right to sever the crops except as this accords with the ordinary mode of utilizing the land, and for this reason, it is submitted, he would have no right to sever them before maturity.<sup>41</sup> For the same reason a constructive severance of the crops, by sale or mort-

32; *Aultman & Taylor Co. v. O'Dowd*, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756.

39. *Cassilly v. Rhodes*, 12 Ohio, 88, 44 Am. Dec. 461; *Houts v. Showalter*, 10 Ohio St. 125; *Foss v. Marr*, 40 Neb. 559, 59 N. W. 122; *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32.

40. *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133, in so far as it decides that one to whom the mortgagor sells the crop may sever it after the mortgagee has acquired possession of the land from the mortgagor, appears open to question.

41. See *Adams v. Beadle*, 47 Iowa, 439.

gage, would seem to be invalid as against one claiming under foreclosure of the mortgage on the land, such a constructive severance not being an ordinary mode of utilizing the land, except perhaps when it takes place after the maturity of the crop, or when, though it takes place before the maturity of the crop, it can be regarded as validated by the subsequent maturity of the crop while the mortgagor is still in possession.

The cases recognizing the effectiveness of a sale or mortgage of the crop as against one claiming under a mortgage of the land,<sup>42</sup> ordinarily base this view upon the fact that, in that jurisdiction, the mortgage is merely a lien. As has been judicially remarked,<sup>43</sup> however, this does not seem to have any essential bearing on the question, inasmuch as the perfecting of the title under a foreclosure of the mortgage has reference to the time at which it became a lien, and this being so, the foreclosure should take priority over the intervening sale or mortgage of the crop. Moreover conceding that the person claiming under foreclosure acquires the crops because it was intended that the crops should be included in the security, this intention cannot be affected by the fact that the mortgagee does not acquire the legal title to the land.

— (c) **Mortgagee in possession.** The mortgagee, if in possession, is entitled to the rents and profits, but he is bound to account therefor on redemption by the mortgagor, or on foreclosure, that they may be set off against the mortgage debt.<sup>44</sup> And the mortgagee

42. *Ante*, this section, note 33.

43. *Batterman v. Albright*, 122 N. Y. 484, 11 L. R. A. 800, 19 Am. St. Rep. 510, 25 N. E. 856, *per* Bradley J.

44. *Peugh v. Davis*, 113 U. S. 542, 28 L. Ed. 1127. *Dicken v. Simpson*, 117 Ark. 304. 174 S. W. 1154; *Murdock v. Clarke*, 59 Cal.

683; *Clark v. Finlon*, 90 Ill. 245; *Ten Eyck v. Casad*, 15 Iowa, 524; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382; *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445; *Dawson v. Drake*, 30 N. J. Eq. 661; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Green v.*

in possession is bound to account not only for rents and profits actually received by him, but also for what he might have received by the exercise of reasonable diligence in leasing or otherwise utilizing the mortgaged premises.<sup>45</sup> If he does exercise such diligence, he is liable only for what he has received.<sup>46</sup>

In order thus to charge one, as a mortgagee in possession, with the profits which he might have received by the exercise of reasonable diligence, but which he did not receive, he must have been in possession as mortgagee, and with knowledge that he occupied such a relation, and he is not so liable if he was in possession otherwise, or he believed himself to be a purchaser, and it afterwards turns out that he had merely a mortgage or other lien on the land.<sup>47</sup>

If the mortgagee himself occupies the premises, he is liable, on an accounting, for a reasonable rent;<sup>48</sup>

Rodman, 150 N. C. 176, 63 S. E. 732; *Anderson v. Lauterman*, 27 Ohio St. 104; *Swegle v. Belle*, 20 Ore. 323, 25 Pac. 633; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Seaver v. Durant*, 39 Vt. 103.

45. *Anonymous*, 1 Vern. 45; *Hughes v. Williams*, 12 Ves. 493; *Daniel v. Coker*, 70 Ala. 260; *Clark v. Finlon*, 90 Ill. 245; *Milliken v. Bailey*, 61 Me. 316; *Miller v. Lincoln*, 6 Gray (Mass.) 556; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083; *Atwood v. Warner*, 92 Neb. 370, 138 N. W. 605; *Schaeffer v. Chambers*, 6 N. J. Eq. 548, 47 Am. Dec. 211; *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Pr. (N. Y.) 33; *Sanders v. Wilson*, 34 Vt. 318; *Liskey v. Snyder*, 66 W. Va. 149, 66 S. E. 702.

46. *Pollard v. American Freehold Land Mortgage Co.*, 139 Ala. 183, 35 So. 767; *Murdock v. Clarke*,

90 Cal. 427, 27 Pac. 275; *Moshier v. Norton*, 100 Ill. 63; *Whitley v. Barnett*, 151 Iowa, 487, 131 N. W. 704; *Gerrish v. Black*, 104 Mass. 400; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382; *Peugh v. Davis*, 113 U. S. 542, 28 L. Ed. 1127.

47. *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Daniel v. Coker*, 70 Ala. 260; *Anglo-Californian Bank v. Field*, 154 Cal. 513, 98 Pac. 267; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 361, 23 N. E. 791; *Whitley v. Barnett*, 151 Iowa, 487, 131 N. W. 704; *Young v. Omohundro*, 69 Md. 424, 16 Atl. 120; *Morris v. Budlong*, 78 N. Y. 555; *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25; see *Barnard v. Jemison*, 27 Mich. 230.

48. *American Freehold Land Mortgage Co. of London v. Pollard*, 132 Ala. 155, 32 So. 630;

but he is not liable for an increase of rental value or profits arising from improvements made by himself, with the cost of which he is not credited.<sup>49</sup>

The mortgagee is usually required, in accounting for the rents and profits received, to make a rest at the end of each year, if at that time the rents and profits received exceed the interest due, and to deduct such excess from the principal sum in determining the amount to bear interest during the following year, since otherwise the mortgagee would have the use of such excess without paying therefor.<sup>50</sup> Occasionally the court will require the rests to be made more frequently than once a year.<sup>51</sup>

The obligation of a mortgagee in possession to account for rents and profits may be asserted by a junior mortgagee as well as by the mortgagor,<sup>52</sup> but such obligation can be asserted by the junior mortgagee only when it could be asserted by the mortgagor, or transferee of the mortgagor.<sup>53</sup> Consequently, it

Barnett v. Nelson, 54 Iowa, 41 37 Am. Rep. 183, 6 N. W. 49; Walter v. Calhoun, 88 Kan. 801, 129 Pac. 1176; Strong v. Blanchard, 4 Allen (Mass.) 538; Van Buren v. Olmstead, 5 Paige (N. Y.) 9; Sanders v. Wilson, 34 Vt. 318; 4 Kent's Comm. 166.

49. Dozier v. Mitchell, 65 Ala. 511; Jones v. Fletcher, 42 Ark. 422; Hidden v. Jordan, 28 Cal. 302; Montgomery v. Chadwick, 7 Iowa, 114; Bradley v. Merrill, 91 Me. 340, 40 Atl. 132; Moore v. Cable, 1 Johns. Ch. (N. Y.) 385; McArthur v. Franklin, 16 Ohio St. 193. See Howard v. Clark, 72 Vt. 429, 48 Atl. 656; Gillis v. Martin, 17 N. C. 470, 25 Am. Dec. 729.

50. Gordon v. Lewis, 2 Sumn. 143, Fed. Cas. No. 5613; Moshier

v. Norton, 100 Ill. 63, 73; Van Vronker v. Eastman, 7 Metc. (Mass.) 157; Shaeffer v. Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211; Gladding v. Warner, 36 Vt. 54; Snively v. Pickle, 29 Gratt. (Va.) 27; Green v. Wescott, 13 Wis. 606; Lynch v. Ryan, 137 Wis. 13, 18 N. W. 174. Compare Walter v. Calhoun, 88 Kan. 801, 129 Pac. 1176.

51. Adams v. Sayre, 76 Ala. 509; Gibson v. Crehore, 5 Pick. (Mass.) 146.

52. Goring v. Shreve, 7 Dana (Ky.) 64; Hatch v. Falconer, 67 Neb. 249, 93 N. W. 172; Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795; White v. Maynard, 54 Vt. 575; Harrison v. Wyse, 24 Conn. 1, 65 Am. Dec. 151.

53. Gaskell v. Viquesney, 122

cannot properly be asserted by a junior mortgagee as against a senior mortgagee who has acquired the mortgagor's title, whether by foreclosure or otherwise,<sup>54</sup> or when he is in possession as tenant of the mortgagor.<sup>55</sup>

Even though the senior mortgagee does not actually take possession, he must, it has been decided, account to the junior mortgagee as if he had done so, if he has, by the assertion of his rights, prevented the junior mortgagee from taking possession by force of his mortgage.<sup>56</sup>

— (d) **Sequestration by receiver.** It has, in a few states, been decided that the existence of a statutory provision denying the right of possession to the mortgage creditor precludes the court from depriving the mortgagor of the possession of the property, by the appointment of a receiver, in the absence of an express pledge of the rents and profits,<sup>57</sup> and in one state such an effect has been given to a statute merely denying to the mortgagee an action to recover the possession.<sup>58</sup> In perhaps two states such a statute has been regarded as precluding the appointment of a receiver merely to sequester the rents and profits for

Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791.

54. *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Gray v. Nelson*, 77 Iowa, 63, 41 N. W. 566; *Rogers v. Herron*, 92 Ill. 583. But see *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151; *Bunce v. West*, 62 Iowa, 80, 17 N. W. 179.

55. *Armistead v. Bishop*, 110 Ark. 172, 161 S. W. 182.

56. *White v. Maynard*, 54 Vt. 575; *Demarest v. Berry*, 16 N. J. Eq. 481.

57. *American Inv. Co. v. Farrar*, 87 Iowa, 437, 54 N. W. 361;

*Hardin v. Hardin*, 34 S. C. 77, 27 Am. St. Rep. 786, 12 S. E. 936; *Greenwood Loan, etc. Ass'n v. Childs*, 67 S. C. 251, 45 S. E. 167; *Josey v. Smith*. — S. C. —, 95 S. E. 133, *Norfor v. Rusby*, 19 Wash. 450, 53 Pac. 715.

58. *Wagar v. Stone*, 36 Mich. 364; *Grand Rapids Fifth Nat. Bank v. Pierce*, 117 Mich. 376, 75 N. W. 1058. And this even though the mortgage instrument expressly provides for such an appointment. *Couper v. Shirley* 75 Fed. 168, 21 C. C. A. 288; *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74.

the benefit of the mortgage creditor, though allowable for the purpose of preserving the property.<sup>59</sup> In other states the fact that the mortgagee has no right of possession before foreclosure has been regarded as not affecting his right to ask for the appointment of a receiver.<sup>60</sup>

The general rule, in reference to the appointment of a receiver, in the course of a foreclosure proceeding, to sequester the rents and profits, is that this relief will be given when the security is of at least doubtful sufficiency, and the person or persons liable for the debt are insolvent.<sup>61</sup> And conversely that a receiver will not be appointed for this purpose unless both of these conditions exist,<sup>62</sup> though he may no doubt be

59. *Locke v. Klunker*, 123 Cal. 231, 55 Pac. 993; *Marshall & Ilsley Bank v. Cady*, 76 Minn. 112, 78 N. W. 978. See *American Nat. Bank v. Northwestern Mut. Life Ins. Co.*, 89 Fed. 610, 32 C. C. A. 275.

60. *Pasco v. Gamble*, 15 Fla. 562; *Hart v. Respass*, 89 Ga. 87, 14 S. E. 910; *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Neb. 804, 66 N. W. 843; *Hyman v. Kelly*, 1 Nev. 179; *Hollenbeck v. Donnell*, 94 N. Y. 342; *Schreiber v. Carey*, 48 Wis. 208, 4 N. W. 124; *Central Trust Co. v. Chattanooga, R. & C. R. Co.*, 36 C. C. A. 241, 94 Fed. 275; *Elmira Mechanics Soc. of New York v. Stanchfield*, 87 C. C. A. 585, 160 Fed. 811.

61. *Ashurst v. Lehman*, 86 Ala. 370, 5 So. 731; *Price v. Dowdy*, 34 Ark. 285; *Roach v. Glos*, 181 Ill. 440, 54 N. E. 1022; *Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161; *Phillips v. Eiland*, 52 Miss. 721; *Land Title & Trust Co. v. Kellogg*, 73 N.

J. Eq. 524, 68 Atl. 80; *Veerhoff v. Miller*, 30 N. Y. App. Div. 355, 51 N. Y. Supp. 1048; *Astor v. Turner*, 11 Paige (N. Y.) 463, 43 Am. Dec. 766; *Kerchner v. Fairley*, 80 N. C. 24; *Bristow v. Home Bldg. Co.*, 91 Va. 18, 20 S. E. 946; *Winkler v. Magdeburg*, 100 Wis. 421, 76 N. W. 332; *Strain v. Palmer*, 86 C. C. A. 618, 159 Fed. 628.

62. *Cone v. Combs*, 18 Fed. 576, 5 McCrary, 651; *Baker v. City Nat. Bank*, 94 Ga. 87, 21 S. E. 159; *Glennon v. Wilcox*, 159 Ill. App. 42; *Aetna Life Ins. Co. v. Broeker*, 166 Ind. 576, 77 N. E. 1092; *Myers v. Estell*, 48 Miss. 373; *New York Bldg. Loan Banking Co., Begly*, 75 N. Y. App. Div. 308, 78 N. Y. Supp. 169; *Rogers v. Southern Pine Lumber Co.*, 21 Tex. Civ. App. 48, 51 S. W. 26; *Morris v. Branchand*, 52 Wis. 187, 8 N. W. 883. In *Warren v. Pitts*, 114 Ala. 65, 21 So. 494, it was decided that even though the mortgage debtor was insolvent, a receiver would not be appointed if the person in possess-



appointed in order to prevent waste or destruction of the property, without reference to the sufficiency of the security or the insolvency of the obligor.<sup>63</sup> In some states, however, the statute authorizes the appointment of a receiver upon a showing as to the inadequacy of the security, without reference to the solvency or insolvency of the mortgage debtor.<sup>64</sup>

That the mortgage instrument contains an express pledge of the rents and profits has been regarded as a reason in favor of the appointment of a receiver to take charge of them,<sup>65</sup> and as authorizing such appointment without reference to the solvency of the mortgage debtor.<sup>66</sup> But even though the mortgage instrument specifically pledged the rents and profits, the court will, according to some decisions, before appointing a receiver, consider whether the mortgaged land itself does not constitute adequate security for the debt, so as to render the sequestration of the rents and profits unnecessary.<sup>67</sup>

ion under the mortgagor were solvent, the theory being that this removed all danger of losing the rents and profits.

63. *Post*, this section, note 74.

64. *Hursh v. Hursh*, 99 Ind. 500; *Merritt v. Gibson*, 129 Ind. 155, 15 L. R. A. 277, 27 N. E. 136; *Leader Pub. Co. v. Grant Trust & Sav. Co.*, 182 Ind. 651, 108 N. E. 121; *Douglass v. Cline*, 12 Bush (Ky.) 608, 622; *Woodley v. Holt*, 14 Bush (Ky.) 788; *Waldron v. First Nat. Bank*, 60 Neb. 245, 82 N. W. 856; *Roberts v. Parker*, 14 S. Dak. 323, 85 N. W. 591; *De Barera v. Frost*, 33 Tex. Civ. App. 580, 77 S. W. 637.

65. *Bagley v. Illinois Trust & Sav. Bank*, 199 Ill. 76, 64 N. E. 1085; *Ortengren v. Rice*, 104 Ill. App. 428; *Des Moines Gas Co. v.*

*West*, 44 Iowa, 23; *Wisconsin National Loan & Bldg. Ass'n v. Pride* 136 Wis. 102, 116 N. W. 637; *Meridian Oil Co. v. Randolph*, 26 Okla. 634, 110 Pac. 722.

66. *West v. Adams*, 106 Ill. App. 114; *Ball v. Marske*, 202 Ill. 31, 66 N. E. 845; *Butler v. Frazer*, (N. Y. Misc.) 57 N. Y. Supp. 90. But not if he is solvent and the property is adequate security *United States Life Ins. Co. v. Ettinger*, 32 N. Y. Misc. 378, 66 N. Y. Supp. 1.

67. *Mason v. Hooper*, 166 Ill. App. 537; *Aetna Life Ins. Co. v. Broecker*, 166 Ind. 576, 77 N. E. 1692; *Brick v. Hornbeck*, 19 N. Y. Misc. 218, 43 N. Y. Supp. 301; *Union Trust Co. v. Charlotte Gen. Elec. Co.*, 152 Mich. 568, 116 N. W. 379. *Contra*, *Lyng v. Marcus*.

Even though the mortgage instrument expressly provides for the appointment of a receiver upon a default, the court will not be justified, it seems, in making such appointment, unless the circumstances are such as to render it proper or necessary.<sup>68</sup> And it has been decided that when the statute enumerated certain causes for which a receiver of the property might be appointed, such a provision in the instrument did not justify an appointment on some other ground.<sup>69</sup> Such a provision, like an express pledge of the rents and profits, has been regarded as authorizing the appointment without reference to the solvency of the mortgage debtor.<sup>70</sup>

It has been decided that even after foreclosure, if the statute gives the mortgagor a right of redemption for a period named with the incidental right of possession, a receiver may be appointed, upon the application of a mortgage creditor, to collect the rents and profits, for the benefit of the latter.<sup>71-72</sup>

Without reference to the necessity or propriety of sequestrating the rents and profits for the purpose of paying the mortgage debt, the court will ordinarily

(N. Y. Misc.) 118 N. Supp. 1056; *Sage v. Mendelson*, 42 N. Y. Misc. 137, 85 N. Y. Supp. 1008; *De Barrera v. Frost*, 33 Tex. Civ. App. 580, 77 S. W. 637.

68. *Aetna Life Ins. Co. v. Broecker*, 166 Ind. 576, 77 N. E. 1092; *New York Bldg. Loan Banking Co. v. Begly*, 75 N. Y. App. Div. 308, 78 N. Y. Supp. 169; *Jarvis v. McQuaide*, 24 N. Y. Misc. 17, 53 N. Y. Supp. 97.

69. *Baker v. Varney*, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 160. And see *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74.

70. *Bagley v. Illinois Trust & Savings Bank*, 199 Ill. 76, 64 N. E.

1085. See *Hubbell v. Avenue Inv. Co.*, 97 Iowa, 135, 66 N. W. 85; *Fletcher v. Krupp*, 35 N. Y. App. Div. 586, 55 N. Y. Supp. 146.

71-72. *First Nat. Bank v. Illinois Steel Co.* 174 Ill. 140, 51 N. E. 206; *Haas v. Chicago Bldg. Soc.* 89 Ill. 498. *Sweet & Clark Co. v. Union Nat. Bank*, 149 Ind. 305, 49 N. E. 159; *Merritt v. Gibson*, 129 Ind. 155, 15 L. R. A. 277; *Hyman v. Kelly*, 1 Nev. 182, 27 N. E. 136; *Astor v. Turner*, 11 Paige (N. Y.) 437, 43 Am. Dec. 766. *Contra*, *West v. Conant*, 100 Cal. 231, 34 Pac. 705, *Swan v. Mitchell*, 82 Iowa, 307, 308, 47 N. W. 1042.

appoint a receiver when this appears to be necessary for the preservation of the corpus of the security.<sup>73</sup> This includes not only the prevention of waste upon the property,<sup>74</sup> but also the avoidance of possible detriment by reason of disuse, abandonment or failure to continue an established business thereon,<sup>75</sup> and likewise the accumulation of delinquent taxes,<sup>76</sup> or interest on prior incumbrances,<sup>77</sup> with the possibility of sale for taxes or to discharge such incumbrances. A breach of a covenant to keep up insurance appears also, under particular circumstances, to be regarded as a ground for the appointment of a receiver, or at least as a consideration in favor of such appointment.<sup>78</sup> Of these various possible causes of detriment to the property, two or more usually co-exist, and they are ordinarily accompanied by possible insufficiency of the security

73. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 395, 27 L. Ed. 609; *Marshall & Ilsley Bank v. Cady*, 76 Minn. 112, 78 N. W. 978; *Newport & C. Bridge Co. v. Douglas*, 12 Bush (Ky.) 673.

74. *Kountze v. Omaha Hotel Co.* 107 U. S. 387, 395, 27 L. Ed. 609; *Brasted v. Sutton*, 30 N. J. Eq. 462; *Dunlap v. Hedges*, 35 W. Va. 287, 13 S. E. 656; *Harding v. Garber*, 20 Okla. 11, 93 Pac. 539. That the acts of waste must be such as to jeopardize the security, see *Title Ins. & Trust Co. v. California Development Co.*, 164 Cal. 58, 127 Pac. 502.

75. *Sweet & Clark Co. v. Union Nat. Bank*, 149 Ind. 305, 49 N. E. 159; *Marshall & Ilsley Bank v. Cady*, 76 Minn. 112, 78 N. W. 978; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Thompson v. Natchez Water Sewer Co.*, 68 Miss. 423, 9 So. 821; *Colins v. Gross*, 51 Wash

516, 99 Pac. 573.

76. *Jackson v. Hooper*, 107 Ala. 634, 18 So. 254; *Ortengren v. Rice*, 104 Ill. App. 428; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Sanford v. Anderson*, 69 Neb. 249, 95 N. W. 632; *Mahon v. Crothers*, 28 N. J. Eq. 567; *Browning v. Sire*, 56 N. Y. App. Div. 399, 67 N. Y. Supp. 798; *American Nat. Bank v. Northwestern Mut. Life Ins. Co.*, 32 C. C. A. 275, 89 Fed. 610.

77. *Farmers Nat. Bank of Owatonna v. Backus*, 64 Minn. 43, 66 N. W. 5; *Warwick v. Hammelt*, 32 N. J. Eq. 427; *Keogh Mfg. Co. v. Whiston*, 26 Abb. N. Cas. (N. Y.) 358.

78. *Winkler v. Magdeburg*, 160 Wis. 421, 76 N. W. 332; *American Nat. Bank v. Northwestern Mut. Life Ins. Co.*, 32 C. C. A. 275, 89 Fed. 610; *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297; *Jackson v. Hooper*, 107 Ala. 634, 18 So. 254.

or by insolvency on the part of mortgage debtor. In granting the application for a receiver the courts refer to any and all circumstances tending to justify the appointment, and it is consequently impossible to say to what extent the existence of one of the circumstances referred to would, of itself, be regarded as justifying a receivership.

§ 614. **Effect of lease of the land—(a) Lease before mortgage.** In jurisdictions where a mortgage transfers the legal title, if a lease was made by the mortgagor before executing the mortgage, the mortgagee is in the position of a transferee of the reversion, and may consequently demand that the lessee pay the rent to him instead of to the mortgagor, and the lessee, after such notice, is liable to the mortgagee for rent, accruing since the date of the mortgage, which is due and as yet unpaid, and likewise for all rent thereafter becoming due,<sup>79</sup> unless, perhaps, this has been paid in advance.<sup>80</sup> The rights of the tenant under such lease to possession of the premises cannot, however, be affected by the making of a subsequent mortgage.<sup>81</sup> In jurisdictions where a mortgage does not transfer the legal title, but gives a lien merely, the tenant under a lease is not affected by the subsequent making of a mortgage by the landlord,<sup>82</sup> and the mortgagee is not substituted as landlord.<sup>83</sup>

79. *Moss v. Gallimore*, 1 Doug. 279; *Comer v. Sheehan*, 74 Ala. 452; *King v. Housatonic R. Co.*, 45 Conn. 226; *Castleman v. Belt*, 2 B. Mon. 157; *White v. Whitney*, 3 Met. (Mass.) 87; *Mirick v. Hoppin*, 118 Mass. 582; *Kimball v. Lockwood*, 6 R. I. 138.

80. By some decisions, he is liable to the mortgagee for rent due after the notice, even though he paid it in advance before receiving notice. *De Nicholls v. Saund-*

*ers*, L. R. 5 C. P. 589; *Cook v. Guerra*, L. R. 7 C. P. 132; *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187, 32 Pac. 246; *Henshaw v. Wells*, 28 Tenn. (9 Humph.) 568. *Contra*, *Stone v. Patterson*, 19 Pick. (Mass.) 476. See *Tiffany, Landlord & Tenant*, § 177c.

81. *Moss v. Gallimore*, 1 Doug. 279.

82. *Hogsett v. Ellis*, 17 Mich.

351; *Myers v. White*, 1 Rawle, 353

83. *Thorn v. Sutherland*, 123 N.

— (b) **Lease after mortgage.** After making the mortgage, the mortgagor cannot, even though in possession, make a lease of the land which will affect any right which the mortgagee may have, by virtue of his legal title, to obtain possession, and the latter may, if entitled to possession, eject the lessee.<sup>84</sup> In the case of a lease thus made by the mortgagor, the mortgage previously made is paramount to the title of the lessor as it existed at the time of the lease, and consequently is not regarded as vesting in the mortgagee a title to the reversion to which the rent is incident, and since there is no privity of estate or contract between him and the lessee, he cannot, by action or by distress, proceed for the recovery of rent.<sup>85</sup> The tenant under such lease may, however, in order to avoid eviction by the mortgagee, “attorn” to the mortgagee by recognizing him as his landlord, thus creating a new tenancy, and such attornment is a good defense to the claim of the mortgagor for rent.<sup>86</sup> Such a new tenancy under the mortgagee has been held not to be sufficiently shown by the fact that the mortgagee has notified the mortgagor’s lessee to pay the rent to him, and the latter has not repudiated the demand.<sup>87</sup>

Y. 236, 25 N. E. 362.

84. *Keech v. Hall*, 1 Doug., 21; *Doe d. Roby v. Maisey*, 8 Barn & C. 767; *Comer v. Sheehan*, 74 Ala. 452; *Gartside v. Outley*, 58 Ill. 210; *Downard v. Goff*, 40 Iowa, 597; *Russum v. Wanser*, 53 Md. 92; *Lane v. King*, 8 Wend. (N. Y.) 584; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Stedman v. Gassett*, 18 Vt. 346; 1 Tiffany, Landlord & Ten. § 73.

85. *Teal v. Walker*, 111 U. S. 242, 28 L. Ed. 415; *Drakford v. Turk*, 75 Ala. 339; *Bartlett v. Hitchcock*, 10 Ill. App. 87; *Massachusetts Hospital Life Ins. Co.*

*v. Wilson*, 10 Metc. (Mass.) 126; *Hogsett v. Ellis*, 17 Mich. 351; *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Kimball v. Lockwood*, 6 R. I. 138; *Stedman v. Gassett*, 18 Vt. 346; *Evans v. Elliott*, 9 Adol. & El. 342.

86. *Comer v. Sheehan*, 74 Ala. 452; *Magill v. Hinsdale*, 6 Conn. 464; *Gartside v. Outley*, 58 Ill. 210; *Sanderson v. Price*, 21 N. J. L. 637; *Jones v. Clarke*, 20 Johns. (N. Y.) 51; *Kimball v. Lockwood*, 6 R. I. 138. *Contra*, *Hogsett v. Ellis*, 17 Mich. 351.

87. *Towerson v. Jackson* (1891), 2 Q. B. 484, disapproving

§ 615. **Expenditures by mortgagee.** The mortgagee is entitled to pay off an incumbrance on the land prior to his mortgage, in order to protect the latter, and may claim a credit for the amount so paid, he being subrogated to the rights of the incumbrancer,<sup>88</sup> and on a like principle he is entitled to be repaid, as part of the mortgage debt, any expenditures by him for taxes on the property.<sup>89</sup> He is also entitled to recover reasonable expenses incurred in defending the mortgagor's title.<sup>90</sup> He can claim reimbursement for insurance premiums paid by him, if the mortgagor agreed to insure and failed to do so.<sup>91</sup>

The mortgagee is not usually allowed for his personal services in connection with the management of the premises, though he may charge for the services of a bailiff whom it is necessary to employ.<sup>92</sup>

— **Repairs and improvements.** The mortgagee in possession is allowed for the cost of any necessary

*Brown v. Storey*, 1 Man. & G. 117; *Gartside v. Outley*, 58 Ill. 210; *Drakford v. Turk*, 75 Ala. 339, 51 Am. Rep. 454.

88 *McCormick v. Knox*, 195 U. S. 122, 26 L. Ed. 940; *Harper v. Ely*, 70 Ill. 581; *Arnold v. Foot*, 7 B. Mon. (Ky.) 66; *Davis v. Winn*, 2 Allen (Mass.) 111; *Comstock v. Michael*, 17 Neb. 288, 22 N. W. 549; *Weld v. Sablin*, 20 N. H. 53, 51 Am. Dec. 240; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519.

89. *Post*, § 615.

90. *Godfrey v. Watson*, 3 Atk. 517; *Miller v. Whittier*, 36 Me. 577; *Riddle v. Bowman*, 27 N. H. 236; *Clark v. Smith*, 1 N. J. Eq. 122.

91. *Harper v. Ely*, 70 Ill. 581; *Stinchfield v. Milliken*, 71 Me. 567; *Fowley v. Palmer*, 5 Gray (Mass.) 549.

92. 4 Kent's Comm. 166; *Godfrey v. Watson*, 3 Atk. 517; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Harper v. Ely*, 70 Ill. 581; *Breckenridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; *Barnard v. Patterson*, 137 Mich. 633, 100 N. W. 893; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62, 7 S. W. 570; *Bourgeois v. Gapen*, 58 Neb. 364, 78 N. W. 639; *Elmer v. Loper*, 25 N. J. Eq. 475; *Moore v. Cable*, 1 Johns Ch. (N. Y.) 385; *Lynch v. Ryan*, 137 Wis. 13, 118 N. W. 174. In a few jurisdictions, however, the mortgagee is allowed a commission on rents collected by him. *Waterman v. Curtis*, 26 Conn. 241; *Walter v. Calhoun*, 88 Kan. 801, 129 Pac. 1176; *Bradley v. Merrill*, 91 Me. 340, 40 Atl. 132; *Gerrish v. Black*, 104 Mass. 400.

repairs made by him.<sup>93</sup> He can claim to be reimbursed for improvements, as distinct from repairs, if these are necessary for the proper enjoyment or use of the premises, but not usually if they are merely calculated to render the property more desirable.<sup>94</sup> But a mortgagee in possession or one standing in his place, as a purchaser under a void foreclosure sale,<sup>95</sup> who, in the reasonable belief that he has the absolute title to the land, makes lasting improvements thereon, is usually allowed therefor in a proceeding by the mortgagor for

93. *American Freehold Land Mortg. Co. of London v. Pollard*, 132 Ala. 155, 32 So. 630; *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64, 1 S. W. 62; *Hidden v. Jordan*, 28 Cal. 301; *McCumber v. Gilman*, 15 Ill. 381; *Sparhawk v. Wills*, 5 Gray (Mass.) 423; *Bourgeois v. Gapen*, 58 Neb. 364, 78 N. W. 639; *Adkins v. Lewis*, 5 Ore., 292; *Harper's Appeal*, 54 Pa. St. 315; *Lowndes v. Chisolm*, 2 McCord. Eq. (S. C.) 455, 16 Am. Dec. 687; *Dewey v. Brownell*, 54 Vt. 441; *Liskey v. Snyder*, 66 W. Va. 149, 66 S. E. 702; *Lynch v. Ryan*, 137 Wis. 13, 118 N. W. 174; *But Barthell v. Syverson*, 54 Iowa, 160, appears to be *contra*.

94. *Whetstone v. McQueen*, 137 Ala. 301, 34 So. 229; *Robertson v. Read*, 52 Ark. 381, 20 Am. St. Rep. 188, 14 S. W. 387; *Morgan v. Mahony*, 127 Ark. 483, 187 S. W. 633; *Malone v. Roy*, 107 Cal. 518, 46 Pac. 1040; *McCumber v. Gilman*, 15 Ill. 381; *Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 9 L. R. A. 676, 21 Am. St. Rep. 231, 25 N. E. 558; *Fort v. Colby*, 165 Iowa, 95, 144 N. W.

393; *Dougherty v. McColgan*, 6 Gill. & J. (Md.) 275; *Bradley v. Merrill*, 88 Me. 319, 34 Atl. 160; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Adkins v. Lewis*, 5 Ore. 292; *Caro v. Wollenberg*, 83 Ore. 311, 163 Pac. 94; *Froelich v. Swafford*, 33 S. D. 142, 144 N. W. 925; *Wells v. Van Dyke*, 109 Pa. St. 330.

The mortgagor is, of course, bound to allow for the improvements if he consented to the making of them by the mortgagee. *Fort v. Colby*, 165 Iowa, 95, 144 N. W. 393; *Bradley v. Merrill*, 88 Me. 319; *Cazenove v. Cutler*, 4 Metc. (Mass.) 246; *Lynch v. Ryan*, 137 Wis. 13, 118 N. W. 174; *Shepard v. Jones*, 21 Ch. Div. 469, per Jessel, M. R.

In England the rule is more liberal to the mortgagee, and he is allowed for lasting improvements of a reasonable character, increasing the value of the property. *Sandon v. Hooper*, 6 Beav. 246; *Shepard v. Jones*, 21 Ch. Div. 469; *Henderson v. Astwood* [1894] App. Cas. 150.

95. See *post*, § 646, note 22, § 656, notes 87-96.

redemption,<sup>96</sup> on the general equitable principle before referred to.<sup>97</sup> And occasionally the courts show a disposition to allow, not the cost of the improvements, but the increase of value accruing therefrom.<sup>98</sup>

§ 616. **Taxes.** As between a mortgagor in possession of the property and the mortgagee, it is for the former, and not the latter, to pay the taxes,<sup>99</sup> and if he fails to do so and the mortgagee is compelled to pay them in order to protect his mortgage interest, he is subrogated to the state's lien therefor, and may add the amount of his payment to the mortgage debt for purposes of foreclosure or redemption.<sup>1</sup> There are, in several states, statutory provisions declaratory of this right.

96. *Hicklin v. Mæreo*, 46 Fed. 424; *Ensign v. Batterson*, 63 Conn. 298, 36 Atl. 51; *Walt v. Chamblin*, 35 Ill. 521, 89 Am. Dec. 322; *Bradley v. Merrill*, 88 Me. 319, 34 Atl. 160; *McSorley v. Larissa*, 100 Mass. 270; *Millard v. Truax*, 73 Mich. 381, 14 N. W. 328; *Bacon v. Cottrell*, 13 Minn. 194; *Cram v. Cottrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; *Mickles v. Dillaye*, 17 N. Y. 80; *Gillis v. Martin*, 17 N. C. 470, 25 Am. Dec. 729; *Harper's Appeal*, 64 Pa. St. 315; *Morgan v. Walbridge*, 56 Vt. 405; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949; *Liskey v. Snyder*, 66 W. Va. 149, 66 S. E. 702; *Hadley v. Stewart*, 65 Wis. 481, 27 N. W. 340. But in *Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374, it was held that the fact that the mortgagee supposed that he had an absolute conveyance did not entitle him to an allowance for improvements.

97. *Ante*, § 241.

98. *Merriam v. Goss* 139 Mass. 77, 28 N. E. 449. *Halbert v. Turner*, 233 Ill. 531, 84 N. E. 704; *Wilson v. Fisher*, 148 N. C. 535, 62 S. E. 622; *Duncvan v. Smith*, — (N. J. Ch.) —, 88 Atl. 167.

99. *Medley v. Elliott*, 62 Ill. 522; *Waterson v. Devoe*, 18 Kan. 223; *Tinslar v. Davis*, 12 Allen (Mass.) 79; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Pond v. Drake*, 50 Mich. 302, 15 N. W. 466; *Townsend v. J. I. Case Threshing Mach. Co.*, 31 Neb. 836, 48 N. W. 899. *Eastman v. Thayer*, 60 N. H. 408; *Price v. Salisbury*, 41 Okla. 416, L. R. A. 1917 B, 520, 138 Pac. 1024. It is immaterial whether the taxes were assessed before or after the date of the mortgage. *Curtis v. Curtis*, 180 Ala. 70, 60 So. 155.

1. *Lester v. Richardson*, 69 Ark. 198, 62 S. W. 62; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Pratt v. Pratt*, 96 Ill. 184; *Schissel v. Dickson*, 129 Ind. 139,



It has been occasionally decided that this claim for reimbursement of the amount paid for taxes can be asserted only as a part of the claim under the mortgage, and that if not so asserted, the right thereto is lost.<sup>2</sup> A different view has, however, been declared, to the effect that the mortgagee's right to be subrogated to the state's lien remains even after foreclosure sale.<sup>3</sup> And in one state a mortgagee paying the taxes has been held to be entitled to bring *assumpsit* against the mortgagor for the amount of the payment.<sup>4</sup>

Since a mortgagee, paying taxes in order to protect his interest in the property, is entitled to be subrogated, on equitable principles, to the lien of the state for taxes, his claim for reimbursement should, it would seem, take priority over a senior mortgage, and it has been so decided.<sup>5</sup>

If the mortgagee is in possession, it is for him, so far at least as the rents and profits suffice for the pur-

28 N. E. 540; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709; *Gooch v. Botts*, 110 Mo. 419, 20 S. W. 192; *Sidenberg v. Ely*, 90 N. Y. 257; *Bates v. Peoples' Sav. etc. Ass'n.* 42 Ohio St. 655; *Dunsmuir v. Port Angeles Gas, Water, Electric Light & Power Co.*, 30 Wash. 586, 71 Pac. 9.

2. *McCrossen v. Harris*, 35 Kan. 178, 10 Pac. 583; *Vincent v. Moore*, 51 Mich. 618, 17 N. W. 81; *Horrigan v. Wellmuth*, 77 Mo. 542; *Martin v. Lennon*, 19 Minn. 67; *Young v. Brand*, 15 Neb. 601, 19 N. W. 494; *Stone v. Tilley*, 100 Tex. 487, 10 L. R. A. (N. S.) 678, 123 Am. St. Rep. 819, 15 Ann. Cas. 524, 101 S. W. 201.

3. *Mut. Life Ins. Co. v. Newell*, 78 Hun (N. Y.) 293, 28 N. Y.

Supp. 913; see *Farmer v. Ward*, 75 N. J. Eq. 33, 71 Atl. 401 (statute).

4. *Hogg v. Longstreth*, 97 Pa. 255. *Contra*, *Gorham v. Nat. Life Ins. Co.*, 62 Minn. 327, 64 N. W. 906; *Stone v. Tilley*, 100 Tex. 487, 10 L. R. A. (N. S.) 678, 123 Am. St. Rep. 819, 15 Ann. Cas. 524, 101 S. W. 201.

5. *Ringo v. Woodruff*, 43 Ark. 469; *Atchison Sav. Bank v. Wyman*, 65 Kan. 314, 69 Pac. 326; *Noeker v. Howry*, 119 Mich. 626, 78 N. W. 669; *Norton v. Metropolitan Life Ins. Co.*, 74 Minn. 484, 77 N. W. 298, 539; *Chrisman v. Hough*, 146 Mo. 102, 47 S. W. 941; *Fiacre v. Chapman*, 32 N. J. Eq. 463; *Fischer v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 742, 64 Pac. 923 (payment in ignorance of prior mtge); *Allison*

pose, to pay the taxes,<sup>6</sup> and for the amount so paid he will be credited upon foreclosure or redemption.<sup>7</sup>

The mortgagor being under an obligation to the mortgagee to pay the taxes cannot leave them unpaid and buy the property at the tax sale,<sup>8</sup> and his transferee is in a like position.<sup>9</sup>

A junior mortgagee stands in the same position as the owner of the land in this regard, and cannot purchase at a sale for taxes on the property, and assert

v. Corson, 83 Fed. 752 (*semble*). But see Hill v. Buffington, 106 Wis. 525.

6. Shoemaker v. The Bank, 15 Phila. (Pa.) 297; Williams v. Hilton, 35 Me. 547, 58 Am. Dec. 729.

7. Pollard v. American Freehold Land Mortgage Co., 139 Ala. 183, 35 So. 767; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Dubois v. Bowles, 30 Colo. 44, 69 Pac. 1067; Roberts v. Fleming, 53 Ill. 196; Dooley v. Potter, 146 Mass. 148, 15 N. E. 499; Martin v. Lennon, 19 Minn. 67; Bourgeois v. Gapen, 58 Neb. 364, 78 N. W. 639; Lysle v. Williams, 15 Serg. & R. (Pa.) 135; Howard v. Clark, 72 Vt. 429, 48 Atl. 656; Savings & Loan Society v. Davidson, 97 Fed. 696, 38 C. C. A. 365.

8. Barnard v. Wilson, 74 Cal. 512, 16 Pac. 307; Goodrich v. Kimberly, 48 Conn. 395; Jordan v. Sayre, 29 Fla. 100, 10 So. 823; McAlpine v. Zitzer, 119 Ill. 273, 10 N. E. 901; Shrigley v. Black, 66 Kan. 213, 71 Pac. 301; Nielsen v. Central Nebraska Land & Investment Co., 87 Neb. 518, 127 N. W. 897; Kezer v. Clifford, 59 N. H. 208; Ryan v. Martin, 104 N. C. 176, 10 S. E. 169; Interstate

Building & Loan Ass'n v. Waters, 50 S. C. 459, 27 S. E. 948. That the mortgagor's wife may purchase, see Wood v. Armour, 88 Wis. 488, 43 Am. St. Rep. 918, 60 N. W. 791.

9. Stears v. Hollenbeck, 38 Iowa, 550; Gibson v. Gilman, 71 Kan. 320, 80 Pac. 587; Phinney v. Day, 76 Me. 83; Brown v. Avery, 119 Mich. 384, 78 N. W. 331; MacEwen v. Beard, 58 Minn. 176, 59 N. W. 942; United States Fidelity & Guaranty Co. v. Marks, 37 Nev. 366, 142 Pac. 524; Fallass v. Pierce, 30 Wis. 443. But that the transferee may purchase, if he did not assume the mortgage debt, see Zuege v. Nebraska Mortgage Co., 92 Kan. 272, 52 L. R. A. (N. S.) 877, Ann. Cas. 1916B 865, 140 Pac. 855. In State Mut. Building & Loan Ass'n of New Jersey v. Millville Improvement Co., 74 N. J. Eq. 721, 70 Atl. 300, 76 N. J. Eq. 336, 75 Atl. 1101, it was apparently decided that if a transferee of the mortgaged land had previously purchased at tax sale with the expectation of also purchasing from the mortgagor, he could not set up the tax title so acquired. The cases bearing on the right of the land owner to purchase at tax

the title so acquired as against the senior mortgagee.<sup>10</sup>

In perhaps the majority of the jurisdictions in which the question has come up for decision, it has been decided that a mortgagee, having the right to pay the taxes on the land and to assert a claim for reimbursement, must take this method of protecting his interest in the land against the claim for taxes, and cannot, by purchasing the land at a sale for non payment of taxes, acquire a paramount title which he can assert as against the mortgagor.<sup>11-12</sup> The courts do not clearly explain the grounds upon which this view is based, and not infrequently say little more than that since the mortgagor and mortgagee have a common interest in the payment of the taxes and in the protection of the property against tax titles, it is inequitable for one to acquire such a title and to assert it against the other, without, however, explaining why it is inequitable for the mortgagee, who owes no duty to the mortgagor to pay the taxes, thus to take advantage of the mortgagor's default in this regard. Occasionally the courts speak as if there were some sort of trust relation between the parties, which, however, is not the case.<sup>13</sup> The more satisfactory ground upon which

sale, as against the mortgagee, are conveniently collected in 52 L. R. A. (N. S.) 877.

10. *Goodrich v. Kimberly*, 48 Conn. 395; *Eck v. Swennumson*, 73 Iowa, 423, 5 Am. St. Rep. 690, 35 N. W. 503; *Frank v. Arnold*, 73 Iowa, 370, 35 N. W. 453; *Norton v. Metropolitan Life Ins. Co.*, 74 Minn. 484, 77 N. W. 298, 539.

11-12. *Ross v. Frick Co.*, 73 Ark. 45, 83 S. W. 343; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Stinson v. Connecticut Mut. Life Ins. Co.*, 174 Ill. 125, 66 Am. St. Rep. 262, 51 N. E. 193; *Fair v. Brown*, 40 Iowa, 298; *Eck v. Swennumson*, 73 Iowa, 423, 5 Am. St.

Rep. 690, 35 N. W. 503;; *Cone v. Wood*, 108 Iowa, 260, 75 Am. St. Rep. 223, 79 N. W. 86 (purchase by mortgagee of co-owner); *Maxfield v. Willey*, 46 Mich. 252, 9 N. W. 271; *Porter v. Corbin*, 124 Mich. 201, 82 N. W. 818; *Woodbury v. Swan*, 59 N. H. 22; *Hall v. Westcott*, 15 R. I. 373, 5 Atl. 629; *First Nat. Bank of Rapid City v. McCarthy*, 18 S. D. 218, 100 N. W. 14; *Shepard v. Vincent*, 38 Wash. 493, 80 Pac. 777; *Beckwith v. Seborn*, 31 W. Va. 1, 5 S. E. 453; *Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148, 35 N. W. 286.

13. *Ante*, § 611.

to base the doctrine of these decisions appears to be that, it being for the advantage of the state that taxes be promptly paid, and the right to purchase at tax sale being unnecessary for the protection of the mortgagee, it is against public policy to allow the mortgagee, by leaving the taxes unpaid, to acquire a tax title and so save the costs of foreclosure.<sup>14</sup> In some jurisdictions the view has been taken that, there being no relation of trust, the mortgagee, if he is not in possession, can by purchase at tax sale acquire a good title as against the mortgagor.<sup>15</sup> But in any state, it seems, if the mortgagee is in possession and receipt of the rents and profits, he is under an obligation to pay the taxes therefrom, at least so far as they are sufficient for the purpose, and if the property is sold for taxes by reason of his failure so as to do, he cannot purchase at the tax sale, and his purchase amounts merely to a payment of the taxes.<sup>16</sup> Likewise if he agrees to pay the taxes he is precluded from purchasing the land at a sale for non payment thereof.<sup>17</sup>

In states in which the mortgagee is not allowed, as against the mortgagor, to acquire title at a sale for taxes, a mortgagee would seem to be under the same disability as against a subsequent mortgagee.<sup>18</sup>

14. See *Farmer v. Ward*, 75 N. J. Eq. 33, 71 Atl. 401.

15. *Spratt v. Price*, 18 Fla. 289; *Waterson v. Devoe*, 18 Kan. 223; *McLaughlin v. Acom*, 58 Kan. 514, 50 Pac. 441; *Moore v. Boagni*, 111 La. 490, 35 So. 716; *Williams v. Townsend*, 31 N. Y. 411; *Smith v. Reber*, 1 Grant (Pa.) 217; *Price v. Salisbury*, 41 Okla. 416, L. R. A. 1917B, 520, 138 Pac. 1024; *Allen v. Dayton Hotel Co.*, 95 Tenn. 480, 32 S. W. 962.

16. See *Schenck v. Kelley*, 88 Ind. 444; *Waterson v. Devoe*, 18 Kan. 223; *McLaughlin v. Acom*, 58 Kan. 514, 50 Pac. 441; *Brown v.*

*Simons*, 44 N. H. 475; *Ten Eyck v. Craig*, 62 N. Y. 406 (*dictum*); *Davis v. Hall*, 52 Md. 673. In *Miller v. Ziegler*, 31 Kan. 417, 2 Pac. 601, the inability of the mortgagee to purchase at tax sale was based not only on his possession, but on the fact that his mortgage was in form an absolute deed, and that he claimed to be the owner, thus leading others to think that his purchase was merely a redemption from taxes.

17. *Dusenberry v. Bidwell*, 86 Kan. 666, 121 Pac. 1098.

18. See *Davis v. Evans*, 174 Mo. 307, 73 S. W. 512; *Woodbury v.*

One who is himself disabled to purchase the mortgaged property at tax sale can obviously not procure another to make the purchase in his behalf.<sup>19</sup> But it has been held that one precluded from purchasing at tax sale may, in the absence of fraud or collusion, immediately purchase from one who had purchased at the tax sale, and obtained a tax deed.<sup>20</sup>

**§ 617. Insurance—By mortgagor.** The mortgagor has an insurable interest in the land,<sup>21</sup> and may insure to the full value of the property, even though the mortgage be for such value.<sup>22</sup> His insurable interest continues even after foreclosure, and until his right to redeem is barred;<sup>23</sup> and his mere personal liability for

Swan, 59 N. H. 22; Compare Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N. W. 707. That the holder of one of the notes secured by a mortgage could not purchase at tax sale as against the holder of another of such notes, see Gilman v. Heitman, 137 Iowa, 336, 113 N. W. 932.

19. Mendenhall v. Hall, 134 U. S. 559, 33 L. Ed. 1012; McAlpine v. Zitzer, 119 Ill. 273, 10 N. E. 901; Frank v. Arnold, 73 Iowa, 370, 35 N. W. 453; Chamberlain v. Forbes, 126 Mich. 86, 85 N. W. 253; Carter v. Bustamente, 59 Miss. 559; Drew v. Morrill, 62 62 N. H. 565; Maher v. Potter, 60 Wash. 443, 111 Pac. 453.

20. Safe Deposit & Trust Co. v. Wickhem, 9 S. D. 341, 62 Am. St. Rep. 873, 69 N. W. 14. But see Gibson v. Gilman, 71 Kan. 320, 80 Pac. 587.

21. Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473; Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302, 25 Am. Rep. 386; Strong v. Manufacturer's Ins. Co., 10

Pick. (Mass.) 40, 20 Am. Dec. 507; Jackson v. Massachusetts Mut. Fire Ins. Co., 23 Pick. (Mass.) 418, 34 Am. Dec. 69; Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98, 33 N. W. 31.

The giving of a mortgage does not involve breach of a condition in the insurance policy against alienation. Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. St. Rep. 582; Hartford Steam-Boiler Inspection & Insurance Co. v. Lasher Stocking Co., 66 Vt. 439, 44 Am. St. Rep. 859, 29 Atl. 629.

22. Royal Ins. Co. v. Stinson, 103 U. S. 25, 26 L. Ed. 473; McDonald v. Black's Adm'r, 20 Ohio, 185, 55 Am. Dec. 448. See Gordon v. Massachusetts Fire & M. Ins. Co., 2 Pick. (Mass.) 249; Aetna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90.

23. Strong v. Manufacturer's Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Stephens v. Illinois Mut. Fire Ins. Co., 43 Ill.

the debt gives him an insurable interest, even when he has conveyed the mortgaged land to another.<sup>24</sup>

If the mortgagor agrees to take out insurance for the benefit of the mortgagee, but nevertheless procures it in his own name, without making it payable to the mortgagee, the latter will be regarded as entitled to the proceeds of the insurance to the extent of the mortgage debt, and will have an equitable lien thereon, equity regarding the policy as in effect payable to the mortgagee, because it should have been made so payable.<sup>25</sup> And a like view has been taken as to insurance taken out by the mortgagor before entering into the agreement with the mortgagee.<sup>26</sup> But if the insurance is taken out by the mortgagor purely for his own account, without any agreement having been made in that regard with the mortgagee, the latter has no claim on the proceeds.<sup>27</sup>

327; Buffalo Steam Engine Works v. Sun Mut. Ins. Co., 17 N. Y. 401; Richland County Mut. Ins. Co. v. Sampson, 38 Ohio St. 672.

24. Waring v. Loder, 53 N. Y. 581; Buck v. Phoenix Ins. Co., 76 Me. 586; Wilson v. Hill, 3 Metc. (Mass.) 66.

25. Wheeler v. Factors' & Traders' Ins. Co., 101 U. S. 439, 25 L. Ed. 1055; *In re* Sands Ale Brewing Co., 3 Biss. 175, Fed. Cas. No. 12307; Grange Mill Co. v. Western Assur. Co., 118 Ill. 396, 9 N. E. 274; Johnson v. Northern Minnesota Land & Investment Co., 168 Iowa, 340, 150 N. W. 596; Thomas' Adm'rs v. Von Kapff's Ex'rs, 6 Gill. & J. (Md.) 372; Miller v. Aldrich, 31 Mich. 408; Aetna Ins. Co. v. Thompson, 68 N. H. 20, 73 Am. St. Rep. 552 40 Atl. 396; Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641; Batson v. Misz, 81 Ore.

607, 160 Pac. 536; Nichols v. Baxter, 5 R. I. 491; Williamson v. Michigan Fire & Marine Ins. Co., 86 Wis. 393, 39 Am. St. Rep. 906, 57 N. W. 46. But it has in Massachusetts been held that the insurance must have been procured by the mortgagor with the intention of performing his agreement, in order that the mortgagee may have a claim on the proceeds. Stearns v. Quincy Ins. Co., 124 Mass. 61.

26. Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Nordyke & M. Co. v. Gery, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683; Nichols v. Baxter, 5 R. I. 491.

27. Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 507, 9 L. Ed. 512; Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. Ed. 1044; Hancock v. Fishing Ins. Co., 3 Sumn. 132, Fed. Cas. No. 6,013; Vande-

— **By the mortgagee.** The mortgagee has an insurable interest,<sup>28</sup> though only to the amount of the mortgage debt;<sup>29</sup> and this interest continues till the mortgage debt is paid, or the land passes into other hands by foreclosure.<sup>30</sup> The interests of the mortgagor and the mortgagee are so distinct that both may be insured at the same time.<sup>31</sup> The mortgagee's right to the proceeds of the insurance taken out by him is not affected by the fact that the property is still, even

*graaff v. Medlock*, 3 Port. (Ala.) 389, 29 Am. Dec. 256; *Niagara Fire Ins. Co. v. Scamman*, 144 Ill. 490, 19 L. R. A. 114, 28 N. E. 919, 32 N. E. 914; *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683; *Ryan v. Adamson*, 57 Iowa. 30, 10 N. W. 287; *Ames v. Richardson*, 29 Minn. 330, 13 N. W. 137; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Nichols v. Baxter*, 5 R. I. 491; *Plimpton v. Farmers' Mut. Fire Ins. Co.*, 43 Vt. 497.

28. *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 25 Pac. 509; *Bell v. Western Marine & Fire Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683; *Clark v. Washington Ins. Co.*, 100 Mass. 509, 1 Am. Rep. 135; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Grevemeyer v. Southern Mut. Fire Ins. Co.*, 62 Pa. St. 340, 1 Am. Rep. 420.

29. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *Hadley v. New Hampshire Ins. Co.*, 55

N. H. 110; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *McDonald v. Black's Adm'r*, 20 Ohio, 185, 55 Am. Dec. 448; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253, 55 Am. Dec. 546.

30. *National Bank of D. O. Mills & Co. v. Union Ins. Co.*, 88 Cal. 497, 2 Am. St. Rep. 324, 26 Pac. 509; *Excelsior Fire Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683.

His insurable interest continues even after his assignment of the note, if he is liable as an indorser on the mortgage note. *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41.

31. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495, 10 L. Ed. 1044; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. (Mass.) 418, 34 Am. Dec. 69; *Williams Mfg. Co. v. Ins. Co. of North America*, 85 Vt. 282, 81 Atl. 916; *Manson v. Phoenix Ins. Co.*, 64 Wis. 26, 51 Am. Rep. 573, 24 N. W. 407.

after the loss insured against, sufficient security for the amount of the mortgage.<sup>32</sup>

If there is no provision in the mortgage requiring the mortgagor to insure the premises, or other agreement on the subject, insurance effected by the mortgagee is purely for his own account, and in case of loss he is entitled to the proceeds of insurance free from any claim by the mortgagor to have it applied on the mortgage debt.<sup>33</sup> If, however, the mortgagee insures the property on account of the mortgagor, or by his request, or at his expense, because the latter fails to comply with his covenant to insure, the proceeds of the policy must be applied on the mortgage debt.<sup>34</sup>

In most states it is held that, upon receipt of the proceeds of insurance by the mortgagee, the insurance company becomes subrogated to the rights of the mortgagee to the extent of the amount thus paid, the mortgagee not being allowed the proceeds of both the mortgage and insurance.<sup>35</sup>

32. Aetna Ins. Co. of Hartford v. Baker, 71 Ind. 102; Foster v. Equitable Mut. Fire Ins. Co., 2 Gray (Mass.) 216; Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271; Smith v. Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546.

33. Russell v. Southard, 12 How. (U. S.) 139, 13 L. Ed. 927; Honore v. Lamar Fire Ins. Co., 51 Ill. 409; Deming Inv. Co. v. Dickerman, 63 Kan. 728, 88 Am. St. Rep. 265, 66 Pac. 1029; Stinchfield v. Milliken, 71 Me. 567; White v. Brown, 2 Cush. (Mass.) 412; Sterling Fire Ins. Co. v. Beffrey, 48 Minn. 9, 50 N. W. 922; Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271.

34. Norwich Fire Ins. Co. v.

Boomer, 52 Ill. 442, 4 Am. Rep. 618; Concord Union Mut. Fire Ins. Co. v. Woodbury, 45 Me. 447; Pendleton v. Elliott, 67 Mich. 496, 35 N. W. 97; Rutherford v. Sample, 186 Mo. App. 469, 171 S. W. 578; Leyden v. Lawrence, 79 N. J. Eq. 113, 81 Atl. 121; Waring v. Loder, 53 N. Y. 581; Nichols v. Baxter, 5 R. I. 491.

35. Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. Ed. 1044; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618; Concord Union Mut. Fire Ins. Co. v. Woodbury, 45 Me. 447; Sterling Fire Ins. Co. v. Beffrey, 48 Minn. 9, 50 N. W. 922; Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. L. 541; Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343, 14



§ 618. **Injuries to the land—Remedies of the mortgagee.** The owner of land subject to a mortgage, in possession of the land, is under an obligation not to commit waste as against the mortgagee. What constitutes waste as between mortgagor and mortgagee is, it seems, ordinarily to be determined by the same considerations as apply in connection with the question of waste as between tenant and remainderman or reversioner.<sup>36</sup> Generally speaking, the mortgagor may do such acts on the mortgaged land, even though these involve the cutting of timber or severance of other parts of the realty, as are incident to the utilization of the land in the manner in which it might be expected to be utilized, having regard to its nature and the use to which it had been appropriated prior to the making of the mortgage,<sup>37</sup> or, as the same idea has been otherwise expressed, acts of the mortgagor in cutting wood or otherwise severing parts of the realty are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed.<sup>38</sup> And provided the acts of the mortgagor fall within these limits, the fact that their effect is to prevent the mortgagee from realizing to the full extent of the obligation sought to be secured would appear to be immaterial.<sup>39</sup> Conversely, the mortgagor cannot injure

Am. Rep. 271; *Smith v. Columbia Ins. Co.*, 17 Pa. 253. In Massachusetts the contrary view is taken,—that the mortgagee may recover both the proceeds of insurance and the full amount of the mortgage. *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen (Mass.) 123.

36. See *Young v. Haviland*, 215 Mass. 120, 102 N. E. 338.

37. See *Ward v. Carp River Iron Co.*, 47 Mich. 65, 10 N. W. 109, 50 Mich. 522, 15 N. W. 889;

*Vervalen v. Older*, 8 N. J. Eq. 98; *Judkins v. Woodman*, 81 Me. 351, 2 L. R. A. 607, 17 Atl. 298; *Hapgood v. Blood*, 11 Gray (Mass.) 400, 42 Am. Rep. 624. But in *Maples v. Million*, 31 Conn. 498, it was decided that shrubs planted by a nurseryman could not be removed by him for purposes of sale.

38. *Smith v. Moore*, 11 N. H. 55; *Page v. Robinson*, 10 Cush. (Mass.) 99; *Searle v. Sawyer*, 127 Mass. 491.

39. *Young v. Haviland*, 215

the land by removing buildings or other fixtures,<sup>40</sup> timber,<sup>41</sup> or minerals,<sup>42</sup> when their removal involves a departure from the ordinary or natural utilization of the property, and the mortgagor so doing is guilty of waste.

In a few states it seems that the mortgagee's only remedy for acts of waste by the mortgagor is in equity, and that he cannot recover at law for any waste or injury to the land.<sup>43</sup> In most of the states, however, even though the legal title is not in the mortgagee, he has a right of action against the owner of the mortgaged land for injury to his security by acts of spoliation on the land.<sup>44</sup> Equity will restrain by injunction the commission of waste by the mortgagor, if calculated to render the security of questionable sufficiency, but

Mass. 120, 102 N. E. 338. Compare *Chavez v. Schairer*, — Tex. Civ. App. —, 199 S. W. 892; *Forman v. G. D. Holloway & Son*, 122 Ark. 341, 183 S. W. 763.

40. *Cole v. Stewart*, 11 Cush. (Mass.) 181; *Wilmarth v. Bancroft*, 10 Allen (Mass.) 348; *Dorr v. Dudderar*, 88 Ill. 107; *Hoskin v. Woodward*, 45 Pa. St. 42.

41. *Page v. Robinson*, 10 Cush. (Mass.) 99; *Sanders v. Reed*, 12 N. H. 558; *Mosher v. Vehue*, 77 Me. 169; *Wright v. Lake*, 30 Vt. 206. See *Forman v. G. D. Holloway & Son*, 122 Ark. 341, 183 S. W. 763. But see *Angier v. Angier*, 98 Pa. St. 587, 42 Am. Rep. 624, which appears to recognize no limit upon the mortgagor's right to cut timber.

42. *Ante*, § 282.

43. *Cooper v. Davis*, 15 Conn. 556; *Vanderslice v. Knapp*, 20 Kan. 647; *Tomlinson v. Thompson*, 27 Kan. 70. See *Triplett v. Parmlee*, 16 Neb. 649, 21 N. W.

403; *Knoll v. New York, C. & St. L. Ry. Co.*, 121 Pa. St. 467, 1 L. R. A. 366, 15 Atl. 571. These decisions place the mortgagee rather at the mercy of an unscrupulous mortgagor, and there would seem, on principle, no reason why one injured as regards a proprietary right, even though it be a lien right only, should not have an action of tort against the person committing the injury.

44. *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184; *Arnold v. Procd*, 15 Colo. App. 389, 62 Pac. 577; *Searle v. Sawyer*, 127 Mass. 491; *Jackson v. Turrell*, 39 N. J. L. 329; *Van Pelt v. McGraw*, 4 N. Y. 110; *Carpenter v. Cincinnati & Whitewater Canal Co.*, 35 Ohio St. 307; *Heath v. Haile*, 45 S. C. 642, 24 S. E. 300; *Chavez v. Schairer*, — Tex. Civ. App. —, 199 S. W. 892; *Langdon v. Paul*, 22 Vt. 205.

not otherwise.<sup>45</sup> And even though the mortgagee has given permission to the mortgagor to cut timber or the like, equity will intervene to protect the mortgagor from an unconscientious abuse of the privilege.<sup>46</sup>

The mortgagee has a right of action, in most states, against a third person committing acts of waste upon the land,<sup>47</sup> provided, at least, such person did not act under authority from the mortgagor and in ignorance of the existence of the mortgage.<sup>48</sup> Occasionally it is said that there is no right of action as for the injury to the security unless such injury is shown by the exis-

45. *King v. Smith*, 2 Hare. 239; *Coker v. Whitelock*, 54 Ala. 180; *Buckout v. Swift*, 27 Cal. 434, 87 Am. Dec. 90; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184; *Dorr v. Dudderar*, 88 Ill. 107; *Minneapolis Trust Co. v. Verhulst*, 74 Ill. App. 350; *Fulton v. Oertling*, 131 La. 768, 60 So. 238; *Webster v. Peet*, 97 Mich. 326; *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203, 44 N. W. 531; *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310; *Verner v. Betz*, 46 N. J. Eq. 256, 7 L. R. A. 630, 19 Am. St. Rep. 387, 19 Atl. 206; *Beaver Lumber Co. v. Eccles*, 43 Ore. 400, 99 Am. St. Rep. 759, 73 Pac. 201; *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 59 L. R. A. 907, 93 Am. St. Rep. 782, 53 Atl. 522; *Fairbank v. Cudworth*, 33 Wis. 358; *Anderson v. Englehart*, 18 Wyo. 409, 108 Pac. 977.

46. *Ensign v. Colburn*, 11 Paige (N. Y.) 503; *Emmons v. Hinderer*, 24 N. J. Eq. 39. See *Scott v. Webster*, 50 Wis. 53, 6 N. W. 363.

47. *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep.

147 note, 22 Pac. 184; *Delano v. Smith*, 206 Mass. 365, 30 L. R. A. (N. S.) 474, 92 N. E. 500; *Webber v. Ramsey*, 100 Mich. 58, 43 Am. St. Rep. 429, note, 58 N. W. 625; *Jackson v. Turrell*, 39 N. J. L. 329; *Van Pelt v. McGraw*, 4 N. Y. 110; *Allison v. McCune*, 15 Ohio, 726, 45 Am. Dec. 605; *Atkinson v. Hewett*, 63 Wis. 396, 23 N. W. 889. In *Stewart v. Finklestone*, 206 Mass. 28, 92 N. E. 27, the mortgagee was regarded as entitled to assert a violation of a building restriction by a neighboring owner.

48. *Moisant v. McPhee*, 92 Cal. 76, 28 Pac. 46; *Banton v. Shorey*, 77 Me. 48; *Webber v. Ramsey*, 100 Mich. 58, 43 Am. St. Rep. 429, 58 N. W. 625; *Jackson v. Turrell*, 39 N. J. L. 329; *Verner v. Betz*, 46 N. J. Eq. 256, 7 L. R. A. 630, 19 Am. St. Rep. 387, 19 Atl. 206; *Wilson v. Maltby*, 59 N. Y. 126; *Smith v. Altick*, 24 Ohio St. 369. In *Howe v. Wadsworth*, 59 N. H. 397, the mortgagee's right of action in trover for lumber severed and sold by the mortgagor, as against the purchaser of the lumber, was held to be unaffected

tence of a deficiency on foreclosure,<sup>49</sup> a rule calculated to affect the mortgagee adversely by compelling him to defer his action for damages until after foreclosure. The cases do not, however, usually suggest such a restriction upon the right of recovery. Indeed in one state, in which the legal title is in the mortgagee, the mortgagee's right of action for acts of waste upon the premises has been regarded as independent of the sufficiency of the security, on the theory that, until the whole debt is paid, the mortgagee has a right to the whole security pledged and is consequently entitled to full redress for the deprivation of any part thereof.<sup>50</sup> Elsewhere his right of recovery has been held to be restricted to the amount of injury which actually accrues to him as a result of such acts.<sup>51</sup>

In perhaps two jurisdictions the mortgagee has been held to be entitled, in a proceeding to foreclose, to an accounting for waste by the mortgagor or his transferee.<sup>52</sup>

In the states where the mortgagee has the legal title, accompanied by the right of possession, he has, perhaps more usually, the remedies incident to such title or right. He may, it has been held, recover in trespass *quare clausum fregit* against one injuring the

by the purchaser's lack of notice of the mortgage. And see *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425.

49. *Taylor v. McConnell*, 53 Mich. 587, 19 N. W. 196; *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184. And see *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213; *Gardner v. Heartt*, 3 Denio (N. Y.) 232. *Contra*, *Arnold v. Brood*, 15 Colo. App. 389, 62 Pac. 577.

50. *Byrom v. Chapin*, 113 Mass. 308; *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563; *Delano v.*

*Smith*, 206 Mass. 365, 30 L. R. A. (N. S.) 474, 92 N. E. 500. See *Leavitt v. Eastman*, 77 Me. 117. But in *King v. Bangs*, 120 Mass. 514, the fact that the premises were sold under the mortgage for sufficient to pay the debt was held to be admissible in mitigation of damages.

51. *Schalk v. Kingsley*, 42 N. J. L. 32; *Van Pelt v. McGraw*, 4 N. Y. 110.

52. *Tate v. Field*, 56 N. J. Eq. 35, 37 Atl. 440; *Scott v. Webster*, 50 Wis. 53, 6 N. W. 363.

land;<sup>53</sup> and when timber or fixtures are removed from the land, his title thereto is not affected by the wrongful severance,<sup>54</sup> and he may recover their value in an action of trover or trespass *de bonis asportatis* from the person, whether the owner of the land or another, who committed the wrong,<sup>55</sup> or he may recover the articles themselves in replevin.<sup>56</sup> In some states, however, although the legal title to the land is in the mortgagee for certain limited purposes, his title is regarded as divested by the severance, so that he cannot assert any rights in the things severed.<sup>57</sup> In those states in which the lien theory of a mortgage prevails, he can assert no claim of title to the things severed,<sup>58</sup> but in two or three states the mortgagee has been regarded as entitled to assert his lien as against a fixture or other article wrongfully severed.<sup>59</sup>

53. *Stowell v. Pike*, 2 Me. 387; *Smith v. Goodwin*, 2 Me. 173; *Leavitt v. Eastman*, 77 Me. 117; *Sanders v. Read*, 12 N. H. 558; *Harris v. Haynes*, 34 Vt. 220. Compare *Gooding v. Shea*, 103 Mass. 360. As to recovery for a trespass prior to entry by the mortgagee, see *Ocean Accident & Guarantee Corp. v. Ilford Gas Co.* (1905) 2 K. B. 493.

54. *Mosher v. Vehue*, 77 Me. 169; *Hutchins v. King*, 1 Wall. (U. S.) 53, 17 L. Ed. 544.

55. *De Lacy v. Tillman*, 83 Ala. 155, 3 So. 294; *Frothingham v. McKusick*, 24 Me. 403; *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425; *Cole v. Stewart*, 11 Cush. (Mass.) 181; *Burnside v. Twitchell*, 43 N. H. 390; *Angier v. Agnew*, 98 Pa. St. 587, 42 Am. Rep. 624; *Jeffers v. Pease*, 74 Vt. 215, 52 Atl. 422. Compare *Farmers' Loan & Trust Co. v. Avera*, — (Miss.) —, 7 So. 358.

56. *Dorr v. Dudderar*, 88 Ill. 107; *Barley v. Pike*, 62 N. H. 495; *Waterman v. Matteson*, 4 R. I. 539. And see *Mosher v. Vehue*, 77 Me. 169; *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425.

57. *Cooper v. Davis*, 15 Conn. 556; *McKelvey v. Creevey*, 72 Conn. 464, 77 Am. St. Rep. 321, 45 Atl. 4; *Kircher v. Schalk*, 39 N. J. L. 335.

58. *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90; *Harris v. Bannon*, 78 Ky. 568; *Clark v. Reyburn*, 1 Kan. 281; *Vanderslice v. Knapp*, 20 Kan. 647; *Moore v. Moran*, 64 Neb. 84, 89 N. W. 629. But see *Dutro v. Kennedy*, 9 Mont. 101, 22 Pac. 763.

59. *Hamlin v. Parsons*, 12 Minn. 108, 90 Am. Dec. 284; *Hoskin v. Woodward*, 45 Pa. St. 42; *Smith v. Altick*, 24 Ohio St. 369; *Turner v. Mebane*, 110 N. C. 413, 28 Am. St. Rep. 697, 14 S. E. 974. *Contra*, *Buckout v. Swift*, 27 Cal.

— **Remedies of the mortgagor.** The mortgagee, if in possession, owes to the mortgagor the duty not to commit waste, and may be restrained from so doing by injunction,<sup>60</sup> and may be required to account for any loss resulting therefrom.<sup>61</sup> The mortgagee is not, however, liable as for permissive waste in failing to keep the premises in repair, or for improper cultivation of the land, unless he has been guilty of gross negligence in that respect.<sup>62</sup>

The mortgagor, if in possession, may bring an action against a third person for injuries to the premises, as if the property were not subject to a mortgage, he being regarded as the owner of the property.<sup>63</sup>

**§ 619. Execution sale of mortgagor's interest.** Formerly, in England, the mortgagor's interest being regarded as purely equitable, it was not subject to execution for his debts,<sup>64</sup> and such may still be the law as recognized in one or two states.<sup>65</sup> In most all jurisdictions, however, at the present time, the mort-

433, 89 Am. Dec. 90; *Harris v. Bannon*, 78 Ky. 568; *Knoll v. New York, C. & St. L. Ry. Co.*, 121 Pa. St. 467, 1 L. R. A. 366, 15 Atl. 571; *Franks v. Cravens*, 6 W. Va. 185. See *Verner v. Betz*, 46 N. J. Eq. 256, 7 L. R. A. 630, 19 Am. St. Rep. 387, 19 Atl. 206; *Edler v. Hasche*, 67 Wis. 653, 31 N. W. 57.

60. *Farrant v. Lovel*, 3 Atk. 723; *Kinthead v. Peet*, 153 Iowa, 199, 132 N. W. 1095; *Youle v. Richards*, 1 N. J. Eq. 534, 23 Am. Dec. 722; *Givens v. McCalmont*, 4 Watts (Pa.) 460.

61. *Sandon v. Hooper*, 6 Beav. 246; *Perdue v. Brooks*, 85 Ala. 459; *Whiting v. Adams*, 66 Vt. 679, 25 L. R. A. 598, 44 Am. St. Rep. 875 30 Atl. 32.

62. *Russel v. Smithies*, 1

Anstr. 96; *Wragg v. Denham*, 2 Younge & C. 117; *Dexter v. Arnold*, 2 Sumn. 108, Fed. Cas. No. 3,858.

63. *Hamilton v. Griffin*, 123 Ala. 600, 26 So. 243; *Arnd v. Arnling*, 53 Md. 192; *Atwood v. Moose Head Paper & Pulp Co.*, 85 Me. 379, 27 Atl. 259; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 66 L. R. A. 617, 42 S. E. 983; *Van Dyke v. Grand Trunk R. Co.*, 84 Vt. 212, Ann. Cas. 1913A, 640, 78 Atl. 958.

64. *Plunket v. Penson*, 2 Atk. 290; *Scott v. Scoley*, 8 East. 497; 4 Kent's Comm., 160; 2 Freeman, Executions (3rd Ed.) § 190.

65. Such is apparently the law in Tennessee. *Wilkins v. Johnson* — (Tenn. Ch. App.), —, 54 S. W. 1001.

gagor's interest is so subject,<sup>66</sup> this being in some states by force of express legislation to that effect, in others by reason of legislation subjecting the debtor's equitable as well as his legal interests to execution. The tendency of the courts, even in states where the legal title is for certain purposes in the mortgagee, to regard the mortgagor as the actual owner, has no doubt contributed to this result. In states where the mortgagee is regarded as having a mere lien, and no title, there could not well be any question as to the liability of the mortgagor's interest to execution.

As the interest of a mortgagor is ordinarily subject to execution, even though the legal title is regarded as vested in the mortgagee, so the interest of one who has made a conveyance in trust to secure a debt has, in a number of jurisdictions, been regarded as so subject.<sup>67</sup> In Ohio it has been decided that the interest of the grantor in a deed of trust is subject to execution, when the conveyance in trust is subject to a condition that it shall become void upon payment of the

66. *Gassenheimer v. Molton*, 80 Ala. 521, 2 So. 562; *Turner v. Watkins*, 31 Ark. 429; *Punderson v. Brown*, 1 Day (Conn.) 93, 2 Am. Dec. 53; *Harwell v. Fitts*, 20 Ga. 723; *Finley v. Thayer*, 42 Ill. 350; *Clinton Nat. Bank v. Manwarring*, 39 Iowa, 281; *Lord v. Crowell*, 75 Me. 399; *Cushing v. Hurd*, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708; *Wiggin v. Heywood*, 118 Mass. 514; *Carpenter v. Bowen*, 42 Miss. 28; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623; *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331; *Farmers' Bank v. Commercial Bank*, 10 Ohio, 71; *Garro v. Thompson*, 7 Watts (Pa.) 416. In New Hampshire the statute makes

3 R. P.—13

special provision for a levy on and sale of the "right to redeem mortgaged real estate." Pub. St., Ch. 233, § 19. The mortgagor's execution creditor may, nevertheless, levy upon the mortgaged land as if not mortgaged, but in such case the land must be set off to him without deducting from its value on account of the mortgage, though it remains subject thereto in his hands. *Dunbar v. Starkey*, 19 N. H. 160; *Hovey v. Bartlett*, 34 N. H. 278. See *Bartlett v. Gilcreast*, 72 N. H. 145, 55 Atl. 189.

67. *Turner v. Watkins*, 31 Ark. 429; *Coe v. Johnson*, 18 Ind. 218; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 254; *Waller v. Todd*, 3 Dana (Ky.) 503, 28 Am. Dec. 94;

debt secured thereby, while not so subject if there is no such condition, but merely a power in the trustee to sell on default, the grantor having, in the latter case, rights of an equitable character only.<sup>68</sup> And in Georgia the interest of one who has made a "security deed" is exempt from execution.<sup>69</sup>

As to the case of a conveyance absolute in form, but intended as security for a debt, it has in two or three states been decided that the interest of the grantor, being in effect the same as that of the mortgagor in the case of an ordinary mortgage, is, as is the latter, subject to execution.<sup>70</sup> In Massachusetts, on the other hand, the interest of the grantor in such a conveyance is held not to be within the statute authorizing a levy on "rights of redeeming mortgaged lands," and on lands conveyed to a third person "on a trust for the debtor, express or implied, whereby he is entitled to a present conveyance."<sup>71</sup> And in New Jersey, since such a conveyance can be shown to be intended as security in a court of equity only, the grantor has an equitable interest only, which is not subject to execution.<sup>72</sup>

That the execution creditor is the person who holds the mortgage is immaterial, provided the execution is not for the purpose of collecting the debt secured by the mortgage. In other words, the holder of the mortgage claim, if he also holds another claim against the owner of the mortgaged land, has the same right as would any other creditor to reduce this latter

Carpenter v. Bowen, 42 Miss. 28; Mayo v. Staton, 137 N. C. 670, 50 S. E. 331; Wright v. Henderson, 12 Tex. 43; Bartles & Dillon v. Dodd, 56 W. Va. 383, 49 S. E. 414. And see cases cited *post*, note 70.

68. Martin v. Alter, 42 Ohio St. 94.

69. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

70. McConeghy v. McGaw, 31 Ala. 447; Smith v. Beattie, 31 N. Y. 542; Fredericks v. Corcoran, 100 Pa. St. 413; Flynn v. Holmes, 145 Mich. 606, 11 L. R. A. (N. S.) 209, 108 N. W. 685.

71. Rawson v. Plaisted, 151 Mass. 71, 23 N. E. 722.

72. Williams v. Baker, 62 N. J. Eq. 563, 51 Atl. 201.



claim to judgment and enforce it by execution against the mortgaged property.<sup>73</sup>

— **Execution for mortgage debt.** The levy, upon the mortgaged property, of an execution under a judgment against the mortgagor for the mortgage debt, has usually been regarded as operating oppressively upon the mortgagor since, while a sale under such a levy deprives him, at the mortgage creditor's option, of the right of redemption from the mortgage,<sup>74</sup> the circumstances of such a sale, and the frequent uncertainty as to what actually passes thereunder, are calculated to deter persons other than the creditor from bidding at the sale, the mortgagor thus being deprived of his interest in the land, the equity of redemption, without securing the value thereof or an adequate credit upon the mortgage debt. In some jurisdictions there is a statutory prohibition of such a levy and sale,<sup>75</sup> in some it will be enjoined by a court of equity,<sup>76</sup> and in some the sale is regarded as absolutely nugatory, the rights of the mortgagor and mortgage creditor being unchanged thereby.<sup>77</sup>

In a number of jurisdictions, an execution sale of the mortgaged property under a judgment for the mortgage debt, is regarded as effective to divest the

73. *Seaman v. Hax*, 14 Colo. 536, 9 L. R. A. 341, 24 Pac. 461; *Cushing v. Hurd*, 4 Pick. (Mass.) 253, 16 Am. Dec. 335; *Walters v. Defenbaugh*, 90 Ill. 241.

74. See *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Camp v. Cox*, 1 Dev. & B. (N. C.) 52.

75. See *Delaplaine v. Hitchcock*, 6 Hill (N. Y.) 14; *Gale v. Hammond*, 45 Mich. 147, 7 N. W. 761; *Boone v. Armstrong*, 87 Ind. 168.

76. *Carpenter v. Bowen*, 42 Miss. 28; *Tice v. Annin*, 2 Johns.

Ch. (N. Y.) 125; *Van Mater v. Conover*, 18 N. J. Eq. 38; see *Lydecker v. Bogert*, 38 N. J. Eq. 136.

77. *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Barker v. Bell*, 37 Ala. 358; *Atkins v. Sawyer*, 1 Pick. (Mass.) 351, 11 Am. Dec. 188; *Camp v. Cox*, 1 Dev. & B. (N. C.) 52; *Simpson v. Simpson*, 93 N. C. 373. That this is so when the mortgage creditor himself purchases at the execution sale, see *Lumley v. Robinson*, 26 Mo. 364; *Young v. Ruth*, 55 Mo. 515.

mortgagor's interest, but different views have been expressed as to the operation of the sale in other respects. Occasionally the purchaser has been regarded as taking title free from the mortgage lien, the execution sale being thus equivalent in effect to a foreclosure sale under the mortgage, and the lien being extinguished by the sale.<sup>78</sup> Under such a view, the mortgage creditor, by having the execution levied on the mortgagor's interest in the land, in effect waives his lien thereon. Such a view has been expressly dissented from in at least two jurisdictions,<sup>79</sup> and in others there are adjudications to the effect that the purchaser at the execution sale acquires the "equity of redemption" only, that is, that he takes subject to the mortgage lien.<sup>80</sup> Conceding that he does take subject to the mortgage lien, the question then presents itself whether he takes subject to the lien as it existed before the sale to him, or whether what he pays on the sale is to be applied in reduction of the mortgage debt and the lien incident thereto. If the purchaser is regarded as taking the property subject to the mortgage lien as it existed before the sale, without any reduction in the mortgage debt by reason of the payment made by him on the execution sale, there is a difficulty as to the person to whom the mortgage debt is eventually to be paid. It cannot well be paid to the mortgage creditor,

78. *Youse v. McCreary*, 2 Blackf. (Ind.) 243; *Crooker v. Frazier*, 52 Me. 406; *Lord v. Crowell*, 75 Me. 399; *Fosdick v. Risk*, 15 Ohio, 84, 45 Am. Dec. 562. But see *Fithian v. Corwin*, 17 Ohio St. 118; *Horbach v. Riley*, 7 Pa. 81; *Day v. Lowrie*, 5 Watts (Pa.) 412. See *Waller v. Tate*, 4 B. Mon. (Ky.) 529; *Matthews v. Eddy*, 4 Ore. 225. But if the sale was under a judgment on a part only of the notes secured by the

mortgage, it could not, it seems, affect the right of another person, holding the balance of the notes, subsequently to foreclose. *Pugh v. Fairmont Gold & Silver Min. Co.*, 112 U. S. 238, 28 L. Ed. 684.

79. *Ireland's Lessee v. Hall*, 10 Johns. (N. Y.) 481; *Rice v. Wilburn*, 31 Ark. 108; *Whitemore v. Tatum*, 54 Ark. 457.

80. See *McClure v. Mounce*, 2 McCord L. (S. C.) 423, and cases cited in next following notes.

since he has already been paid from the proceeds of the execution sale, and the previous owner of the land, against whom the execution was issued, having been, by the execution sale, divested of his interest, payment cannot be made to him as such owner.<sup>81</sup> The only alternative would seem to be to regard such former owner, the mortgagor or his transferee, as subrogated to the rights of the mortgage creditor, to the extent to which the mortgage debt was paid by the execution sale of his interest, so as to obtain reimbursement from the purchaser.<sup>82</sup> Otherwise, the purchaser would be relieved from paying the mortgage debt, subject to which he purchased. If, on the other hand, the view is adopted that the purchaser takes subject to the mortgage lien only to the extent that the debt secured thereby is not extinguished by the payment made by him on the execution sale, the incumbrance diminishes as the bid is increased, so long as this latter does not exceed the mortgage debt as previously existing, so that, up to that point, it is immaterial what one bids,<sup>83</sup> while any greater bid is in effect for the property free from the lien, as the debt is to be paid out of the amount realized on the sale. Under such a view, the confusion and uncertainty which might naturally exist in a possible purchaser's mind, as to the effect of the amount of his bid upon the amount of the incumbrance to which the purchase is subject, would tend to prevent bidding by persons other than the mortgage creditor, and so operate injuriously to the mortgagor.<sup>84</sup> Moreover, if the bids are made on the theory that the sale will be subject to the mortgage lien as it before existed, and yet the mortgage debt is in fact diminished by the

81. *Goring's Ex'r v. Shreve*, 7 Dana (Ky.) 64.

82. *Tice v. Annin*, 2 Johns. Ch. (N. Y.) 125; *Lumley v. Robinson*, 26 Mo. 364.

83. *Tice v. Annin*, 2 Johns. Ch.

(N. Y.) 125; *Goring's Ex'r v. Shreve*, 7 Dana (Ky.) 64.

84. *Van Mater v. Conover*, 13 N. J. Eq. 38; *Lumley v. Robinson*, 26 Mo. 364.

amount of the bid, the effect may be that the mortgagor will get nothing for his interest in the land, while the purchaser will obtain a credit on the incumbrance to which he is not entitled.<sup>85</sup>

If the mortgage creditor himself is the purchaser at the execution sale, the effect of the sale might possibly be different from its effect when a stranger is the purchaser. It has been decided in one state that, whatever might be the effect of a sale to another, by a sale to the creditor he acquires the absolute title free from the mortgage,<sup>86</sup> while in another state a sale to him has been regarded as nugatory.<sup>87</sup> So while in one state such a sale to the creditor has been regarded as effecting a total extinction of the debt,<sup>88</sup> in another it has been held to extinguish the debt only to the amount of his bid.<sup>89</sup>

Even in a jurisdiction in which it has been held that the mortgagor's interest in the land, his "equity of redemption," cannot be levied on under an execution for the mortgage debt, it has been decided that one having a debt secured by a first mortgage can levy on the right of redemption from a second mortgage on the same land.<sup>90</sup> And it has, in the same jurisdiction, been decided that execution may be levied on a mortgagor's equity of redemption, in behalf of one to whom the mortgage note has been assigned without the mortgage.<sup>91</sup>

An execution sale of the mortgaged land under a judgment on part of the notes secured by the mortgage does not affect the right of the holder of others of the notes as regards a proceeding to foreclose.<sup>92</sup>

85. *Carpenter v. Bowen*, 42 Miss. 28.

86. *Cottingham v. Springer*, 88 Ill. 90.

87. *Lumley v. Robinson*, 26 No. 364.

88. *McLure v. Wheeler*, 6 Rich. Eq. (S. C.) 343.

89. *Lydecker v. Bogart*, 38 N. J. Eq. 136.

90. *Johnson v. Stevens*, 7 Cush. (Mass.) 431.

91. *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; *Andrews v. Fiske*, 101 Mass. 422.

92. *Pugh v. Fairmont Gold &*

## III. TRANSFER OF MORTGAGED LAND.

§ 620. **General considerations.** The mortgagor may, as before stated, convey or devise the mortgaged land, it may be sold on execution, and it passes, on his death intestate, to his heirs or, if his estate is less than freehold, to his personal representatives. The grantee, devisee, heir, or personal representative, unless a purchaser for value without notice,<sup>93</sup> takes the land subject to the mortgage, but he has the rights of the mortgagor. He may redeem from the mortgage,<sup>94</sup> and may require the mortgage creditor, if in possession, to account for the rents and profits.<sup>95</sup> He stands generally in the same position as regards the mortgage on the land as did his predecessor in interest, and he has no greater rights, since the rights of the mortgagee cannot be impaired by a transfer of the land.<sup>96</sup> On the other hand, the rights vested in him, as against the mortgage creditor, by his acquisition of the land, cannot be subsequently modified without his consent by agreement between the mortgagor and the creditor.<sup>97</sup>

Silver Min. Co., 112 U. S. 238, 28 L. Ed. 684.

93. *Ante*, § 564, *et seq.*

94. *Post*, § 645(a).

95. *Strang v. Allen*, 44 Ill. 428; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083; *Ruckman v. Astor*, 9 Paige (N. Y.) 517; *Clark v. Missouri, K. & T. Trust Co.*, 59 Neb. 53, 80 N. W. 257.

96. *Warner v. Grayson*, 200 U. S. 257, 50 L. Ed. 470; *Miller v. Williams*, 27 Colo. 34, 59 Pac. 740; *Fetrow v. Merriwether*, 53 Ill. 275; *Bibbler v. Walker*, 69 Ind. 362; *Holtzclaw v. Craynor*

*Smith Lumber Co.*, — Ky. L. Rep. —, 114 S. W. 271; *Stoddard v. Whiting*, 46 N. Y. 627; *Oakman v. Walker*, 69 Vt. 344, 38 Atl. 63; *Camden v. Alkire*, 24 W. Va. 674.

As the mortgagor's possession is not adverse to the mortgagee, so his transferee's possession is not adverse. *Wittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Doyle v. Mellen*, 15 R. I. 523, 8 Atl. 709; *Smith v. Gillam*, 80 Atl. 296; *Alsup v. Stewart*, 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795.

97. *First Nat. Bank v. Honeyman*, 6 Dak. 275, 42 N. W. 771; *Pool v. Horton*, 45 Mich. 404, 8 N. W. 59; *McGready v. McGready*, 17 Mo. 597; *Johnson v. Elliot*, 26

§ 621. **Transfer to mortgagee.** After the making of the mortgage, the mortgagor and the mortgagee may deal with each other as any other individuals, and a conveyance by the mortgagor to the mortgagee of his interest in the land is ordinarily valid. The transaction will, however, be carefully scrutinized by a court of equity, and will not be upheld in case the mortgagee appears to have been guilty of fraud, undue influence, or oppression, in connection therewith.<sup>98</sup> Such a conveyance by a mortgagor to the mortgagee is to be carefully distinguished from an attempted release or waiver of the right to redeem from the mortgage. The statement quite frequently made, that the mortgagor may release his equity of redemption by agreement, subsequently to the mortgage, but not contemporaneously therewith, involves a considerable degree of ambiguity, arising from the double use of the expression equity of redemption. The mortgagor may convey the land which is subject to the mortgage, inappropriately referred to as the equity of redemption,<sup>99</sup> and this he can do merely because he is the owner of the land with the right to dispose of it as he will, but he cannot release or waive the right to redeem, retaining the land, for the reason that a mortgage without a right to redeem is not recognized.

Occasionally it is stated that a transfer by the mortgagor to the mortgagee must be supported by an

N. H. 67; *Ballard v. Williams*, 95 N. C. 126.

98. *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775; *Shaw v. Lacy*, — Ala. —, 74 So. 933; *Green v. Butler*, 26 Cal. 595; *Boal v. Gassen*, — Cal. —, 172 Pac. 588; *Seymour v. Mackay*, 126 Ill. 341, 18 N. E. 552; *Fort v. Colby*, 165 Iowa, 95, 144 N. W. 393; *Greenlaw v. Eastport Sav. Bank*, 106 Me. 205, 76 Atl. 485; *Baughner v. Merryman*, 32 Md. 185; *Trull v.*

*Skinner*, 17 Pick. (Mass.) 213; *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612; *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497; *Odell v. Montross*, 68 N. Y. 499; *Shaw v. Walbridge*, 33 Ohio St. 1; *Wagg v. Herbert*, 19 Okla. 525, 92 Pac. 250; *Caro v. Wollenberg*, 68 Ore. 420, 136 Pac. 866; *Hall v. Hall*, 41 S. C. 163, 44 Am. St. Rep. 696, 19 S. E. 305; *Coates v. Marsden*, 142 Wis. 106, 124 N. W. 1057.

99. *Ante*, § 609.

“adequate” or “reasonable” consideration,<sup>1</sup> but it would seem that this requirement, so far as it exists, merely means that the fact that the mortgagor could have obtained a substantially higher price from another purchaser is strong, if not conclusive, evidence of fraud, undue influence, or oppression.<sup>2</sup> The transfer is not invalid merely because the estimated value of the property over and above the mortgage is not paid by the mortgagee.<sup>3</sup> It is not indeed necessary that any pecuniary consideration pass at the time of the making of the conveyance, provided the value of the property is not very substantially greater than the amount of the mortgage debt.<sup>4</sup>

As the mortgagee may acquire the land from the mortgagor by voluntary conveyance, so he may acquire it by purchase at a forced sale under a junior lien, that of a judgment, for instance.<sup>5</sup>

1. *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, 20 L. Ed. 406; *Linnell v. Lyford*, 72 Me. 280; *Hutchings v. Terrace City Realty & Securities Co.* — Mo. —, 175 S. W. 905; *McBride v. Campredon*, 24 N. M. 323, L. R. A. 1918D. 467, 171 Pac. 140, (“what property worth”); *Odell v. Montross*, 68 N. Y. 499; *Cole v. Boyd*, 175 N. C. 555, 95 S. E. 778, (“full value”); *Moeller v. Moore*, 80 Wis. 434, 56 N. W. 396; *Lynch v. Ryan*, 132 Wis. 271, 111 N. W. 707, 112 N. W. 427.

2. The transfer “must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity.” *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775.

3. *DeMartin v. Phelan*, 115 Cal. 538, 56 Am. St. Rep. 115, 47 Pac.

356; *West v. Reed*, 55 Ill. 242. See, also, *Hicks v. Hicks*, 5 Gill. & J. (Md.) 75; *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170; *Goree v. Clements*, 94 Ala. 337, 10 So. 906; *Perry v. Ward*, 82 Vt. 1, 71 Atl. 721.

4. *Watson v. Edwards*, 105 Cal. 70, 38 Pac. 527; *Walker v. Farmers' Bank*, 8 Houst. (Del.) 258; *Rue v. Dole*, 107 Ill. 275; *Shaner v. Rathdrum State Bank*, 29 Idaho, 576, 161 Pac. 90; *Fort v. Colby*, 165 Iowa, 95, 144 N. W. 393; *Amos v. Livingston*, 26 Kan. 106; *Hutchings v. Terrace City Realty & Securities Co.* — Mo. —, 175 S. W. 905; *Shelton v. Hampton*, 28 N. C. 216; *Perry v. Ward*, 82 Vt. 1, 71 Atl. 721; *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131. See *Trull v. Skinner*, 17 Pick. (Mass.) 213.

5. *Threlkeld v. Walker*, 141 Ky. 737, 133 S. W. 772; *Francis v. Sheates*, 153 Ala. 468, 127 Am. St.

— **Mode of conveyance.** The mortgagee, taking a conveyance of the interest of the mortgagor, acquires it subject to any burdens or obligations to which it was previously subject in the hands of the mortgagor,<sup>6</sup> including junior mortgages.<sup>7</sup>

The transfer of the mortgagor's interest to the mortgagee must ordinarily, it seems clear, comply with the Statute of Frauds.<sup>8</sup> In the case of an absolute conveyance intended for purposes of security, however, a different view has occasionally been taken. In such a case a mere oral agreement by which the grantor (mortgagor) relinquishes the right of redemption has been held to vest an absolute title in the grantee.<sup>9</sup> And so in the case of a separate written defeasance, the cancellation or surrender thereof has been given the same effect.<sup>10</sup> These decisions are usually based on the

Rep. 61, 45 So. 241; *Equitable Building & Loan Ass'n v. Thomas*, 216 Pa. 571, 65 Atl. 1100.

6. *Rothschild v. Bay City Lumber Co.*, 139 Ala. 571, 36 So. 785; *Archer v. Salinas City*, 93 Cal. 43, 16 L. R. A. 45, 28 Pac. 839; *Mac Intyre v. Ferst*, 101 Ga. 682, 28 S. E. 989; *Triplett v. Parmlee*, 16 Neb. 649, 21 N. W. 403; *Scott v. Lewis*, 40 Ore. 37, 66 Pac. 299.

7. *Powell v. Jeffries*, 5 Ill. 387; *Davis v. Rogers*, 28 Iowa, 413; *Crow v. Tinsley*, 6 Dana (Ky.) 462; *Thompson v. Chandler*, 7 Me. 377; *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612; *Blake v. Williams*, 36 N. H. 39; *Navassa Guano Co. v. Richardson*, 26 S. C. 401, 2 S. E. 307.

8. *McMillan v. Jewett*, 85 Ala. 476, 5 So. 145; *Scott v. McFarland*, 13 Mass. 309; *Marble v. Marble*, 5 N. H. 374; *VanKeuren v. McLaughlin*, 19 N. J. Eq. 187; *Odell*

*v. Montross*, 68 N. Y. 499.

9. *McMillan v. Jewett*, 85 Ala. 476, 5 So. 145; *Bazemore v. Mullins*, 52 Ark. 207, 12 S. W. 474; *Seymour v. Mackay*, 126 Ill. 341, 18 N. E. 552; *Hutchison v. Page*, 246 Ill. 71, 92 N. E. 571; *Ferguson v. Boyd*, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1064; *Scholl v. Hopper*, 134 Ky. 83, 119 S. W. 770; *Baxter v. Pritchard*, 122 Iowa, 590, 101 Am. St. Rep. 282, 98 N. W. 372; *Sears v. Gilman*, 199 Mass. 384, 85 N. E. 466; *Stall v. Jones*, 47 Neb. 706, 66 N. W. 653; *Minick v. Reichenbach*, 97 Neb. 629, 150 N. W. 1001; *Miller v. Smith*, 20 N. D. 96, 126 N. W. 499; *Shaw v. Walbridge*, 33 Ohio St. 1. See Editorial note, 24 Harv. Law Rev. 244.

10. *West v. Reed*, 55 Ill. 242; *Wilson v. Carpenter*, 62 Ind. 495; *Greenlaw v. Eastport Sav. Bank*, 106 Me. 205, 76 Atl. 485; *Trull v.*



theory that by such action the grantor (mortgagor) renders it inequitable for him to assert the right of redemption, estops himself so to do, it is sometimes said. It might be suggested, however, that conceding the original invalidity of the transaction as not complying with the Statute of Frauds, there is ordinarily nothing inequitable in asserting such invalidity, especially when the other party has not changed his position on the strength thereof. The doctrine of the above cases, that a conveyance intended to operate as a mortgage may be changed, by a subsequent oral agreement, into an absolute conveyance, vesting an absolute title in the grantee, has been denied in two or three states, on the ground that such a conveyance, though purporting to transfer the legal title, merely creates a lien.<sup>11</sup> The propriety of such a conclusion, that an instrument which was not originally effective to convey the legal title could not be given such effect by a subsequent oral agreement, appears to be incontestable.<sup>12</sup> Even in states in which a conveyance absolute in terms given as security does convey the legal title,<sup>13</sup> the view that it may be made absolute in fact by an oral agreement to that effect is not entirely satisfactory. The mortgagor is, even in those states, the substantial owner of the property, and it is difficult to see how a transaction by which he vests that ownership in another can be regarded otherwise than as a conveyance. He has, in those states, the same character of interest as has one

Skinner, 17 Pick. (Mass.) 213; Sears v. Gilman, 199 Mass. 384, 85 N. E. 466; Seawell v. Hendricks, 4 Okla. 435, 46 Pac. 557; Raski v. Wise, 56 Ore. 72, 107 Pac. 984. See Editorial note, 22 Harv. Law Rev. 295.

11. VanKeuren v. McLaughlin, 19 N. J. Eq. 187; Conover v. Patmer, 60 N. Y. Misc. 241, 111 N. Y. Supp. 1074; Ullman v. Devereux,

46 Tex. Civ. App. 459, 102 S. W. 1163; Keller v. Kirby, 34 Tex. Civ. App. 404, 79 S. W. 82. See Howe v. Carpenter, 49 Wis. 697, 6 N. W. 357; Odell v. Montross, 68 N. Y. 499; Williams v. Purcell, 54 Okla. 489, 145 Pac. 1151.

12. See Editorial note, 22 Harv. Law Rev. 295.

13. *Ante*, § 605 (b), note.

who makes a mortgage in ordinary form in states in which the title theory of a mortgage is recognized, and he should not be allowed to divest himself of such interest by an oral agreement in the one case and not in the other.

Quite frequently what is in form an absolute conveyance of the mortgagor's interest to the mortgagee has been regarded by the court as in effect a mortgage, intended to supplement or take the place of the original mortgage.<sup>14</sup> The question whether the conveyance is to be so regarded is ordinarily determined with reference to the same class of considerations as apply in the case of any absolute conveyance asserted to be intended for purposes of security only.<sup>15</sup> The conveyance to the mortgagee is not necessarily a mortgage because there is a provision entitling the original mortgagor to a reconveyance upon the payment by him to the mortgagee of the amount of the debt originally secured, or some other amount. It may be an absolute conveyance with a right of repurchase in the grantor, a "conditional sale."<sup>16</sup> A conveyance to the mortgagee, however, with a provision that he is to sell the property and, after paying the mortgage debt, account for the

14. *Vernon v. Bethell*, 2 Eden, 110; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, 20 L. Ed. 406; *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *McElhaney v. Shoemaker*, 76 Iowa, 416, 41 N. W. 58; *Bailey v. Myrick*, 50 Me. 571; *Baughner v. Merryman*, 32 Md. 185; *Murray v. Riley*, 140 Mass. 490, 6 N. E. 512; *Ferris v. Wilcox*, 51 Mich. 105, 47 Am. Rep. 551, 16 N. W. 252; *Tower v. Fetz*, 26 Neb. 706, 18 Am. St. Rep. 795, 42 N. W. 884; *Blizzard v. Craigmiles*, 7 Lea (Tenn.) 693; *De Bruhl v. Maas*, 54 Tex. 464; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171; *Skeels v. Blanchard*, — Vt. —,

81 Atl. 913.

15. *Ante*, § 605(c).

16. *Fletcher v. Northcross*, 97 Cal. XVII, 32 Pac. 328; *Adams v. Adams*, 51 Conn. 544; *Rue v. Dole*, 107 Ill. 275; *Carroll v. Tomlinson*, 192 Ill. 398, 85 Am. St. Rep. 344, 61 N. E. 484; *Bridges v. Linder*, 60 Iowa, 190, 14 N. W. 217; *Tyget v. Potter*, 97 Ky. 54, 29 S. W. 976; *Murray v. Riley*, 140 Mass. 490, 6 N. E. 512; *Bailey v. St. Louis Union Trust Co.*, 188 Mo. 483, 87 S. W. 1003; *Tripler v. Campbell*, 22 R. I. 262, 47 Atl. 385; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941.

surplus to the mortgagor, has occasionally been construed as a mortgage and not an absolute conveyance.<sup>17</sup>

§ 622. **Transfer subject to mortgage.** The transfer of the mortgaged land may be merely "subject to" the mortgage, or it may be accompanied by an agreement on the part of the transferee to pay the mortgage debt, a contract of assumption, as it is frequently called, or it may be neither.

Except in the case of a transfer to one who takes free from the mortgage lien as being a *bona fide* purchaser for value,<sup>18</sup> a transfer of mortgaged land is necessarily subject to the mortgage, in the sense that the transferee takes the land subject to the possibility that it may, at the instance of the holder of the mortgage, be applied to the satisfaction of the obligation secured by the mortgage, that is, the land is subject to the mortgage lien in his hands as it was so subject in the hands of his transferor. The statement in a particular case, however, that the transfer is "subject to" the mortgage, usually refers, not to the fact that rights of the mortgage creditor take precedence of the rights of the transferee, but to the relation between the parties to the transfer as regards the duty to satisfy the debt secured by the mortgage. By taking a transfer of the land subject to the mortgage, the transferee concedes that, as between him and the transferor, the debt is to be satisfied out of the land, and that the transferor is not, as being personally liable for the debt, under any obligation to pay it for the purpose of relieving the land in the transferee's hands.

Ordinarily, when it is intended that the transfer shall be subject to the mortgage in this sense, the in-

17. *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, 20 L. Ed. 406; *Trimble v. McCormick*, 12 Ky. L. Rep. 857, 15 S. W. 358; *Jones v. Blake*, 33 Minn. 362, 23 N. W. 538; *Tower v. Fetz*, 26 Neb. 706, 18 Am. St.

Rep. 795, 42 N. W. 884. *Contra*, *Wilson v. Parshall*, 129 N. Y. 223, 29 N. E. 297; *Clark v. Haney*, 62 Tex. 511.

18. *Ante*, § 566 *et seq.*

strument of transfer expressly so states. And that the transfer is subject to the mortgage is involved in an assumption of the debt by the transferee, since this necessarily precludes him from asserting in his own behalf that the transferor should pay the debt rather than that it be paid from the land. If there is no contract of assumption and there is no express statement in the conveyance that it is subject to the mortgage, the question whether it was intended to be so subject must be determined by reference to the circumstances attending the transaction. A circumstance which is usually of controlling importance in this regard is whether the mortgage was considered in adjusting the purchase price. If the price was reduced by reason of the mortgage, it is a reasonable conclusion that it was intended that the debt, either in whole or in part, should be imposed on the land in the hands of the transferee rather than on the transferor, while if the full agreed value of the land was paid, it may be concluded that the parties intended the grantor to pay the mortgage debt out of the proceeds of the sale.<sup>19</sup>

It has been said that, in the absence of evidence to the contrary, it may be presumed that the amount of the mortgage was deducted in fixing the price, and that the transfer was, therefore, subject to the mortgage.<sup>20</sup> This would appear to be a reasonable presumption. But the fact that there was such a deduction is not conclusive of an intention that the transfer was intended to be so subject.<sup>21</sup>

In case there is no purchase price, that is, in case the mortgaged property is transferred as a gift, and

19. *Maher v. Lanfrom*, 86 Ill. 513; *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671 (*semble*); *Fuller v. Hunt*, 48 Iowa, 163; *Atherton v. Toney*, 43 Ind. 211; *Wadsworth v. Lyon*, 93 N. Y. 201, 45 Am. Rep. 190; *Howard v. Robbins*, 170 N.

Y. 498, 63 N. E. 530; *Sternberger v. Hanna*, 42 Ohio St. 305; *Carpenter v. Koons*, 20 Pa. 222.

20. *Atherton v. Toney*, 43 Ind. 211; *Guernsey v. Kendall*, 55 Vt. 201; *Howard v. Robbins*, 170 N. Y. 498, 63 N. E. 530.

21. *Bennett v. Bates*, 94 N. Y.

there is no language in the conveyance, or other evidence, indicative of the intention of the parties in this regard, it might, it would seem, be assumed that the expectation of the parties was that the donor should pay his debt himself rather than that his donee should pay it out of the property.<sup>22</sup> But there is at least one case in which the court refused to recognize any right in the donee, in such a case, upon paying the mortgage debt, to assert a claim against the donor's estate for the amount of the payment.<sup>23</sup> The former view accords in result with the common law rule that the devisee of land may call upon the executor to exonerate the land by paying the decedent's mortgage debt out of the personalty.<sup>24</sup>

In case the instrument of transfer contains a covenant of warranty or other covenant for title sufficient to cover the mortgage incumbrance, the obligation to pay the mortgage debt is, as against the transferee, upon the transferor, and the transfer is not subject to the mortgage.<sup>25</sup> If, however, the instrument also contains a clause to the effect that the transfer is subject to the mortgage, this is to be construed as excluding the mortgage from the operation of the covenant.<sup>26</sup> That, however, the mortgage was expressly

354; *Maher v. Lanfrom*, 86 Ill. 514.

22. See *Re Darby* (1907), 2 Ch. 465; compare *post*, § 625, notes 50-52.

23. *Fischer v. Union Trust Co.*, 138 Mich. 612, 68 L. R. A. 987, 110 Am. St. Rep. 329, 101 N. W. 852. In this case there was a promise by the donor to pay the mortgage debt, which was invalid for lack of consideration, but such promise might, it is submitted, have been regarded as showing an intention that the conveyance of the land was not subject to

the mortgage, in the sense of making the land the primary fund for the payment of the debt.

24. *Post*, § 640(b), notes 83-87.

25. *Maher v. Lanfrom*, 86 Ill. 513; *Fuller v. Hunt*, 48 Iowa, 63; *Wadsworth v. Williams*, 100 Mass. 126; *Kelly v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Hooper v. Henry*, 31 Minn. 264, 17 N. W. 476; *Mickles v. Townsend*, 18 N. Y. 575; *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625.

26. *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Freeman v.*

excepted from the operation of a covenant against incumbrances in the instrument of transfer has been held not to show an intention that the transfer should be subject to the mortgage.<sup>27</sup> But by one decision a different effect was, it seems, given to such an exception in a covenant of warranty.<sup>28</sup> In case the transfer is not expressly subject to the mortgage, and there is nothing, such as a reduction in the amount of the purchase price, to show an intention to that effect, the transfer is not so subject, even though there are no covenants on the part of the transferor applicable to the mortgage.<sup>29</sup>

In case the transferor is not personally liable for the debt, the transferee necessarily takes it subject to the mortgage, without any right to assert a primary personal liability upon the part of the transferor, except as the latter may have covenanted with him against such an incumbrance. The question may arise, however, whether the transferor's predecessor in title, who is personally liable, can assert that there is a primary liability on the part of the land in the hands of the transferee, and that his own liability is secondary only. It seems that this is dependent on whether the land was primarily liable in the hands of the transferor. That is, if A, who is personally liable, transfer the land to B, who assumes no personal liability, and B transfers the land to C, the question whether C takes the land subject to the mortgage as against A ordinarily depends on whether B so took it. If B took the land subject to a primary liability in favor of A, B cannot

Foster, 55 Me. 508; Hopper v. Smyser, 90 Md. 363, 45 Atl. 206; Brown v. South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382; Fuller v. Devolld, 144 Mo. App. 93, 128 S. W. 1011; Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150; Jackson v. Hoffman, 9 Cow. (N. Y.) 271; Belmont v. Coman, 22 N. Y. 438,

78 Am. Dec. 213.

27. Bennett v. Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112; Calkins v. Copley, 29 Minn. 471, 13 N. W. 904.

28. Gerdine v. Menage, 41 Minn. 417, 43 N. W. 91.

29. See cases cited *post*, § 625, notes 37-41.

relieve it therefrom by making a transfer to C.<sup>30-31</sup> If B did not take the land subject to such primary liability in favor of A, the fact that B's transfer to C is in terms subject to the mortgage should not, it is conceived, be regarded as showing an intention to relieve A, not a party to the transaction, of the primary liability previously established against him.<sup>32</sup>

The right of a transferee who does not assume the debt, and who does not take subject to the mortgage, to assert a primary liability on the part of his predecessor in title, is apparently independent of the origin of such predecessor's personal liability, that is, upon whether he was the original debtor, or merely assumed the debt. In both cases the transferee is a stranger to the contract, but this has no bearing upon the latter's right to assert that the debt is such predecessor's debt, and should therefore be paid by him in exoneration of the land.

In case the mortgaged property is sold under execution, the transferee, it has been decided, is at least presumed to take subject to the mortgage.<sup>33</sup> It seems questionable, indeed, whether by any arrangement between the purchaser at such sale and the sheriff, the property could be made merely secondarily liable, if not otherwise so, since this would deprive the execution debtor, without his consent, of the possibility of having the mortgage debt paid from the land.<sup>34</sup> Even

30-31. *Boice v. Coffeen*, 158 Iowa, 705, 138 N. W. 857; *Jurnel v. Jurnel*, 7 Paige (N. Y.) 591.

32. *Merritt v. Byers*, 46 Minn. 74, 48 N. W. 417, is not in accord with the view of the text. In that case the court appears to regard the question of primary and secondary liability as dependent exclusively on whether there are covenants of title of which the transferee can avail himself.

33. *Hanger v. State*, 27 Ark. 673; *Funk v. Reynolds*, 33 Ill. 481; *Bunch v. Grave*, 11 Ind. 351, 12 N. E. 514; *Myers v. Jones*, 61 Kan. 191, 59 Pac. 275; *Rogers v. Hedemark*, 70 Minn. 441, 73 N. W. 252; *Heyer v. Pruyn*, 7 Paige (N. Y.) 465; *McKinstry v. Curtis*, 10 Paige (N. Y.) 503; *Steele v. Walter*, 204 Pa. 257, 53 Atl. 1097.

34. See *Erlinger v. Boul*, 7 Ill. App. 40.

though the sale is made without reference to the existence of the mortgage, and the purchaser pays full value for the property, he should bear the loss. If, however, the execution debtor held the land subject only to a secondary liability, the primary liability being upon the mortgagor or another personally, the purchaser at execution sale would also, it seems, take subject merely to such secondary liability. There is no reason why the execution sale, whatever its terms, should operate to relieve such other person of the primary liability.

The effect of the transfer of the land subject to the mortgage being to make the land in the hands of the transferee the primary fund, as between him and the transferor, for the payment of the mortgage debt, the transferee cannot pay the debt and, on the theory of subrogation to the mortgagee's rights, or by reason of an actual assignment thereof, assert a personal claim against the mortgagor for the debt.<sup>35</sup> The effect of his payment of the debt is to extinguish the mortgage and the debt as against the mortgagor.<sup>36</sup> On the other hand, the mortgagor is, on paying the debt, subrogated to the rights of the mortgagee as against the land.<sup>37</sup>

That one takes a transfer of the land subject to the mortgage does not render him personally liable for the mortgage debt,<sup>38</sup> but he is, according to the English and

35. *Iowa Loan & Trust Co. v. Mowery*, 67 Iowa, 113, 24 N. W. 747; *Northwestern Nat. Bank v. Stone*, 97 Iowa, 183, 66 N. W. 91; *Landau v. Cottrill*, 159 Mo. 308, 60 S. W. 64; *In re Wisner's Estate*, 20 Mich. 442; *Bennett v. Keehn*, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112; *Gayle v. Wilson*, 30 Gratt. (Va.) 166.

36. *Post*, § 644.

37. *Kinnear v. Lowell*, 34 Me.

299; *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Johnson v. Zink*, 51 N. Y. 333.

38. *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678; *Shepherd v. May*, 115 U. S. 505, 29 L. Ed. 456; *Hibernia Saving & Loan Society v. Dickinson*, 167 Cal. 616, 140 Pac. 265; *McArthur v. Goodwin*, 173 Cal. 499, 160 Pac. 679; *Lloyd v. Lowe*, — Colo. —, 165 Pac. 609; *Post v. Tradesmen's Bank*, 28



Canadian cases, ordinarily under a personal obligation to indemnify the mortgagor, his transferor, in case the latter is compelled actually to pay the debt, irrespective of the value of the land.<sup>39</sup> There appears to be some question as to the character of this obligation, whether it can properly be referred to as a case of implied contract,<sup>40</sup> but, however this may be, its existence may be negatived in any particular case by evidence of a contrary agreement.<sup>41</sup> Such a personal obligation to indemnify on the part of the grantee may be regarded as established in Pennsylvania,<sup>42</sup> and it has been recognized with more or less positiveness in two or three other states.<sup>43</sup> In most of the states, however, no such personal obligation by reason of a "subject" clause in

Conn. 420; *Lippitt v. Thames Loan & Trust Co.*, 88 Conn. 185, 90 Atl. 369; *Dunn v. Rodgers*, 43 Ill. 260; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Robinson Bank v. Miller*, 153 Ill. 244, 27 L. R. A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078; *Gregory v. Arms*, 48 Ind. App. 562, 96 N. E. 196; *Green v. Turner*, 38 Iowa, 112; *Lamka v. Donnelly*, 163 Iowa, 255; 143 N. W. 869; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Green v. Hall*, 45 Neb. 89, 63 N. W. 119; *Woodbury v. Swan*, 58 N. H. 380; *Loudenslager v. Woodbury Heights Land Co.*, 64 N. J. L. 405, 45 Atl. 784; *Bennett v. Bates*, 94 N. Y. 354; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Hammond v. Wall*, — Utah, —, 171 Pac. 148; *Chaffee v. Hawkins*, 89 Wash. 130, 154 Pac. 143, 157 Pac. 35; *Tanguay v. Felthousen*, 45 Wis. 30. But the contrary appears to be assumed in *Hatcher v. Kinkaid*, 48 Okla. 163, 150 Pac. 182.

39. *Waring v. Ward*, 7 Ves. 332, 337; *Adair v. Carden* (1892), 29 L. R. Ir. 469; *Mills v. United Counties Bank, Ltd.* (1912), 1 Ch. 231; *Williston v. Lawson*, 19 Can. Sup. 673; *Fraser v. Fairbanks*, 23 Can. Sup. 79; *Maloney v. Campbell*, 28 Can. Sup. 228; *McMichael v. Wilkie*, 18 Ont. App. 464.

40. See remarks of Farwell, J., in *Mills v. United Counties Bank* (1912), 1 Ch. 231, and comment thereon in 28 Law Quart. Rev. 122.

41. *Mills v. United Counties Bank* (1912), 1 Ch. 231.

42. *Moore's Appeal*, 88 Pa. St. 450, 32 Am. Rep. 469; *In re Stanhope's Estate*, 184 Pa. St. 414, 39 Atl. 217; *In re May's Estate*, 218 Pa. 64, 67 Atl. 120; *Faulkner v. McHenry*, 235 Pa. 298, 83 Atl. 827.

43. *Townsend v. Ward*, 27 Conn. 610; *Thompson v. Thompson*, 4 Ohio St. 33; *Lamka v. Donnelly*, 163 Iowa, 255, 143 N. W. 869; *Sheppard v. Berkshire Life Ins. Co.*, 161 Ill. App. 467.

the conveyance has been recognized, and, it is submitted, there should properly be no such obligation. If the grantee agrees to pay the mortgage debt, he is, as is hereafter more fully stated, personally liable therefor.<sup>44</sup> If he does not so agree, he is, as is stated above, not personally liable for the debt. But the English and Pennsylvania decisions say, in effect, that though, not having agreed to pay the debt, he is not personally liable therefor, he is personally liable to the mortgagor if the latter pays the debt, to the extent necessary to indemnify the latter. There is, in result, but little difference between a personal obligation to pay the debt, and a personal obligation to indemnify another person who may be compelled by the creditor to pay it. The mortgagor who transfers the mortgaged land is, by his right of subrogation,<sup>45</sup> protected to the extent of the value of the land, and that is as far as his grantee intended to protect him. The English doctrine in this regard may probably have become established at a time when the theory of subrogation had not been sufficiently developed to accord to the mortgagor paying the debt any protection whatsoever, while the establishment of the doctrine in Pennsylvania appears to have been the result of comparatively early decisions in that state,<sup>46</sup> in which the conveyance was not in terms subject to the mortgage, but subject to "the payment" of the mortgage, a form of expression which might well be regarded as involving an agreement to pay.<sup>47</sup>

While a "subject" clause, occurring in an absolute conveyance of the mortgaged land, has, as has been indicated, important effects in determining the obliga-

44. *Post*, § 623.

45. *Post*, § 646.

46. See *Campbell v. Shrum*, 3 Watts (Pa.) 60; *Blank v. German*, 5 W. & S. (Pa.) 36; *Woodward's Appeal*, 38 Pa. St. 322; *Burke v. Gummey*, 49 Pa. St. 518.

47. A right of indemnity apart

from express contract is negatived in *Middaugh v. Bachelder*, 33 Fed. 706; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137 (*semble*); *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Smith v. Tinslow*, 84 N. Y. 660. See Editorial note, 11 *Columbia Law Rev.* 688.

tion to satisfy the mortgage debt, such a clause occurring in a subsequent mortgage is, it is conceived, ordinarily inoperative except as showing notice of the prior mortgage.<sup>48</sup> It could, at most, indicate merely that, as between the parties to the second mortgage, the mortgagee assents to the satisfaction of the entire first mortgage debt from the property, in relief of the mortgagor, and such an agreement, while possible, is so unusual that it should be made to appear by something other than the mere statement that the second mortgage is subject to the first. In the case of an absolute transfer subject to the mortgage, the transferee receives a consideration, ordinarily a reduction in the purchase price to the extent of the mortgage debt, and it would be inequitable for him to assert a primary personal liability on the part of the transferor, but in the case of a mortgage in terms subject to a prior mortgage, the mortgagee receives no consideration by reason of the existence of the prior mortgage, and there is no lack of equity on his part in asserting that, as between them, the debt should be regarded as the debt of the mortgagor rather than of the land.

**§ 623. Assumption of mortgage debt.** In case the transferee of the land expressly agrees to pay or assume the mortgage or mortgage debt, he becomes personally liable for the amount of the debt,<sup>49</sup> a lia-

48. In *Savings Investment & Trust Co. of East Orange v. United Realty & Mortgage Co.*, 84 N. J. Eq. 472, Ann. Cas. 1916D, 1134, 94 Atl. 588, such a clause in a second mortgage of a part of the land included in the first mortgage was construed as intending that such part should contribute ratably to the payment of the paramount mortgage.

49. *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Birke v.*

*Abbott*, 103 Ind. 1, 53 Am. Rep. 474; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Rice v. Sanders*, 152 Mass. 108, 8 L. R. A. 315, 23 Am. St. Rep. 804, 24 N. E. 1079; *Taylor v. Whitmore*, 35 Mich. 97; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 31 Atl. 1099; *Trotter v. Hughes*, 13 N. Y. 74, 62 Am. Dec. 137; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Farmers' Nat. Bank v. Gates*, 33 Ore. 388, 72 Am. St. Rep.

bility which can ordinarily be enforced by the mortgage creditor,<sup>50</sup> as well as by the transferor, with whom the agreement is made.<sup>51</sup> In case a stipulation that the transferee shall pay the debt is incorporated in the conveyance, the transferee is liable thereon, it has been frequently decided, although he does not himself execute the instrument, his acceptance of the conveyance,<sup>52</sup> or failure to repudiate it upon learning of the presence of such stipulation,<sup>53</sup> being regarded as sufficient to bind him as showing his assent. And it is not even necessary that the transferee's agreement to pay the mortgage debt be incorporated in the instrument of transfer.

724, 54 Pac. 205; *Taylor v. Preston*, 79 Pa. St. 436.

50. *Post*, this section, note 77, *et seq.*

51. *Post*, this section, note 7, *et seq.*

52. *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Felker v. Rice*, 110 Ark. 70, 161 S. W. 162; *Lick v. Anderson*, 29 Cal. App. 491, 156 Pac. 70; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Crawford v. Edwards*, 33 Mich. 354; *Finley v. Simpson*, 22 N. J. Law 311, 53 Am. Dec. 252; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. 504; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Baber v. Hanie*, 163 N. C. 588, 80 S. E. 57; *Windle v. Hughes*, 4 Ore. 1; *South Carolina Ins. Co. v. Kohn*, 108 S. C. 475, 95 S. E. 65; *O'Conner v. O'Conner*, 88 Tenn. 76, 7 L. R. A. 33, 12 S. W. 447; *Perry v. Ward*, 82 Vt. 1, 71 Atl. 1; *Thacker v. Hubbard &*

*Appleby*, 122 Va. 379, 94 S. E. 929; *Bishop v. Douglass*, 25 Wis. 696; *Small v. Thompson*, 28 Can. Sup. Ct. 219.

53. *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Townsend v. Ward*, 27 Conn. 610; *Merriman v. Schmitt*, 211 Ill. 263, 71 N. E. 986; *Kelly v. Geer*, 101 N. Y. 664, 5 N. E. 332.

The transferee's acceptance of the conveyance in ignorance of the insertion of the contract of assumption therein does not in itself impose any liability on him. *Lloyd v. Lowe*, — Colo. —, 165 Pac. 609; *Raffel v. Clark*, 87 Conn. 567, 89 Atl. 184; *Swisher v. Palmer*, 106 Ill. App. 432; *Merriman v. Schmitt*, 211 Ill. 263, 71 N. E. 986; *Demaris v. Rodgers*, 110 Minn. 49, 124 N. W. 457; *Llewellyn v. Butler*, 186 Mo. App. 525, 172 S. W. 413; *Kilmer v. Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Blass v. Terry*, 156 N. Y. 122, 50 N. E. 953; *Bradshaw v. Provident Trust Co.*, 81 Ore. 55, 158 Pac. 274; *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678.

It may be evidenced by a separate writing,<sup>54</sup> or it may be oral.<sup>55</sup> In the case of an oral agreement, as well as of one incorporated in a conveyance not executed by the transferee, the applicability of the Statute of Frauds has been quite frequently in question, and it has been decided that such a stipulation is not within the provision of the statute as to a promise to answer for the debt or default of another, usually upon the theory that the promise to pay the mortgage debt is an original promise, to pay one's own debt,<sup>56</sup> or that the promise is made to the debtor and not to the creditor.<sup>57</sup> Occasionally, when the stipulation is contained in a conveyance, its acceptance by the grantee appears to have been regarded as equivalent to its execution by him for the purpose of the statute,<sup>58</sup> though why this should be so is not ex-

54. *Kenney v. Streeter*, 88 Ark. 406, 114 S. W. 923; *Hartman v. Six*, 155 Ill. App. 202; *Iowa Loan & Trust Co., v. Haller*, 119 Iowa, 645, 93 N. W. 636; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607; *Society of Friends v. Haines*, 47 Ohio St. 423, 25 N. E. 119.

55. *Dodds v. Spring*, 174 Cal. 412, 163 Pac. 351; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677; *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. (N. S.) 907, 46 So. 183; *Lang v. Dietz*, 191 Ill. 161, 60 N. E. 841; *Wright v. Briggs*, 99 Ind. 563; *Bowen v. Kurtz*, 37 Iowa, 239; *Bossingham v. Syck*, 118 Iowa, 192, 91 N. W. 1047; *Strohauer v. Votz*, 42 Mich. 444, 4 N. W. 161; *Swarthout v. Shields*, 185 Mich. 427, 152 N. W. 202; *Bolles v. Beach*, 22 N. J. L. 680; *Knighton v. Chamberlin*, 84 Ore. 153, 164 Pac. 703; *Merriman v. Moore*, 90 Pa. St. 78; *Goode v. Bryant*, 118

Va. 314, 87 S. E. 588; *Frazey v. Casey*, 96 Wash. 422, 165 Pac. 104.

56. *Mulvany v. Gross*, 1 Colo. App. 112, 27 Pac. 878; *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. (N. S.) 907, 46 So. 183; *Lamb v. Tucker*, 42 Iowa, 118; *Flint v. Winter Harbor Land Co.*, 89 Me. 420, 36 Atl. 634; *Van Meter v. Poole*, 130 Mo. App. 433, 110 S. W. 5; *Fiske v. Gregory*, 34 N. H. 414; *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607; *Taylor v. Preston*, 79 Pa. St. 436; *Moore v. Stovall*, 2 Lea (Tenn.) 543.

57. *Helms v. Kearns*, 40 Ind. 124; *Neiswanger v. McClellan*, 45 Kan. 599, 26 Pac. 18; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Thompson v. Cheesman*, 15 Utah, 43, 48 Pac. 477; *Morgan v. South Milwaukee Lake View Co.*, 97 Wis. 275, 72 N. W. 872.

58. *Foster v. Atwater*, 42 Conn. 244; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994; *Schmucker v.*

plained.<sup>59</sup> And in two or three instances it is asserted that in case of such acceptance the law "implies" a promise corresponding to the stipulation.<sup>60</sup> But any liability imposed on the grantee by reason of such an expression of intention is, it is submitted, properly by way of express, as distinguished from implied, contract, that is, the liability is one growing out of contract, and not out of *quasi* contract.

In no case does it appear to have been suggested that an oral promise to pay a mortgage debt, maturing more than a year in the future, might come within the provision of the Statute of Frauds as to contracts not to be performed within a year, but it is by no means clear that it does not do so. It is possible, however, that the execution of the transfer by the mortgagor might be regarded as bringing the case within the English doctrine, accepted in some of the states, but repudiated in others, that the performance of a contract within a year by one party thereto is sufficient to take it out of this provision of the statute, though performance by the other is not to take place till after a year.<sup>61</sup>

The question whether, apart from the Statute of Frauds, evidence of an oral agreement of assumption might not be inadmissible by reason of the "parol evidence" rule, has been uniformly decided in favor of its admissibility, on the ground that it is introduced merely for the purpose of showing the true consideration of the conveyance,<sup>62</sup> or the person to whom the

Sibert, 18 Kan. 104, 26 Am. Rep. 765.

59. See Browne, Stat. of Frauds, § 366.

60. Pike v. Brown, 7 Cush. (Mass.) 133; Locke v. Homer, 131 Mass. 93; Urquhart v. Brayton, 12 R. I. 169. See Maine v. Cuniston, 98 Mass. 317; Burkhardt v. Yates, 161 Mass. 591, 37 N. E. 759.

61. See Browne, Stat. of

Frauds, § 166; 1 Smith's Leading Cases (8th Am. Ed.), 614, 624, notes to Peter v. Compton.

62. Strohauer v. Voltz, 42 Mich. 444, 4 N. W. 161; Drury v. Tremont Improvement Co., 13 Allen (Mass.) 168; Bolles v. Beach, 22 N. J. L. 680; Ordway v. Downey, 18 Wash. 412, 63 Am. St. Rep. 892, 51 Pac. 1047, 52 Pac. 228.

consideration is to be paid.<sup>63</sup> In other words, the conveyance is regarded as not intended to cover the question of assumption of the mortgage *vel non*, and consequently evidence in that regard is admissible as of a "collateral agreement."<sup>64</sup>

If the transferee assumes the payment of the mortgage debt, he cannot, on paying it, assert a right of recourse, on the principle of subrogation, against the mortgagor. On the other hand the mortgagor, if he pays the debt, may not only assert a personal liability against the transferee by reason of the assumption clause, but may enforce the mortgage against the land.<sup>65-66</sup>

Although a conveyance in terms "subject to" a mortgage does not of itself involve a personal liability upon the part of the transferee,<sup>67</sup> the fact that in such case the price to be paid for the premises was agreed on, and the amount of the mortgage debt was deducted therefrom and left in the hands of the purchaser, the balance only being paid to the vendor, has been regarded as evidencing an agreement on the part of the purchaser to pay the amount of the mortgage debt, represented by the money so retained, to the mortgagee.<sup>68</sup> The mere fact, however, that the estimated difference

63. *Morgan v. South Milwaukee Lake View Co.*, 97 Wis. 275, 72 N. W. 872.

64. See *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607; *Fiske v. Gregory*, 34 N. H. 414. An oral contract of assumption has been held to be inadmissible when there is a written contract covering the whole matter of the consideration. *Mott v. American Trust Co.*, 124 Ark. 70, 186 S. W. 631.

65-66. *Post*, § 646.

67. *Ante*. § 622, note 38.

68. *Middaugh v. Bachelder*, 33

Fed. 706; *Comstock v. Hitt*, 37 Ill. 542; *Ray v. Lobdell*, 213 Ill. 389, 72 N. E. 1076; *Bristol Sav. Bank v. Stiger*, 86 Iowa, 344, 53 N. W. 265; *Lamka v. Donnelly*, 163 Iowa, 255, 143 N. W. 869; *Heid v. Vreeland*, 30 N. J. Eq. 591; *Rockwell v. Blair Sav. Bank*, 31 Neb. 128, 47 N. W. 641, as explained in *Green v. Hall*, 45 Neb. 89, 63 N. W. 119. But a recital in the instrument of conveyance of the full value of the property as the consideration for the conveyance has been regarded as having little or no weight in this re-

between the value of the property and the amount of the mortgage, that is, the estimated value of the "equity of redemption," was paid by the transferee in making the purchase is not sufficient to impose liability on the purchaser.<sup>69</sup> That is almost invariably done, and does not involve any undertaking or assumption by the purchaser as to the mortgage debt. It is merely evidence, as before stated, of an agreement that the land shall be the primary fund for the payment of the mortgage debt.

In some of the cases which state that the transferee is liable in case there is a deduction of the amount of the mortgage from the agreed purchase price and the balance only paid to the vendor, it is said that from this circumstance the law "implies" a personal liability.<sup>70</sup> This would appear to mean, not that there is a liability in *quasi* contract, apart from intention, actual or presumed, but rather that from such circumstance the law infers an intention to create a liability, that is, the law recognizes a rebuttable presumption that the parties so agreed. Evidence that there was no such agreement is no doubt admissible.<sup>71</sup>

That the mortgage is stated in the instrument of conveyance to constitute part of the consideration therefor has been decided not to impose a personal liability on the purchaser,<sup>72</sup> especially when this statement does

gard. *Belmont v. Coman*, 22 N. Y. 438; *Lawrence v. Towle*, 59 N. H. 28.

69. *Rapp v. Stoner*, 104 Ill. 618; *Ray v. Lobdell*, 213 Ill. 389, 72 N. E. 1076; *Heid v. Vreeland*, 30 N. J. Eq. 591; *Bradley v. Hufferd*, 138 Iowa, 611, 116 N. W. 814.

70. *Comstock v. Hitt*, 37 Ill. 542; *Siegel v. Borland*, 191 Ill. 107, 60 N. E. 863; *Townsend v. Ward*, 27 Conn. 610; *Twitchell v. Mears*, 8 Biss. 211, Fed. Cas. No. 14,286.

71. *Siegel v. Borland*, 191 Ill. 107, 60 N. E. 863; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Moore's Appeal*, 88 Pa. St. 450.

72. *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Green v. Hall*, 45 Neb. 89, 63 N. W. 119; *Equitable Life Assur. Society v. Bostwick*, 100 N. Y. 623, 3 N. E. 296; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Granger v. Roll*, 6 S. D. 611. *Contra, semble*, *Twitchell v. Mears*, 8 Biss. 211.



not accord with the facts.<sup>73</sup> Such a statement has been said to be inserted merely to exclude a liability on the part of the purchaser for the whole sum named as the consideration, that is, to show that the purchase price is not to that extent still unpaid.<sup>74</sup>

A clause in the conveyance, "subject to the payment of" the mortgage has been held to involve a personal undertaking to pay it,<sup>75</sup> as has a statement that the "payment of" the mortgage forms part of the consideration of the conveyance.<sup>76</sup>

— **Enforcement by mortgage creditor.** The transferee of the mortgaged premises, if he agrees to pay the mortgage debt, is, by the decided weight of authority, liable directly to the mortgage creditor, who may recover by virtue of the agreement, though not a party thereto. This right of recovery by the creditor is frequently in terms based upon the doctrine, quite generally accepted in this country, that a third person for whose benefit a contract is made may sue thereon,<sup>77</sup> a doctrine which, however, appears to be

73. *Bristol Sav. Bank v. Stiger*, 86 Iowa, 344, 53 N. W. 265; *Hubbard v. Ensign*, 46 Conn. 576.

74. *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659.

75. *Campbell v. Shrum*, 3 Watts (Pa.) 60; *Taylor v. Preston*, 79 Pa. St. 436; *Carley v. Fox*, 38 Mich. 387. But see *Loudenslager v. Woodbury Heights Land Co.*, 64 N. J. L. 405, 45 Atl. 784.

76. *Jager v. Vollinger*, 174 Mass. 521, 55 N. E. 458. A stipulation that the consideration "shall be payable as follows: \$2000 in said mortgage," was regarded as involving an assumption of the mortgage debt. *Torrey v. Thay-*

*er*, 37 N. J. L. 339.

77. *Morris v. Fidelity Mortgage Bond Co.*, 187 Ala. 262, 65 So. 810; *Holmes v. Bennett*, 14 Ariz. 298, 127 Pac. 753; *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340; *Gilbert v. Sanderson*, 56 Iowa, 349, 41 Am. Rep. 103, 9 N. W. 293; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Burr v. Beers*, 24 N. Y. 173, 80 Am. Dec. 327; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Gifford v. Corrigan*, 117 N. Y. 257, 6 L. R. A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; *Poe v. Dixon*, 60 Ohio, St. 124,

properly inapplicable in the case of the assumption of a mortgage debt by the transferee, for the reason that such a contract is almost invariably made for the benefit of the promisee and not of the mortgagee.<sup>78</sup> In some cases the mortgage creditor's right of recovery against the transferee has been based on the theory that, by his agreement to pay the mortgage, the transferee becomes the principal debtor, and his grantor becomes the surety for the payment of the mortgage debt, and that since, in equity, a creditor is entitled to be subrogated to any security which the surety has for his indemnity, the mortgagee is entitled to be subrogated to the right of the mortgagor against the transferee.<sup>79</sup> This latter theory, as stated, is objectionable as basing the transferee's liability to the mortgage creditor on a relation of suretyship which, so far as the creditor is concerned, does not exist, and also because it assumes that a mere personal right of action against the principal in favor of the surety, arising out of the very contract by which the relation of suretyship is created, constitutes a security furnished to the surety for his indemnity, within the rule entitling the

71 Am. St. Rep. 713, 54 N. E. 86; Merriman v. Moore, 90 Pa. St. 78; Urquhart v. Brayton, 12 R. I. 169; Enos v. Sanger, 96 Wis. 150, 37 L. R. A. 862, 65 Am. St. Rep. 38, 70 N. W. 1069. In Pennsylvania a statute has been adopted, (Act of 1878) which provides that the right to assert the personal liability of the grantee shall not enure to any person other than the person with whom the agreement is made. Sloan v. Klein, 230 Pa. 132, 79 Atl. 403; *In re Tritten's Estate*, 238 Pa. 555, 86 Atl. 461.

78. See Editorial note, 10 Columbia Law Rev. 765.

79. Hopkins v. Warner, 109 Cal.

133, 41 Pac. 868; Bassett v. Bradley, 48 Conn. 224; Herrin v. Abbe, 55 Fla. 769, 18 L. R. A. (N. S.) 907, 46 So. 183; Wright v. Briggs, 99 Ind. 56; Miller v. Thompson, 34 Mich. 10; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650; Wager v. Link, 134 N. Y. 122, 31 N. E. 213, 150 N. Y. 549, 44 N. E. 1163; Woodcock v. Bostic, 118 N. C. 822, 24 S. E. 362; Sherman v. Goodwin, 12 Ariz. 42, 95 Pac. 121; Baber v. Hanie, 163 N. C. 588, 36 S. E. 57; Davis v. Hulett, 58 Vt. 96, 4 Atl. 139; Osborne v. Cabell, 77 Va. 462; Keller v. Ashford, 133 U. S. 610, 33 L. Ed. 667.

creditor to the benefit of such a security. The most satisfactory theory on which to base this liability of the transferee to the mortgage creditor is, as has been admirably explained by a contemporary writer,<sup>80</sup> that it involves merely the application by a court of equity of property of the debtor, that is, of his right of action against the transferee, to the payment of the mortgage debt, and this, as is remarked by the same writer, is what the courts have in mind when they say that the mortgagee is subrogated to the rights of the transferor. Their assumption, for the purpose of attaining this end, of the existence of a relation of suretyship which evidently has no existence, serves merely to obscure the matter.

In England and Canada, and perhaps also in Massachusetts, the agreement of the transferee to pay the mortgage debt cannot be enforced by the mortgage creditor either in equity or at law, this according with the general rule existing in those jurisdictions that one not a party to a contract cannot recover thereon.<sup>81</sup>

A question of difficulty arises when the transferor of the mortgaged property is not himself personally liable for the mortgage debt, as, for instance, when one acquires the property without agreeing to pay the debt and thereafter transfers it to one who does agree to pay it. Accepting the view that the transferee's liability to the mortgage creditor by reason of his agree-

80. Professor Samuel Williston, in an article on "Contracts for the Benefit of a Third Person" in 15 Harv. Law Rev. at p. 767, embodied in his edition of Pollock on Contracts at p. 237 *et seq.*

81. Tweddell v. Tweddell, 2 Bro. ch. 152; *In re Errington* (1894) 1 Q. B. 11; Bonner v. Tottenham Society, (1899) 1 Q. B. 161; Fontenac Loan Co. v. Hysop, 21 Ont. 577; Mellen v. Whipple, 1

Gray (Mass.) 317; Coffin v. Adams, 131 Mass. 133; Creesy v. Willis, 159 Mass. 249, 34 N. E. 365; Goodenough v. Labrie, 206 Mass. 599, 92 N. E. 807. The Massachusetts dicta and decisions are however merely that there can be no recovery at law, nothing being said as to the possibility of recovery in equity. See 15 Harv. Law Rev. 787, note 7.

ment of assumption is in the ordinary case to be based on the doctrine of subrogation, or the analogous theory of the application of the debtor's property to the payment of his debt, there appears to be no room for the application of this doctrine when the transferor, with whom the agreement is made, is not himself liable for the debt. It has been so decided in several cases.<sup>82</sup> On the other hand, when the liability of the transferee on his agreement is regarded as based on the theory that the mere beneficiary of a contract may sue thereon, the fact that the person with whom the agreement is made is not himself liable for the debt would seem absolutely immaterial, and there are a number of decisions to that effect.<sup>83</sup> But in at least three states, although this theory of the transferee's liability in the ordinary case is adopted, it is nevertheless regarded as a prerequisite of such liability that the transferor himself be liable. In two of these states this view has been based on the theory that since the transferor could not have any object in requiring the transferee to agree to pay a debt for which the transferor himself is not liable, the agreement should be construed merely as one to take the property subject to the mortgage.<sup>84</sup> In

82. *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *American Security & Trust Co. v. Ferrers*, 45 App. Cas. (D. C.) 84; *Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58; *Colorado Sav. Bank v. Bales*, 101 Kan. 160, 165 Pac. 843; *Norwood v. DeHart*, 30 N. J. Eq. 412; *Trotter v. Hughes*, 12 N. Y. 74.

83. *Cobb v. Fishel*, 15 Colo. App. 384, 62 Pac. 625; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Hart v. Emery*, 184 Ill. 560, 56 N. E. 865; *Marble Sav. Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 198; *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 967; *Llewellyn*

*v. Butler*, 186 Mo. App. 525, 172 S. W. 413; *Hare v. Murphy*, 45 Neb. 809, 29 L. R. A. 851, 64 N. W. 211; *McDonald v. Finseth*, 32 N. D. 400, L. R. A. 1916D, 149, 155 N. W. 863; *Brewer v. Maurer*, 38 Ohio St. 543; *Merriman v. Moore*, 90 Pa. 78; *South Carolina Ins. Co. v. Kohn*, 108 S. C. 475, 95 S. E. 65; *McKay v. Ward*, 20 Utah, 149, 46 L. R. A. 623, 57 Pac. 1024; *Corkrell v. Poe*, 100 Wash. 625, 171 Pac. 522; *Enos v. Sanger*, 96 Wis. 150, 37 L. R. A. 862, 65 Am. St. Rep. 38, 70 N. W. 1069.

84. *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*,

another state it is said that to enable a third person to sue upon a contract, there must be an intent on the part of the promisee to benefit such person, and that in the case of an agreement by the transferee to pay the mortgage debt, no such intent is apparent unless the transferor is himself liable.<sup>85</sup> But even when the transferor is himself liable, there is ordinarily no intent on his part to benefit the mortgage creditor, and it would rather appear that, in asserting the view that the creditor has no right of action upon the transferee's agreement if the transferor is not himself liable, the court was to a great extent controlled by earlier decisions to that effect, rendered at a time when a creditor's right to sue on a promise made to the debtor to pay the debt was regarded as exclusively dependent on the theory of subrogation.<sup>86</sup>

— **Agreement by junior mortgagee.** The case of an agreement by one to whom a mortgage is made, to pay a prior mortgage on the property, stands on a different basis from such an agreement by one to whom an absolute transfer is made. In the latter case the transferee in effect promises to pay the money which he owes for the land, to the extent of the amount of the mortgage debt, to a third person, the mortgage creditor. In the case of an agreement by a subsequent mortgagee, he owes the mortgagor no debt which he can promise to pay to the prior mortgage creditor, and his agreement is therefore no more than an agreement to advance money to pay the prior mortgage debt. And

47 Minn. 103, 49 N. W. 526; Wood v. Johnson, 117 Minn. 267, 135 N. W. 746; Fry v. Ausman, 29 S. D. 30, 39 L. R. A. (N. S.) 150, Ann. Cas. 1914C, 842, 135 N. W. 708. See Kramer v. Gardner, 104 Minn. 370, 116 N. W. 925; Clement v. Willett, 105 Minn. 267, 17 L. R. A. (N. S.) 1094, 117 N. W. 491.

85. Vrooman v. Turner, 69 N.

Y. 280; Carter v. Holahan, 92 N. Y. 498, 504. Young Men's Christian Ass'n of Portland v. Croft, 34 Ore. 106, 75 Am. St. Rep. 568, 55 Pac. 439, is to the same effect.

86. King v. Whitley, 10 Paige (N. Y.) 465; Potter v. Hughes, 12 N. Y. 74. See 15 Harv. Law Rev. 781.

an agreement with a debtor to advance the money to pay the claim against him is not one for the breach of which the debtor is ordinarily entitled to recover substantial damages, and *à fortiori* the creditor is not so entitled.<sup>86a</sup> As has been judicially remarked, if such a contract could be enforced by the creditor who would be incidentally benefitted by its performance, every agreement by one person with another to pay his debts could be enforced by the creditors.<sup>87</sup> It has accordingly been decided that the mortgage creditor cannot recover on such an agreement of assumption by a subsequent mortgagee,<sup>88</sup> and this whether the subsequent mortgage is such in form or is in the form of an absolute conveyance.<sup>89</sup> The same rule apparently holds good although the subsequent mortgage is in terms for an amount which includes not only the sum loaned by the mortgagee at the time of taking the mortgage, but also the amount of the prior mortgage which he assumes.<sup>90</sup> Since a mortgage secures only the sum actually due, whatever amount it may purport to secure,<sup>91</sup> the mortgage cannot, even in such case, be regarded as having in his hands money belonging to the mortgagor which he is under an obligation to pay over to the prior mortgagee. The case might be different, it seems, if at the time of the making of the second mortgage the mortgagee actually paid over the full sum of the amounts purporting to be secured by the two mortgages and the mortgagor returned to the second

86a. See 15 Harv. Law Rev. 701.

87. Rapallo, J., in *Garnsey v. Rogers*, 47 N. Y. 233.

88. *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440; *Pardee v. Treat*, 82 N. Y. 385. But in *Bassett v. Bradley*, 48 Conn. 234, it was held that if the mortgagor assigned to the first mortgagee the benefit of the second mortgagee's promise, the first mortgagee could

sue the second mortgagee thereon, and a judgment for the amount of the prior mortgage was upheld.

89. *Merriman v. Schmitt*, 211 Ill. 263, 71 N. E. 986; *Roe v. Barker*, 82 N. Y. 431; *Cole v. Cole*, 110 N. Y. 630, 17 N. E. 682. See *Arnaud v. Grigg*, 29 N. J. Eq. 482.

90. *Gaffney v. Hicks*, 131 Mass. 124.

91. *Ante*, § 606, notes 69, 70.

mortgagee the amount of the first mortgage for the express purpose of paying it.<sup>92</sup>

— **Successive transfers.** In case the mortgaged land is retransferred by the mortgagor's transferee, and so passes in succession to two or more persons, and each successive transferee agrees to pay the mortgage debt, each and every one of them is liable, as was the original transferee, and on the same principle, directly to the mortgage creditor.<sup>93</sup>

— **Defenses.** The transferee may assert in defense as against the mortgagee as well as against the transferor, with whom the agreement was made, that the agreement was the result of fraud or mistake.<sup>94</sup> On whichever theory the transferee's liability is based, there is no reason why the mortgagee, who has paid nothing to secure the agreement, should be allowed to enforce it when lacking the reality of consent necessary to its enforcement by the promisee.<sup>95</sup>

As to the power of the transferor to release or discharge the transferee from his contract of assumption, and so preclude the enforcement thereof by the mortgage creditor, the cases are not in accord. Perhaps the weight of authority is in favor of the view that the transferor can so discharge the transferee from liability provided he does so before the mortgage creditor has

92. See *Jewett v. Draper*, 6 Allen (Mass.) 424.

93. *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Carnahan v. Tousey*, 93 Ind. 561; *Reed v. Paul*, 131 Mass. 129; *Corning v. Burton*, 102 Mich. 86, 62 N. W. 1040; *Kollen v. Sooy*, 172 Mich. 214, 137 N. W. 808; *Hyde v. Miller*, 45 N. Y. App. Div. 396 60 N. Y. Supp. 974, 168 N. Y. 590 60 N. E. 1113; *Baber v. Hanie*, 163 N. C. 588, 80 S. E. 57.

3 R. P.—15

94. *Drury v. Hayden*, 111 U. S. 223, 28 L. Ed. 408; *Johns v. Wilson*, 6 Ariz. 125, 53 Pac. 583; *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652; *Fuller v. Lamar*, 53 Iowa, 477, 5 N. W. 606; *Bogart v. Phillips*, 112 Mich. 697, 71 N. W. 320; *Clifford v. Minor*, 76 Minn. 12, 78 N. W. 861; *Saunders v. McClintock*, 46 Mo. App. 216; *Dey Ermand v. Chamberlin*, 88 N. Y. 658.

95. See 15 Harv. Law Rev. 797.

in some way shown a desire to accept the benefit of the agreement.<sup>96</sup> There are also to be found decisions that the transferor can release the transferee from his agreement at any time, without reference to whether the benefit thereof has been accepted by the mortgagee,<sup>97</sup> provided at least the release is given in good faith and for a valuable consideration,<sup>98</sup> and before the commencement of foreclosure proceedings.<sup>99</sup> Occasionally, on the other hand, it has been decided that upon the making of the agreement a right of action vests immediately in the mortgage creditor, irrespective of the latter's acceptance of the benefit of the agreement, which right cannot be divested by any subsequent action on the part of the transferor.<sup>1</sup> It has been well suggested,<sup>2</sup> that if the right of action is to be regarded as based on the principle of subrogation, the mortgage creditor acquiring no right directly by reason of the agreement, but having, as the transferor's creditor, merely a right to avail himself of the benefit of the agreement made with the transferor, as constituting in effect an asset belonging to the latter, there appears to be no reason why a discharge by the

96. *Gilbert v. Sanderson*, 56 Iowa, 349, 41 Am. Rep. 103, 9 N. W. 293; *Jones v. Higgins*, 80 Ky. 409; *Field v. Thistle*, 58 N. J. Eq. 339, 43 Atl. 1072; *Gifford v. Corrigan*, 117 N. Y. 257, 6 L. R. A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; *Clark v. Fisk*, 9 Utah, 94, 33 Pac. 248; *Willard v. Worsham*, 76 Va. 392. See *Huffman v. Western Mortgage & Investment Co.*, 13 Tex. Civ. App. 169, 36 S. W. 306; *Hoeldtke v. Horstman*, 61 Tex. Civ. App. 148, 128 S. W. 642; *Trimble v. Strother*, 25 Ohio St. 378.

97. *Biddel v. Brizolara*, 64 Cal. 354, 30 Pac. 609.

98. *O'Neill v. Clark*, 33 N. J.

Eq. 444.

99. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Field v. Thistle*, 58 N. J. Eq. 339, 43 Atl. 1072.

1. *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340; *Starbird v. Cranston*, 24 Colo. 20, 43 Pac. 652; *Ranney v. McMullen*, 5 Abb. N. Cas. 246. See *Rogers v. Gosnell*, 58 Mo. 589; *Douglas v. Welis*, 18 Hun (N. Y.) 88.

2. Prof. Williston's article, 15 Harv. L. Rev. at p. 800. And see the able dissenting opinion of Learned, P. J., in *Douglass v. Wells*, 18 Hun (N. Y.) at p. 96, and Editorial note, 10 Columbia Law Rev. at p. 765.



transferor should not be effective as against the mortgage creditor, provided it is given in good faith and for a valuable consideration, in other words, provided it does not constitute a disposition by the transferor of a part of his assets in fraud of a creditor.<sup>3</sup> If, on the other hand, the right of action in the mortgage creditor is based on the theory that a third person is entitled to sue at law upon a contract to which he is not a party, as being an intended beneficiary thereof, it would seem that the benefit thereof should be regarded as vesting in him immediately, subject to the possibility of future disaffirmance by him,<sup>4</sup> and that this benefit, with its incidental right of action, cannot be divested by any subsequent act on the part of the transferor.<sup>5</sup>

— **Action by transferor.** In several jurisdictions it has been decided that the right of action upon the contract of assumption is vested exclusively in the mortgage creditor, and that the person with whom the contract was made, the transferor, cannot sue thereon, though he is, in case he pays the mortgage debt, entitled to be subrogated to the right of the creditor to sue the transferee upon the contract.<sup>6</sup> This is not however the view usually adopted, but the transferor is allowed to sue on the contract.<sup>7</sup> And this he may

3. As tending to support this view of the subject Prof. Williston cites *Trustees v. Anderson*, 30 N. J. Eq. 366; *Youngs v. Trustees*, 31 N. J. Eq. 290, and *Willard v. Worsham*, 76 Va. 392, in which cases the invalidity of the release was regarded as depending, to a great extent at least, on the solvency of the transferor.

4. *Ante*, § 463.

5. See 15 Harv. Law Rev. at p. 799, 10 Columbia Law Rev. at p. 765.

6. *Ayers v. Dixon*, 78 N. Y. 318 (Compare *Sage v. Trulow*, 88 N. Y. 240); *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713, 54 N. E. 86; *Blood v. Crew Levick Co.*, 171 Pa. St. 328, 33 Atl. 344; *Gunst v. Pelham*, 74 Tex. 586, 12 S. W. 233.

7. See *Halstead v. La Rue*, 177 Ind. 660, 98 N. E. 638; *Gerardi v. Christie*, 148 Mo. App. 75, 127 S. W. 635; *Lanka v. Donnelly*, 163 Iowa, 255, 143 N. W. 869.

ordinarily do upon the transferee's failure to pay the debt at maturity, without reference to whether the transferor himself has or has not paid it, that is, the contract is not ordinarily construed as merely one of indemnity.<sup>8</sup>

In case the transferor sues the transferee before himself paying the mortgage debt, the measure of damages would ordinarily be the amount of the mortgage debt yet unpaid, that is, the amount of liability to which he is subjected by reason of the breach by the transferee.<sup>9</sup> So if the debt is paid in part by the foreclosure of the mortgage, the deficiency only can be recovered,<sup>10</sup> with the result that if it is entirely paid, the transferee is ordinarily liable under his contract for nominal damages only.<sup>11</sup>

If the transferor himself pays the mortgage debt, which the transferee should have paid, he may recover the amount of the payment from the transferee,<sup>12</sup> and

8. *Abell v. Coons*, 7 Cal. 105, 68 Am. Dec. 229; *Foster v. Atwater*, 42 Conn. 244; *Morlan v. Loch*, 95 Kan. 716, 149 Pac. 413; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Stichter v. Cox*, 52 Neb. 532, 72 N. W. 848; *Sparkman v. Gove*, 44 N. J. L. 252; *Holland Reform School Society v. De Lazier*, 85 N. J. Eq. 497, 97 Atl. 253; *Adams v. Symon*, 22 Abb. N. Cas. 469; *Haas v. Dudley*, 30 Ore. 355, 48 Pac. 168; *Callender v. Edmison*, 8 S. D. 81, 65 N. W. 425; *Perry v. Ward*, 82 Vt. 1, 71 Atl. 721. But see *Smith v. Pears*, 24 Ont. App. 82; *Slauson v. Watkins*, 86 N. Y. 597. See 15 Harv. Law Rev. 795.

9. *New Haven Pipe Co. v. Work*, 44 Conn. 230; *Stout v. Folger*, 34 Iowa, 71; *Furnas v. Dur-*

*gin*, 119 Mass. 500; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Sparkman v. Gove*, 44 N. J. L. 252; *Adams v. Symon*, 22 Abb. N. Cas. 469; *Callender v. Edmison*, 8 S. D. 81, 65 N. W. 425.

10. *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30; *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161; *New Haven Pipe Co. v. Work*, 44 Conn. 220; *Walton v. Ruggles*, 180 Mass. 24, 61 N. E. 267; *Scott v. Norris*, — Okla. —, 162 Pac. 1085.

11. *Muhlig v. Fiske*, 131 Mass. 110. Compare *Rice v. Sanders*, 152 Mass. 108, 8 L. R. A. 315, 23 Am. St. Rep. 804, 24 N. E. 1079.

12. *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677; *Williams v. Moody*, 95 Ga. 8, 22 S. E. 30; *Lappen v. Gill*, 129 Mass. 349; *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161; *Tichenor v. Dodd*,

he is also entitled to be subrogated to the mortgage creditor's rights against the land.<sup>13</sup> In case there is a retransfer by the first transferee, both transferees assuming the debt, the original transferor is, it has been decided, on paying the debt, subrogated to the right of his immediate transferee to recover on the obligation of the second transferee, who is, as between the three parties, primarily liable for the debt.<sup>14</sup>

In case the assumption of the mortgage debt is by a purchaser of part only of the mortgaged property, and the whole property is disposed of at foreclosure sale, the transferor, or the person to whom he transfers the part retained, is entitled, it has been decided, to recover the value of the part belonging to him thus sacrificed to satisfy the mortgage debt.<sup>15</sup>

**§ 624. Transferor becoming surety.** Upon the assumption of the mortgage debt by the transferee, he becomes, according to the current of authority, as regards the transferor, the principal debtor, while the transferor becomes a surety merely for its payment.<sup>16</sup>

4 N. J. Eq. 454; *Taintor v. Hemmingway*, 18 Hun (N. Y.) 418; *Kearney v. Tanner*, 17 Serg. & R. (Pa.) 94, 17 Am. Dec. 648; *Latimer v. Latimer*, 38 S. C. 379, 16 S. E. 995.

13. *Post*, § 646.

14. *Holland Reformed School Society v. De Lazier*, 85 N. J. Eq. 497, 97 Atl. 253.

15. *Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. 823; *Haas v. Dudley*, 30 Ore. 355, 48 Pac. 168.

16. *Felker v. Rice*, — Ark. —, 151 S. W. 162; *Boardman v. Larrabee*, 51 Conn. 39; *Flagg v. Geltmacher*, 98 Ill. 293; *Ellis v. Johnson*, 96 Ind. 377; *Boice v. Coffeen*, 158 Iowa, 705, 138 N. W. 857; *George v. Andrews*, 60 Md.

26, 45 Am. Rep. 706; *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861; *Newark v. Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 120; *Cook v. Berry*, 193 Pa. St. 377, 44 Atl. 771; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882, 32 S. E. 50.

And so a subsequent grantee assuming the debt becomes primarily liable as against his grantor, the grantee of the mortgagor, *Oglebay v. Todd*, 166 Ind. 250, 76 N. E. 238, and as against the mortgagor, *Risk v. Hoffman*, 69 Ind. 137; *Holland Reformed School Society*

The mortgage creditor's right of action to enforce the personal liability of the transferor is not affected by the fact that, as between the parties to the transfer, the mortgagor is surety only.<sup>17</sup> But he is, according to a number of decisions, bound to recognize this new relation of principal and surety in his dealings with the principal, that is, the transferee, and consequently the transferor is discharged from his personal liability if the mortgage creditor, after knowledge of the transfer and the terms thereof, enters into a contract with the transferee extending the time of payment,<sup>18</sup> releasing him from the obligation,<sup>19</sup> or otherwise altering the terms thereof.<sup>20</sup> And if, in the particular jurisdiction, a creditor is bound to sue the principal at the request of the surety, the transferor may be discharged in so far as the creditor's failure to comply with such a request has resulted in diminishing the security.<sup>21</sup> And so, it seems, as regards any act of negligence on the part of the creditor whereby the

v. De Lazier, 85 N. J. Eq. 497, 97 Atl. 253.

17. *Flagg v. Geitmacher*, 98 Ill. 293; *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861; *Stephany v. More*, 82 N. J. L. 186, 82 Atl. 731; *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713, 54 N. E. 86; *Hull v. Hayward*, 13 S. D. 291, 79 Am. St. Rep. 890, 83 N. W. 270.

18. *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. Ed. 118; *Herd v. Tuohy*, 133 Cal. 55, 65 Pac. 139; *Brosseau v. Lowy*, 269 Ill. 405, 70 N. E. 901; *Union Stove & Machine Works v. Caswell*, 48 Kan. 689, 16 L. R. A. 85,

29 Pac. 1072; *George v. Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Franklin Sav. Bank v. Cochrane*, 182 Mass. 586, 61 L. R. A. 760, 66 N. E. 200; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; *Merriam v. Miles*, 54 Neb. 566, 69 Am. St. Rep. 731, 74 N. W. 861; *Calvo v. Davis*, 73 N. Y. 211, 29 Am. Rep. 130; *Paine v. Jones*, 76 N. Y. 274; *Miller v. Kennedy*, 12 S. D. 478, 81 N. W. 906; *Bunnell v. Carter*, 14 Utah, 100, 46 Pac. 755.

19. *Heidahl v. Geiser Mfg. Co.*, 112 Minn. 319, 140 Am. St. Rep. 493, 127 N. W. 1050.

20. *Paine v. Jones*, 76 N. Y. 274.

21. *Russell v. Weinberg*, 4 Abb. N. Cas. 139. *Contra*, *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081.

benefit of the mortgage security is lost.<sup>22</sup> In a few jurisdictions, on the other hand, the mortgage creditor must have in some way indicated his assent to this relation of principal and surety in order that he may be bound to recognize it in his dealings with the transferee.<sup>23</sup> It has been suggested<sup>24</sup> that this latter view is proper when the liability of the transferee of the land directly to the mortgage creditor is based on the theory of subrogation, since on that theory there is no legal liability on his part to such creditor, such as is necessary to make him a principal debtor, while if a direct legal liability on the part of the transferee of the land to the mortgagee exists, the former view, that the creditor must recognize the relation of principal and surety, is justified.

In case the transfer of the land is merely subject to the mortgage, without any assumption of the debt, the land in the hands of the transferee is, as regards the mortgagor, the principal debtor, and the mortgagor a surety, merely, and, applying the rule which has more usually been applied when the transferee assumes the debt,<sup>25</sup> the mortgagor's personal liability may properly be regarded as extinguished by reason of an extension of time granted to the transferee, or other change in the obligation,<sup>26</sup> or even a failure to foreclose on request.<sup>27</sup> But the relation of suretyship in such case

22. *Hampe v. Manke*, 28 S. D. 501, 134 N. W. 60.

23. *Shepherd v. May*, 115 U. S. 505, 29 L. Ed. 456; *Boardman v. Larrabee*, 51 Conn. 39; *Corbett v. Waterman*, 11 Iowa, 87; *Iowa, Loan & Trust Co. v. Haller*, 119 Iowa, 645, 93 N. W. 636; *Bradstreet v. Gill*, 22 N. M. 202, 160 Pac. 354; *Denison University v. Manning*, 65 Ohio St. 138, 61 N. E. 706.

24. Editorial note, 13 Columbia Law Rev. 239.

25. *Ante*, this section, note 18.

26. *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 269; *Bunnell v. Carter*, 14 Utah, 100, 46 Pac. 755; *Murray v. Marshall*, 94 N. Y. 611; *Metzger v. Nova Realty Co.*, 214 N. Y. 26, 107 N. E. 1027. *Contra*, *Chilton v. Brooks*, 72 Md. 554, 20 Atl. 125.

27. *Osborne v. Heyward*, 40 N. Y. App. Div. 78, 57 N. Y. Supp. 542; *Gottschalk v. Jungmann*, 78 N. Y. App. Div. 171, 79 N. Y. Supp. 551.

extends only to the value of the land at the time, and no dealings between the mortgagee and the transferee can discharge the mortgagor to any greater extent.<sup>28</sup>

Apart from the apparent equity of the rule, as adopted in the majority of the courts which have considered the matter, that the mortgagee, having knowledge of the facts, must act with due regard to the right of the mortgagor to have the debt satisfied out of the property itself, it may be observed that this is the view which best harmonizes with the decisions, elsewhere referred to,<sup>29</sup> that if part of the land is subject to a primary liability as regards another part, the mortgage creditor, knowing this, cannot release the part primarily liable without to that extent extinguishing his rights against the other part. If he is bound to recognize the existence of primary and secondary liability as regards different parts of the land, he should be bound to recognize it as regards different persons, or as regards a person and the land. Indeed the primary liability of a part of the land quite usually grows out of the primary liability of a particular person as regards the land transferred,<sup>30</sup> and to apply different rules in this regard in the two cases is calculated to cause a very considerable degree of confusion.

When the transfer is not subject to the mortgage, and there is no assumption by the transferee, the mortgagor is primarily liable, and the land secondarily so,<sup>31</sup> and this, it seems, must be recognized by the mortgage creditor in his dealings with the mortgagor, at the risk of discharging the land from the the lien.<sup>32</sup>

28. *North End Savings Bank v. Snow*, 197 Mass. 339, 83 N. E. 1099; *Travers v. Dorr*, 60 Minn. 173, 62 N. W. 629; *Sime v. Lewis*, 112 Minn. 403, 128 N. W. 468; *Antisdell v. Williamson*, 165 N. Y. 372, 59 N. E. 207.

29. *Post*, § 625, notes 67, 68, § 644.

30. See Editorial note, 3 Columbia Law Rev. 199.

31. *Ante*, § 622.

32. See *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625.

§ 625. **Transfer of part of land.** In case distinct portions of the land are conveyed to different persons by simultaneous and similar conveyances, and no one of such transferees assumes the mortgage, each portion is liable for a part of the mortgage debt, proportioned to the value of that portion of the land, and, if one of such transferees pays an amount greater than his proportional share, he is entitled to contribution from the owners of the other portions.<sup>33</sup>

In case one or more of such transferees assume the obligation of paying the mortgage, or take "subject to" the mortgage, and the others do not do so, the part or parts conveyed to the former would be primarily liable, and those conveyed to the latter but secondarily so, as between the transferees themselves. Since the parts of the land in the latter's hands would be only secondarily liable as against the transferor's personal liability, while the parts in the former's hands would be primarily liable as against the transferor's personal liability,<sup>34-35</sup> the parts which are thus secondarily liable as against the transferor's personal liability would necessarily be secondarily liable as against the other parts, which are primarily liable as against that personal liability.

Much more frequent than the simultaneous transfer of portions of the mortgaged property to different persons, is the case of a transfer by the original mortgagor, or by a subsequent owner of the whole property, of part of the property to another, retaining the residue, or subsequently transferring it to another.

33. *Pomeroy*, Eq. Jur. § 1222; *Bailey v. Myrick*, 50 Me. 171; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Hall v. Morgan*, 79 Mo. 47; *Brown v. Simons*, 44 N. H. 475; *Swain v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Alley v. Rogers*, 19 Grat. (Va.) 366.

So, if one tenant in common pays a greater part of the mortgage debt than is proportioned to his interest in the land, he is entitled to contribution from the other tenants in common. *Simpson v. Gardiner*, 97 Ill. 237; *Lyon v. Robbins*, 45 Conn. 513.

34-35. *Ante*, §§ 622, 623.

The rights as between the parties to such transfers are to be determined by considerations similar to those which control in the case of a transfer of the whole of the mortgaged land.

When one who has executed a mortgage upon land to secure his debt, transfers a part of the land, retaining the residue, it is equitable that, in so far as he is under an obligation to his transferee to relieve the land transferred by paying his debt,<sup>36</sup> the part retained by him should be subjected to the whole incumbrance in exoneration, so far as possible, of the part transferred.<sup>37</sup> And this equity as between the parties to the transfer will usually be enforced upon a foreclosure proceeding by a decree requiring the part retained to be applied in satisfaction of the mortgage debt before the part transferred is so applied.<sup>38</sup> And if, in such case, the transferee pays the mortgage debt, he is entitled to contribution from the mortgagor to the extent of the value of the land retained, and, when this exceeds the debt, to complete exoneration,<sup>39</sup> while if the mortgagor pays the amount of the

36. *Ante*, § 622.

37. *Rann v. Reynolds*, 11 Cal. 14; *Cumming v. Cumming*, 3 Ga. 460; *Iglehart v. Crain*, 42 Ill. 267; *Erlinger v. Boul*, 7 Ill. App. 40; *Cooper v. Bigley*, 13 Mich. 474; *Brown v. Simons*, 44 N. H. 475; *Clowes v. Dickinson*, 5 Johns. Ch. (N. Y.) 295; *Commercial Bank v. Western Reserve Bank*, 11 Ohio 444; *Taylor v. Maris*, 5 Rawle (Pa.) 56; *Carpenter v. Koons*, 20 Pa. 222.

38. *Savings Bank v. Cresswell*, 100 U. S. 630, 25 L. Ed. 713; *Houser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206; *Mack v. Shafer*, 135 Cal. 113, 67 Pac. 40; *Cumming v. Cumming*, 3 Ga. 460; *Boone v. Clark*, 129 Ill.

466, 5 L. R. A. 276, 21 N. E. 850; *Mickley v. Tomlinson*, 79 Iowa, 383, 41 N. W. 311, 44 N. W. 684; *Greene v. Healy*, 70 Kan. 173, 78 Pac. 416; *Hopper v. Smyser*, 90 Md. 363, 45 Atl. 206; *Bradfield v. Sewall*, 58 Neb. 637, 79 N. W. 615; *Foster v. Rahway Union Bank*, 34 N. J. Eq. 48; *Solicitors' Loan & Trust Co. v. Washington & I. R. Co.*, 11 Wash. 684, 40 Pac. 344; *Perkins v. McAuliffe*, 105 Wis. 582, 81 N. W. 645.

39. *Aldrich v. Cooper*, 2 White & Tudor, Lead Cas. Eq. Amer. notes, p. 291; *Cumming v. Cumming*, 3 Ga. 460; *Loch v. Fulford*, 52 Ill. 166; *Windsor v. Evans*, 72 Iowa, 692, 34 N. W. 481; *Caruthers v. Hall*, 10 Mich. 40;



mortgage, since this is merely a compliance with his legal obligation, he cannot demand any contribution from his transferee.<sup>40</sup>

If, after having thus conveyed part of the mortgaged land, the mortgagor conveys the part retained to another person, such person is regarded as standing in his place, and, as against the prior transferee, the land last transferred is liable for the mortgage debt. If, instead of transferring the whole of the land retained by him, the mortgagor transfers a part thereof only, the part still retained by him is equitably first liable for the whole debt, and, if that is insufficient, then the part last transferred should be charged for the deficiency, rather than that first transferred, since the second transferee took the land in the same condition in which it was in the hands of the grantor. Thus, the different parts of the mortgaged land are liable "in the inverse order of alienation."<sup>41</sup> In two or three states only has a contrary view been adopted, to the effect that, as between successive transferees of different parts, each part is liable in proportion to the value of that part,<sup>42</sup> a view which, as has been fre-

Engle v. Haines, 5 N. J. Eq. 186, 43 Am. Dec. 624; Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235.

40. Chase v. Woodbury, 6 Cush. (Mass.) 143; Pollard v. Noyes, 60 N. H. 184; Henderson v. Truitt, 95 Ind. 309; Clark v. Warren, 55 Ga. 575; Holcomb v. Holcomb, 2 Barb. (N. Y.) 20. See *post*, § 646, note 7.

41. Cheever v. Fair, 5 Cal. 337; Sanford v. Hill, 46 Conn. 42; Cumming v. Cumming, 3 Ga. 460; Iglehart v. Crane, 42 Ill. 261; Sheperd v. Adams, 32 Me. 63; George v. Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; Gray v. Loud & Sons Lumber Co., 128 Mich. 427, 54 L. R. A. 731, 87 N. W. 376;

Crosby v. Farmers' Bank of Andrew County, 107 Mo. 436, 17 S. W. 1004; Brown v. Simons, 44 N. H. 475; Thompson v. Bird, 57 N. J. Eq. 175, 40 Atl. 857; Clowes v. Dickenson, 5 Johns. (N. Y.) 235; Sternberger v. Hanna, 42 Ohio St. 365; Cowden's Estate, 1 Pa. St. 267; Miller v. Rogers, 49 Tex. 398; Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151.

42. Bates v. Ruddick, 2 Iowa. 423; Barney v. Myers, 28 Iowa. 472; Dillivan v. German Sav. Bank (Iowa), 124 N. W. 350; Dickey v. Thompson, 8 B. Mon. (Ky.) 312; Griffin v. Gingell, 25 Ky. L. Rep. 2031, 79 S. W. 284.

quently pointed out, is objectionable as enabling the mortgagor, who has transferred a part of the land and so established an equity in the transferee to have the residue first applied on the mortgage, to divest this equity at pleasure by transferring such residue to another.

The transferee of a part of the mortgaged land is, by the record of the prior transfer of another part by the same grantor, charged with notice of such transfer and of any consequent primary liability upon the part then retained.<sup>43</sup> He knows that he purchases a part subject to the possibility that there may have been a prior sale of another part, and it is his duty, in the exercise of due diligence, to examine the records to ascertain whether there has been such a prior sale. If he makes such examination and fails to find such a prior transfer of record, he has a right to assume, if he has no information to the contrary, that no such transfer occurred. Consequently the transferee of part of the mortgaged land may, by failure to record his transfer, lose the right to have the part subsequently transferred to another first applied upon the mortgage, if the result is that the subsequent transferee takes without notice of the previous transfer, and of the consequent increased burden upon the land transferred to him.

The doctrine above discussed, imposing a primary liability upon the land retained by the grantor, and upon that last transferred by him, being based upon an obligation resting on the grantor, as against his transferee, to pay off the mortgage and so relieve the land transferred, can apply only when there is such an ob-

43. *Interstate Land & Investment Co. v. Logan*, 196 Ala. 196, 72 So. 36; *Hunt v. Mansfield*, 31 Conn. 488; *Chase v. Woodbury*, 6 Cush. (Mass.) 143; *Gray v. Loud & Sons Lumber Co.*, 128

Mich. 427, 54 L. R. A. 731, 87 N. W. 376; *Brown v. Simons*, 44 N. H. 475; *Hull v. Howell*, 36 N. J. Eq. 25; *Chapman v. West*, 17 N. Y. 125; *Stanley v. Stocks*, 16 N. C. 314.

ligation. Consequently its application is excluded by a contract of assumption on the part of the first transferee, since this relieves the grantor from any such obligation.<sup>44-45</sup> And even though there is no contract of assumption, the doctrine is not applicable if the first transfer is subject to the mortgage,<sup>46</sup> in the sense that the land transferred is thereby rendered the primary fund for the payment of the mortgage debt.<sup>47</sup> Furthermore, the land transferred to different persons may by agreement or express provision be transferred subject to particular portions of the mortgage debt.<sup>48</sup> Occasionally even an express "subject" clause in the conveyance has been construed as imposing on the part conveyed only a proportionate part of the mortgage debt.<sup>49</sup>

In one state it has been decided that if there is no pecuniary consideration for the conveyance of part of the land, and no covenant therein protecting the transferee, he will take it subject to a primary liability for a proportional part of the mortgage debt.<sup>50</sup> Such

44-45. *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Welch v. Beers*, 8 Allen (Mass.) 151; *Jager v. Vollinger*, 174 Mass. 521, 55 N. E. 458; *Mowry v. Mowry*, 137 Mich. 277, 100 N. W. 388; *Chancellor of New Jersey v. Towell*, 80 N. J. Eq. 223, 39 L. R. A. (N. S.) 359, Ann. Cas. 1914 A, 710, 82 Atl. 861; *Thompson v. Bird*, 57 N. J. Eq. 175, 40 Atl. 857; *Bowne v. Lynde*, 91 N. Y. 92.

46. *Briscoe v. Power*, 47 Ill. 447; *Monarch Coal & Mining Co. v. Hand*, 197 Ill. 288, 64 N. E. 381; *Burger v. Grief*, 55 Md. 518; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382; *Engle v. Haines*, 5 N. J. Eq. 186; *Johnson v. Zink*, 51 N. Y. 333; *Carpenter v. Koons*, 20 Pa. St. 222;

*New England Loan & Trust Co. v. Stephens*, 16 Utah, 385, 52 Pac. 624; *Sweetzer v. Jones*, 35 Vt. 317, 82 Am. Dec. 639.

47. *Ante*, § 622.

48. *Moore v. Shurtleff*, 128 Ill. 370, 21 N. E. 775; *Mickle v. Maxfield*, 42 Mich. 304, 3 N. W. 961; *Zabriskie v. Salter*, 80 N. Y. 555; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382.

49. *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43; *Slater v. Breese*, 36 Mich. 7; *Hall v. Morgan*, 79 Mo. 47; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Burger v. Greif*, 55 Md. 518 (*semble*).

50. *Jackson v. Condict*, 57 N. J. Eq. 522, 41 Atl. 374; *Mills v. Kelley*, 62 N. J. Eq. 213, 50 Atl.

a view appears questionable, as applied to cases in which the transferor is personally liable for the debt. The presumption is, it is conceived, in such a case of transfer by way of gift, that the transferor is to pay his own debt<sup>51</sup> and consequently the land retained would be primarily liable.<sup>52</sup> Even in the state referred to, the fact that the consideration is nominal merely is immaterial in this regard, if the conveyance contains a covenant of warranty applicable to the mortgage, this serving to indicate an intention that the land conveyed shall be free from liability.<sup>53</sup>

It has been quite frequently stated, either expressly or by implication, that the doctrine by which the part retained by the mortgagor, or last transferred by him, is made primarily liable, applies only in favor of one who is protected by a warranty deed, or at least a deed containing some covenant for title applicable to the mortgage.<sup>54</sup> On the other hand the doctrine is more usually stated without any such qualification.<sup>55</sup>

144. In *Mead v. Peabody*, 183 Ill. 126, 55 N. E. 719, it was decided without discussion that the part first transferred should be first applied on the debt, when the transfer was for a nominal consideration except that the transferee's husband assumed the debt.

51. *Ante*, § 622, note 22.

52. *Watson v. Neal*, 38 S. C. 90, 16 S. E. 833; *Cumming v. Cumming*, 3 Ga. 460.

53. *Harrison v. Guerin*, 27 N. J. Eq. 219. See *Howser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206.

54. *Aderholt v. Henry*, 87 Ala. 415, 6 L. R. A. 451, 6 So. 625; *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328, 30 Pac. 43; *Erlinger v. Boul*, 7 Ill. App. 40; *Jennings v. Moon*, 135 Ind. 168, 34

N. E. 996 (*semble*); *Bradley v. George*, 2 Allen (Mass.) 392; *Aiken v. Gale*, 37 N. H. 501; *Carpenter v. Koons*, 20 Pa. St. 222; *Steinmeyer v. Steinmeyer*, 55 S. C. 9, 33 S. E. 15; *Solicitors' Loan & Trust Co. v. Washington & I. R. Co.*, 11 Wash. 684, 40 Pac. 344 (*semble*). See *In Re Jones* (1893) 2 Ch. 461. It is so stated in 3 *Pomeroy Eq. Jur.* § 1225; 2 *White & T. Lead Cas. Eq.* (4th Am. Ed.) 296, 303. Mr. Pomeroy's statement to this effect is disapproved in *Biswell v. Gladney*, — Tex. Civ. App. —, 182 S. W. 1168.

55. See, *c. g.*, *Savings Bank v. Creswell*, 100 U. S. 630, 25 L. Ed. 713; *Sanford v. Hill*, 46 Conn. 42; *Looney v. Quill*, 3 Mackey (D. C.) 51; *Iglehart v. Crane*, 42 Ill. 261; *Wallace v. Stevens*, 64 Me. 225;

The lack of harmony in these statements appears to be due to a failure to discriminate between the different classes of circumstances under which the doctrine may be sought to be applied.

In case the transfer of part of the land is by the mortgagor himself, who is personally liable for the debt, the part retained by him is primarily liable whenever, as between him and the part transferred, he is himself primarily liable. If by reason of an assumption or subject clause, or otherwise, the part transferred is primarily liable as against him, it is so liable as against the part retained by him. The presence or absence of a covenant of title is immaterial except as this may serve to show that the land in the hands of the transferee is or is not primarily liable for the debt.<sup>56</sup> In case the transfer of part of the land is not by the mortgagor, but by his transferee, and the latter is personally liable as having assumed the mortgage debt, the question whether the part retained by him upon a transfer of part is primarily liable is determined by the same considerations as control when the transfer of part is by the original mortgagor. It is so primarily liable if he is primarily liable as regards the part transferred by him, and not otherwise.

Hopper v. Smyser, 90 Md. 363, 45 Atl. 206; Cooper v. Bigley, 13 Mich. 474; Gray v. H. M. Loud & Sons Lumber Co., 128 Mich. 427, 54 L. R. A. 731, 87 N. W. 376; Crosby v. Farmers' Bank of Andrew County, 107 Mo. 436, 17 S. W. 1004; Mahagan v. Mead, 63 N. H. 570; Welling v. Ryerson, 94 N. Y. 98; Clowes v. Dickerson, 5 Johns. Ch. (N. Y.) 235; Sternberger v. Hanna, 42 Ohio St. 305; Cowden's Estate, 1 Pa. 207; Watson v. Neal, 38 S. C. 90, 16 S. E. 833; Miller v. Rogers, 49 Tex. 398; Hawkins v. Potter, 62 Tex.

Civ. App. 126, 130 S. W. 643; Deavitt v. Judevine, 60 Vt. 695, 17 Atl. 410; Miller v. Holland, 84 Va. 652, 5 S. E. 701; State v. Titus, 17 Wis. 241.

56. In the following cases the existence of a covenant for title was referred to as indicating an intention that the land conveyed should be exonerated. Sanford v. Hill, 46 Conn. 42; Thompson v. Bird, 57 N. J. Eq. 175, 40 Atl. 857; Case Threshing Mach. Co. v. Mitchell, 74 Mich. 679, 42 N. W. 151; *In re Jones* (1893) 2 Ch. 461.

In case the transfer of part is by a transferee of the land who did not assume any personal liability for the mortgage debt, the part retained by him is not subject to a primary liability unless, in making the transfer of part, he undertakes to relieve that part from liability for the debt. In this case the presence or absence of a covenant of title is a matter of controlling importance. In the absence of any such covenant, there is no primary liability upon the part retained by him, because there is no primary liability upon him personally. The fact that the transfer to him is in terms subject to the mortgage is immaterial in this regard, since that imposes no personal liability. On the other hand, if there is a covenant by him for title, which is applicable to the mortgage, the part retained by him is primarily liable, because he himself is under an obligation to protect his transferee as regards the mortgage.<sup>57</sup>

If, by reason of the assumption of the mortgage debt by a transferee of part of the mortgaged property, or by reason of the fact that the transfer of such part is subject to the mortgage, that part has once become primarily liable, it must necessarily so remain, into whosoever hands it may subsequently pass.<sup>58</sup>

It has been decided that, though a part transferred is primarily liable as against the part retained, yet if this latter part is subsequently transferred to another in terms subject to the mortgage, the trans-

57. In *Hopkins v. Wolley*, 81 N. Y. 77, it was decided without discussion, that where A the owner of the whole land subject, transferred the land to B, and B subsequently transferred a part of the land back to A, the fact that A was personally liable for the debt did not affect his right to have the part retained by B. first applied on the debt. But here the

original transfer from A. to B. was in terms subject to the lien, which fact is sufficient to explain the decision.

58. *Skinner v. Harker*, 23 Colo. 333, 48 Pac. 648; *Iowa Loan & Trust Co. v. Mowery*, 67 Iowa, 113, 24 N. W. 747; *Jumel v. Jumel*, 7 Paige (N. Y.) 591; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509.

ferree of that part cannot assert that there is a primary liability upon the part first transferred.<sup>59</sup>

The doctrine subjecting the parts of mortgaged land in the inverse order of alienation has been applied in the case of subsequent successive mortgages of parts as well as in the case of absolute transfers.<sup>60</sup> And it has also been applied as between a purchaser of part and a mortgage of another part.<sup>61</sup> A distinction may however be suggested in this connection. If one who is personally liable for the mortgage debt, as being the original mortgagor or as having assumed the debt, subsequently mortgages a part of the mortgaged land for another debt, the part of the land not subjected to the second mortgage should ordinarily be first applied in payment of the first mortgage. It being the debt of the maker of the second mortgage, it should be paid primarily from that part of the land in which he is alone interested, and the right of the second mortgagee to insist on the satisfaction of that debt from such part of the land as is not covered by his mortgage would not be affected by the fact that such other part is subsequently transferred or mortgaged to another. If, however, the person who makes the second mortgage of part is not personally liable for the debt secured by the first mortgage, he is under no obligation to the second mortgagee as regards the payment of the first mortgage debt, or the removal of the incumbrance of

59. *Pearson v. Bailey*, 177 Mass. 218, 58 N. E. 1028. And see *Burger v. Greif*, 55 Md. 518, apparently to the same effect.

60. *Savings Bank v. Creswell*, 100 U. S. 630, 25 L. Ed. 713; *Fassett v. Mulock*, 5 Colo. 466; *Payne v. Avery*, 21 Mich. 524; *Dawes v. Cammus*, 32 N. J. Eq. 456; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Cowden's Estate*, 1 Pa.

267; *Milligan's Appeal*, 104 Pa. 503; *Conrad v. Harrison*, 3 Leigh. (Va.) 532.

61. *Howser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206; *George v. Kent*, 7 Allen (Mass.) 16; *Case Threshing Mach. Co. v. Mitchell*, 74 Mich. 679, 42 N. W. 151; *State v. Titus*, 17 Wis. 241.

the first mortgage, unless he entered into a covenant in this regard, and consequently the part of the land not subjected to the second mortgage should not, it would seem, either in his hands, or in the hands of a subsequent purchaser or mortgagee, be subject to a primary liability for the first mortgage debt in total or partial exoneration of the part covered by the second mortgage. The fact that the second mortgage of part is or is not in terms subject to the first mortgage does not appear to have any particular weight in this connection, as it does in the case of an absolute conveyance which is so subject.<sup>62</sup>

The doctrine of liability in the inverse order of alienation has been applied in favor of one claiming a part of the land under a contract of purchase which is specifically enforceable, he being the owner in the view of a court of equity.<sup>63</sup> But a purchaser of part, although he has acquired the legal title, has been held not to be entitled to the benefit of the doctrine, unless or until he pays all the agreed purchase price, since the part unpaid is properly money belonging to the grantor, remaining in the purchaser's hands, which he should apply upon the mortgage debt for the benefit of the subsequent grantee.<sup>64</sup>

An execution sale of mortgaged land is at least presumed to be subject to the mortgage, in the sense that the execution purchaser cannot assert a right of exoneration as against the execution debtor.<sup>65</sup> And consequently a purchaser of part of the mortgaged land at such sale cannot assert a primary liability upon the part retained.<sup>66</sup>

62. *Ante*, § 622, note 48. See *Savings Investment & Trust Co. of East Orange v. United Realty & Mortgage Co.*, 84 N. J. Eq. 472, Ann. Cas. 1916 D, 1134, 94 Atl. 588.

63. *Sterberger v. Hanna*, 42 Ohio St. 305; *Libby v. Tufts*, 121

N. Y. 172, 24 N. E. 12; *Watson v. Neal*, 38 S. C. 90, 16 S. E. 833.

64. *Beddow v. Dewitt*, 43 Pa. St. 326; *Watson v. Neal*, 38 S. C. 90, 16 S. E. 833.

65. *Ante*, § 622, note 33.

66. *Sternberger v. Sussman*, 69 N. J. Eq. 197, 60 Atl. 195, 85 N. J.



The mortgagee, or his assignee, if he has notice of the transfer of a part or parts of the mortgaged land, cannot release any part, to the injury of the owners of other parts, and, by a release of a part which is either concurrently or primarily liable, he to that extent extinguishes the lien. So, when the several parts in the hands of different grantees are liable in proportion to their value, as having been conveyed by concurrent and similar conveyances, a release of one part may extinguish the mortgage lien in favor of the other parts, to the extent to which such part would be liable, measured by its proportional value;<sup>67</sup> and so when a part primarily liable, as having been last transferred, or otherwise, is released, the lien on the part secondarily liable is ordinarily extinguished to the extent of the value of the land so released.<sup>68</sup> But this preclusion of the holder of the mortgage to disturb the equities of the persons interested by releasing a part from the mortgage applies only when he has actual notice of these equities. He is not affected with constructive notice of any transfer which may be made, by reason of the record of such transfer, there being no obligation on him to search the records in order to discover conveyances recorded subsequently to his own.<sup>69</sup> Con-

Eq. 593, 98 Atl. 1087; *Erlinger v. Boul*, 7 Ill. App. 40; *Carpenter v. Koons*, 20 Pa. 222. See *Delaware County Trust Co. v. Lukens*, 38 Pa. Super. Ct. 509. Compare *Semmes v. Moses*, 21 Ga. 439.

67. *Birnie v. Main*, 29 Ark. 591; *Brooks v. Benham*, 70 Conn. 92, 66 Am. St. Rep. 87, 38 Atl. 908, 39 Atl. 1112; *Taylor v. Short's Adm'r*, 27 Iowa, 361, 1 Am. Rep. 280; *Johnson v. Rice*, 8 Me. 157; *Parkman v. Welch*, 19 Pick. (Mass.) 231; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Deuster v. McCamus*, 14 Wis. 307.

68. *Interstate Land & Investment Co. v. Logan*, 196 Ala. 196, 72 So. 36; *Ellis v. Fairbanks*, 38 Fla. 257, 21 So. 107; *Boone v. Clark*, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850; *George v. Wood*, 9 Allen (Mass.) 80, 85 Am. Dec. 741; *Brown v. Simons*, 44 N. H. 475; *Gaskill v. Sine*, 13 N. J. Eq. 400, 78 Am. Dec. 105; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Paxton v. Harrier*, 11 Pa. St. 312; *Burson v. Blackley*, 67 Tex. 5, 2 S. W. 668.

69. *Post*, § 644, notes 2, 3.

sequently, any transferee of a part desiring to protect his equities in this regard should notify the holder of the mortgage claim of the transfer to him.

**§ 626. Transferor's conduct as affecting the bar of limitations.** A number of courts have adopted the view that, if the mortgaged land is transferred by the mortgagor to another, and the mortgagor thereafter, by his absence from the state or acknowledgment of the debt, prevents the running of the statute of limitations as against an action to enforce his personal liability, he thereby prevents the running of the statute in favor of his transferee as against a suit to foreclose the mortgage.<sup>70-71</sup> Other courts have adopted the contrary view, that the transferee's right to assert the bar of the statute as against a proceeding to foreclose cannot be affected by the acts of the mortgagor subsequent to the transfer,<sup>72</sup> provided, at least, the mortgagee can be regarded, by reason of the record of the transfer of the land or otherwise, as having notice that the mortgagor has disposed of the property.<sup>73</sup>

70-71. Rickey v. Sinclair, 167 Ill. 184, 47 N. E. 364; Murray v. Emery, 187 Ill. 408, 58 N. E. 327; Clinton County v. Cox, 37 Iowa. 570; Robertson v. Stuhlmiller, 93 Iowa, 326, 61 N. W. 986; Schmucker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Murdock v. Waterman, 145 N. Y. 455, 27 L. R. A. 418, 39 N. E. 829 (*dictum*); Mack v. Anderson, 165 N. Y. 529, 59 N. E. 289 (*dictum*); Falwell v. Henning, 78 Tex. 278, 14 S. W. 613; Kendall v. Tracy, 64 Vt. 522, 24 Atl. 1118; Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; See Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682.

72. Wood v. Goodfellow, 43 Cal. 185; California Bank v. Brooks,

126 Cal. 198, 59 Pac. 302; Cook v. Union Trust Co., 106 Ky. 803, 45 L. R. A. 212, 51 S. W. 600; Bush v. White, 85 Mo. 339; Fowler v. Wood, 78 Hun. (N. Y.) 304, 28 N. Y. Supp. 976, 150 N. Y. 584, 44 N. E. 1124; Colonial & U. S. Mortgage Co. v. Northwest Thresher Co., 14 N. D. 147, 70 L. R. A. 814, 116 Am. St. Rep. 642, 8 Ann. Cas. 1160; Arthur v. Screven, 39 S. C. 77, 17 S. E. 640; Boucofski v. Jacobsen, 36 Utah, 165, 26 L. R. A. (N. S.) 898, 104 Pac. 117; George v. Butler, 26 Wash. 456, 57 L. R. A. 396, 90 Am. St. Rep. 756, 67 Pac. 263.

73. See Filipino v. Trobock, 134 Cal. 441, 66 Pac. 587; Hibernia, etc., Ass'n v. Farnham, 153

The cases of the first class are sometimes based on the theory that, as the mortgage is merely incident to the debt, the right to enforce the mortgage must endure so long as the right to recover the debt endures. But that the mortgage is merely incident to the debt involves no such consequence. It is perfectly possible to discharge the mortgage in whole or in part without discharging the debt. The principal can endure without the incident, though the incident cannot endure without the principal. Others of these cases appear to regard the conclusion asserted therein as a necessary result of the proposition that the transferee takes the property subject to the burden to which it was subject in the hands of the mortgagor, without explaining why this should be so.<sup>74</sup> The burden subject to which he takes is the mortgage lien, with the normal right to enforce that lien within the time fixed by the statute, and his burden should not be extended in duration, any more than in amount, by the course of conduct which the mortgagor may subsequently choose to adopt. Unless the language of the statute of limitations renders such a construction imperative, there would seem to be little justice or policy in making the right of one person to assert the bar of the statute dependent upon the right of another person, in an entirely different class of action, to assert such a bar, and especially is this the case when such other's inability to assert the bar is the result exclusively of his own individual conduct.<sup>75</sup> Even in jurisdictions which have adopted, for most purposes, the doctrine that the action of the mortgagor after his transfer may

Cal. 578, 96 Pac. 11; *Paine v. Dodds*, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931; *Denny v. Palmer*, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268.

74. *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. Ed. 142;

*Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289; *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118.

75. The contrary view is upheld in a well written editorial note in 9 *Columbia Law Rev.* at p. 718.

operate to extend the duration of the lien as against the transferee, this doctrine would not be applied, it seems, if the debt is barred at the time of the transfer.<sup>76</sup>

There are occasional decisions to the effect that a transferee of mortgaged land cannot, by part payment or other acknowledgment of the debt, affect the running of the statute of limitations against the mortgagor's personal liability.<sup>77</sup> But there are also decisions that part payment by a transferee, who has assumed the debt, may be regarded as on behalf of the mortgagor's indebtedness, so as to interrupt the running of the statute.<sup>78</sup>

A part payment by a transferee of part of the land has been held not to arrest the operation of the statute in favor of a transferee of another part, who had not assumed any personal liability for the debt.<sup>79</sup>

#### IV. TRANSFER OF MORTGAGEE'S RIGHTS.

§ 627. **General considerations.** Since the debt is, in the view of a court of equity, the principal, and the security upon the land merely the accessory, a transfer of the mortgagee's rights, an "assignment of the mortgage," as it is usually termed, is in effect a transfer of the debt, with its attendant security. The expression "assignment of mortgage" is therefore hardly accurate, since the mortgage security cannot be assigned apart from the debt.<sup>80</sup> It is true that, in states in which a legal title to the land is vested in the mort-

76. *Cooke v. Prindle*, 97 Iowa, 464, 66 N. W. 781.

77. *Old Alms House Farm v. Smith*, 52 Conn. 434; *Home Life Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Cottrell v. Shepherd*, 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983. See *Biddell v. Brizolara*, 56 Cal. 374.

78. *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Harper v. Edwards*, 115 N. C. 246, 20 S. E. 392.

79. *Murdock v. Waterman*, 145 N. Y. 55, 27 L. R. A. 418, 39 N. E. 829; *Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289.

80. *Post*, § 628(c).

gagee, such title may remain in the mortgagee though he has assigned the debt, but in the view of a court of equity such legal title is held for the exclusive benefit of the holder of the debt, and consequently the security in its beneficial, as distinct from its purely legal, aspect, belongs to the latter.

Choses in action being, at the present day, ordinarily assignable at law as well as in equity, and a debt secured by mortgage being, like a debt not so secured, merely a chose in action, such a debt is assignable, and the assignment of the debt, the principal, carries with it the benefit of the mortgage security, the accessory.<sup>81-82</sup> In other words, as it would ordinarily, though somewhat inaccurately, be expressed, a mortgage is, as a general rule, freely assignable. Not only may a fixed and certain debt be assigned, carrying with it the mortgage security, but a contingent debt secured by mortgage, such as an obligation to indemnify another, may be transferred, with the effect of transferring the benefit of the mortgage security for the payment of the debt or other performance of the obligation secured.<sup>83</sup> But the assignment of a debt secured by mortgage, as of one not so secured,<sup>84</sup> may be restrained by a provision in the instrument evidencing the debt.<sup>85</sup>

Since a contract by one person to support another is necessarily of such a personal nature that the benefit cannot be assigned, and since a mortgage security cannot be transferred separately from the obligation secured, it would seem to follow that the benefit of a mortgage given to secure the performance

81-82. *Post*, § 628(a), note 5.

504.

83. *Camp v. Smith*, 5 Conn. 80; *Stewart v. Preston*, 1 Fla. 11, 44 Am. Dec. 621; *Carper v. Munger*, 62 Ind. 481; *Murray v. Porter*, 26 Neb. 288, 41 N. W. 1111; *Bancroft v. Marshall*, 16 N. H. 244; *Waller v. Oglesby*, 85 Tenn. 321, 3 S. W.

84. 5 *Encyclopedia Law & Prac.* 911.

85. See *Houseman v. Bodine*, 122 N. Y. 158, 25 N. E. 255; *Hidden v. Kretzshmar*, 37 Fed. 465; *Nyerstown Bank v. Roessler*, 186 Pa. St. 431, 40 Atl. 963.

of a contract to support the mortgagee cannot be transferred, and it has been so decided.<sup>86</sup> In one state, however, it has been decided that the benefit of such a mortgage could be transferred by the mortgagee, the beneficiary of the contract, to another person who, after the execution of the mortgage, and with the consent of the mortgagor, assumed the burden of the mortgagee's support.<sup>87</sup>

Since an assignment of a mortgage is in reality the assignment of the debt secured, the only person capable of making such assignment is, ordinarily, the beneficial owner of the debt. And so if the debt is secured by a deed of trust, the owner of the debt and not the trustee is the person to make the transfer.<sup>88</sup>

Upon the death of the owner of a debt secured by mortgage, the debt passes to his personal representative, with the benefit of the mortgage security,<sup>89</sup> and he may transfer the debt, with its incidental security, to another.<sup>90</sup> In states in which the mortgagee has the legal title to the land, the statute ordinarily invests the executor with such title for the purpose of assigning

86. *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34.

87. *Ottaquechee Sav. Bank v. Holt*, 58 Vt. 166. 1 Atl. 485.

88. *McFarland v. Dey*, 69 Ill. 419; *Hatz's Appeal*, 40 Pa. St. 209; *Ryckman v. Canada Life Ins. Co.*, 17 Grant's Ch. (Up. Can.) 550. But one who holds a debt, secured by mortgage in trust for another, can transfer the debt to the same extent as he could transfer any other property held by him in trust. *Foster v. Dey*, 27 N. J. Eq. 599; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; *Chicago Title & Trust*

*Co. v. Brugger*, 196 Ill. 96, 63 N. E. 637.

89. 2 *Woerner, Administration*, § 631. 11 Am. & Eng. Encyclopedia of Law, 840.

90. *McCausland v. Baltimore Humane Impartial Soc.*, 95 Md. 741, 52 Atl. 918; *Williams v. Ely*, 13 Wis. 1; *Pryor v. Wood*, 31 Pa. 142. In *Cook v. Parkam*, 63 Ala. 456, an assignment by the heirs or devisees of the mortgagee was upheld, on the theory, apparently, that they were the distributees or legatees, to whom the personal representative had presumably transferred the mortgage debt and security.

or enforcing the security.<sup>91</sup> In the absence of such a statute, the heir or devisee would hold the legal title in trust for the holder of the debt secured.<sup>92</sup>

The person to whom the debt, with the benefit of the mortgage security, is transferred, "the assignee of the mortgage," has ordinarily the same remedies, by foreclosure or otherwise, as his assignor had,<sup>93</sup> and if the assignor was entitled to the possession of the mortgaged land, the assignee would ordinarily be so entitled,<sup>94</sup> unless, it seems, the right of possession is dependent on the acquisition of the legal title, and the transfer is insufficient to pass this. And the transfer of the debt entitles the transferee to the benefit not only of the mortgage security, but also of any other security to which the transferor was entitled.<sup>95</sup>

The assignor of a chose in action is usually regarded as warranting the existence and validity of

91. *Douglass v. Durin*, 51 Me. 121; *Smith v. Dyer*, 16 Mass. 18; *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *Pierce v. Brown*, 24 Vt. 165.

92. *Smith v. Dyer*, 16 Mass. 18; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Baldwin v. Hatchett*, 56 Ala. 461; *Coote*, *Mortgages* (4th Ed.) 1036.

93. *Hunt v. New England Mortg. Co.*, 92 Ga. 720, 19 S. E. 27; *Kilgour v. Gockley*, 83 Ill. 109; *Howard v. Handy*, 35 N. H. 315; *Hoitt v. Webb*, 36 N. H. 158; *Dewing v. Crueger*, 7 Wash. 590, 35 Pac. 393. That he is entitled to sue on the assumption of the mortgage debt by the mortgagor's transferee, see *Fitzgerald v. Barker*, 85 Mo. 113. That he cannot do so in his own name, see *Gable v. Scarlett*, 56 Md. 169. The assignee may take advantage of a clause giving the mortgagee an option to declare the whole debt

due in case of default in interest. *Welborn v. Cobb*, 92 S. C. 384, 75 S. E. 691; *Lincoln Nat. Bank v. Mundy*, 162 Ill. App. 128.

94. *Fountain v. Bookstaver*, 141 Ill. 461, 21 N. E. 17; *Mason v. Davis*, 11 N. H. 383; *Jackson v. Minkler*, 10 Johns. (N. Y.) 430. If an absolute conveyance is intended to operate as a mortgage, the grantee is not entitled to possession, and consequently his grantee is not so entitled. *Shimerda v. Wohlford*, 13 S. D. 155, 82 N. W. 393.

95. *Parsons v. Fairbanks*, 22 Cal. 343; *Longfellow v. McGregor*, 61 Minn. 494, 63 N. W. 1032; *Philips v. Lewistown Bank*, 18 Pa. 494. The assignment of a mortgage was construed to include the right of action against a previous assignor on a covenant as to the validity of the mortgage. *Byles v. Lawrence*, 35 Mich. 458.

the claim,<sup>96</sup> and this rule has been applied in connection with a debt secured by mortgage.<sup>97</sup> And the one who in terms transfers a mortgage with the debt secured by it has been held impliedly to warrant that the instrument is genuine and not forged.<sup>98</sup> In those states in which the assignor of a debt is regarded as warranting the payment thereof,<sup>99</sup> he will no doubt be so regarded when the debt is secured by mortgage as well as when it is unsecured.<sup>1</sup> And conversely, in those states in which no such warranty is implied in the case of an unsecured claim, it will not be implied in the case of a secured claim.<sup>2</sup>

**§ 628. Method of transfer—(a) Transfer of the debt.** Applying the equitable principle that the debt or other obligation secured is the principal thing, and the mortgage securing it merely an incident, it has become the established rule in courts of equity in this country, and in many states in courts of law as well, that a transfer of the debt alone has the effect of transferring the benefit of the mortgage security.<sup>3</sup> In states

96. 5 Encyclopedia Law & Prac. 951; 5 Corpus Juris, 968.

97. Ross v. Terry, 63 N. Y. 613, Koch v. Hinkle, 35 Pa. Super. Ct. 421.

98. Waller v. Staples, 107 Iowa, 738, 77 N. W. 570.

99. See cases cited 5 Corpus Juris, 969.

1. Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878.

2. French v. Turner, 15 Ind. 59; Dixon v. Clayville, 44 Md. 573; Nally v. Long, 71 Md. 585, 17 Am. St. Rep. 547, 18 Atl. 811.

3. Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. Ed. 313; Welsh v. Phillips, 54 Ala. 309; Mack v. Wetzlar, 39 Cal. 247; Lawrence v. Knap, 1 Root (Conn.)

248, 1 Am. Dec. 42; Stewart v. Preston, 1 Fla. 11, 44 Am. Dec. 621; Clark v. Havard, 122 Ga. 273; Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586; Bank of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Smith v. Booth Brothers, etc., Granite Co., 112 Me. 297, 92 Atl. 103; Morris v. Bacon, 123 Mass. 58, 25 Am. Rep. 17; Mitchell v. Ladew, 36 Mo. 526, 88 Am. Dec. 156; Whittemore v. Gibbs, 24 N. H. 484; Green v. Hart, 1 Johns. (N. Y.) 580; Runyan v. Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; Hillman v. Young, 64 Ore. 73, 127 Pac. 793, 129 Pac. 124;



in which the "lien" theory of a mortgage obtains, this must necessarily be the case, since the mortgage is merely a means of realizing the debt, and it is inconceivable that one person should be entitled to a debt and another person to the benefit of its realization. The case is the same in the states which adopt the "title" theory of a mortgage, so far as courts of equity are concerned. It is true that in those states the legal title, which passes to the mortgagee upon the execution of the mortgage, may be vested in one person while the debt is owned by another, but this legal title a court of equity will regard as held for the benefit of the owner of the debt. In other words, such security as may result from the transfer of the legal title to the mortgagee is beneficially vested in the owner of the debt, and a court of equity will under proper circumstances even order the holder of the legal title to transfer it to the owner of the debt.<sup>4</sup> The mere transfer of the debt, however, will not usually carry with it the legal title as it does the equitable security.<sup>5</sup> The transferor, if he held the legal title at the time of the transfer, will continue to hold it, but merely for the benefit of the transferee of the debt.<sup>6</sup>

*Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; *Emmons v. Hawk*, 62 W. Va. 526, 59 S. E. 519; *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720; *Milwaukee Trust Co. v. Van Valkenburgh*, 132 Wis. 638, 112 N. W. 1085.

4. *Morris v. Bacon*, 123 Mass. 58.

5. *Cottrell v. Adams*, 2 Biss. 351, Fed. Cas. No. 3,272; *Welsh v. Phillips*, 54 Ala. 309; *Clark v. Havard*, 122 Ga. 273, 50 S. E. 108; *Barrett v. Hinckley*, 124 Ill. 32, 7

Am. St. Rep. 331, 14 N. E. 863; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Young v. Miller*, 6 Gray. (Mass.) 152; *Bailey v. Winn*, 101 Mo. 649, 12 S. W. 1045; *Contra*, *Southerin v. Mendum*, 5 N. H. 420; *Whittemore v. Gibbs*, 24 N. H. 185.

6. *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Jordan v. Cheney*, 74 Me. 359; *Crane v. March*, 4 Pick. (Mass.) 131, 16 Am. Dec. 329; *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17; *Keyes v. Wood*, 21 Vt. 331.

The equitable doctrine above referred to, that a transfer of the debt involves a transfer of the mortgage security, has been applied even when the transferee was at the time ignorant of the existence of the mortgage.<sup>7</sup> A contrary view would involve either a separation of the debt and of the security, which would appear, as we have just seen, to be impossible on principle, or an extinguishment of the security by reason of such ignorance, which would appear to be unjust and unreasonable.

It is sometimes said that the benefit of the security passes upon a transfer of the debt "in the absence of an agreement to the contrary."<sup>8</sup> The exact significance of such a qualification of the general rule is not entirely clear. It does not mean that the legal title passes in the absence of an agreement to the contrary, because, as we have just seen, it does not pass. It cannot mean that, upon the transfer of the debt, the benefit of the security may be retained by the transferor, since, as we have said above, the security is merely a means of realizing the debt, and cannot be the property of a person other than the owner of the debt. It must, it seems, if it means anything, mean that the transferor and the transferee of the debt may, by agreement at the time of the transfer, discharge the security for the debt, without affecting the debt itself. Since the transferor could, before the transfer of the debt, discharge the mortgage, and the transferee can do so thereafter, it seems clear that, at the very moment of transfer, the two together can do so. But it is obviously but seldom, if ever, that the parties to the transfer would have any object in entering into an agreement, to which the owner of the mortgaged land

7. *Betz v. Newcomer*, 1 Pen. & W. (Pa.) 280; *Keyes v. Wood*, 21 Vt. 331; *Evertson v. Booth*, 19 Johns. (N. Y.) 491. But see *Franklin Sav. Bank v. Colby*, 105

Iowa, 424, 75 N. W. 346.

8. See 2 *Jones, Mortgages*, § 817; 27 *Cyclopedia Law & Proc.* p. 1786. Cases cited 35 Cent. Dig. tit. Mortgages, § 621.

is not a party, for the purpose of relieving the land of the burden of the mortgage. Consequently, the suggested qualification of the general rule, as to the passing of the benefit of the security upon a transfer of the debt, may well be ignored, as being of no practical importance, and as involving, at the most, but a recognition of the right of the parties beneficially interested in the debt to discharge the mortgage security.

As to the mode of transferring the debt, with the incidental right to the benefit of the mortgage lien, absolutely no formalities are required, a merely oral transfer of the debt being regarded as sufficient,<sup>9</sup> as is, obviously, an express written transfer of the debt.<sup>10</sup> In case a note or bond was given for the amount of the debt secured,<sup>11</sup> a transfer of such note or bond is regarded as in effect a transfer of the debt, and incidentally of the benefit of the mortgage lien.<sup>12</sup> Such transfer may be effected by a written assignment of the note or bond, either by indorsement or otherwise,<sup>13</sup> or by a mere manual delivery of the note or bond into the hands of the intended transferee,<sup>14</sup>

9. *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; *Rigney v. Lovejoy*, 13 N. H. 247; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Pratt v. Bennington Bank*, 10 Vt. 293, 33 Am. Dec. 201; *Fred Miller Brewing Co. v. Manasse*, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535; *Orman v. North Alabama Assets Co.*, 204 Fed. 289.

10. *Cortelyou v. Jones*, 132 Cal. 131, 64 Pac. 119; *Larned v. Donovan*, 31 Abb. N. Cas. 308, 29 N. Y. Supp. 825.

11. *Ante*, § 607(c).

12. *Romberg v. McCormick*, 194 Ill. 205, 62 N. E. 537; *Connecti-*

*cut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586; *Jordan v. Cheney*, 74 Me. 359; *Romberg v. McCormick*, 194 Ill. 205, 62 N. E. 537; *Commonwealth v. Globe Investment Co.*, 168 Mass. 80; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73; *Dick v. Mawry*, 9 Sm. & M. (Miss.) 448; *Daniels v. Densmore*, 32 Neb. 40, 48 N. W. 906.

13. *Kenney v. Jefferson County Bank*, 12 Colo. App. 24, 54 Pac. 404; *Miller v. Larned*, 103 Ill. 562; *Hewell v. Coulbourn*, 54 Md. 59; *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58.

14. *O'Neal v. Seixas*, 85 Ala. 80, 4 So. 745; *Arnett v. Willough-*

this according with the general rule that such manual delivery of a note or bond or, as it may be otherwise expressed, an oral assignment thereof, is a good transfer, at least in the view of a court of equity.<sup>15</sup>

— (b) **Formal assignment.** Although, as we have above seen, the transfer of the debt alone vests the benefit of the mortgage security in the transferee, it is usually desirable that the transfer assume a more formal shape, specifically referring to the mortgage, and the statutes ordinarily recognize the propriety of such a formal “assignment of a mortgage,” by setting out the form of an instrument available for this purpose, and also naming requirements as to its execution. The chief advantage of such a written transfer in terms of the mortgage lien, as well as of the debt, is that it can in most states be recorded, with the effect of charging persons with notice of the transfer by the existence of the record, while a mere transfer in terms of a debt, although the debt is secured by mortgage, is not susceptible of record. Such an instrument is regarded as assuming, for the most part, the characteristics of a conveyance of an interest in land, although the essential character of the mortgage lien, as being a mere accessory to the debt, remains the same as before.

The mode of execution of such an express assignment of the mortgage, for the purpose of placing it upon the records, or for other purposes, is to be determined by the statutes of the particular jurisdiction.<sup>16</sup> That the transfer is written upon some part of the mortgage instrument, “indorsed thereon,” as

by, 190 Ala. 530, 67 So. 426; Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; Pease v. Warren, 25 Mich. 9, 18 Am. Rep. 58; Pratt v. Skolfield, 45 Me. 386; Southerin v. Mendum, 5 N. H. 420; Curtis v. Moore, 152 N. Y. 159, 57 Am.

St. Rep. 506, 46 N. E. 168; Kiff v. Weaver, 94 N. C. 274, 55 Am. Rep. 601.

15. 1 Daniel, Negot. Inst. § 741; 8 Corpus Juris., pp. 384, 385.

16. See Smith v. Kelley, 27 Me. 237.

it is ordinarily expressed, is immaterial, such a transfer being as effective as if written on a separate paper, provided it is properly executed for the purpose.<sup>17</sup>

— (c) **Assignment omitting reference to debt.**

An assignment of the mortgage security, apart from the debt, is a nullity.<sup>18</sup> And this appears to be so without reference to whether the mortgagee has the legal title. If he has the latter, he can in some states transfer it without the debt,<sup>19</sup> but the mortgage lien, that is, the right to proceed against the land as security, can exist only in favor of the holder of the debt secured.<sup>20</sup>

It has been decided in a number of cases, apparently, that a transfer or assignment in terms of the "mortgage," is insufficient to transfer the debt secured, and is therefore a nullity, in the absence of a specific transfer of the debt, or of the note or bond given for the debt.<sup>21</sup> These decisions purport to be based on the principle above referred to, that a transfer of the "mortgage" without the debt is a nullity. But, it is conceived, the acceptance of this principle should not preclude a transaction from operating to transfer the debt, even though no specific reference is made to the debt as distinct from the mortgage. The question is properly one of the construction of the language used, and in arriving at the proper construction, evidence of the sense in which that language is ordi-

17. *Ward v. Ward*, 108 Ala. 278, 19 So. 354; *Douglass v. Durin*, 51 Me. 121; *Hills v. Eliot*, 12 Mass. 26, 7 Am. Dec. 26; *Honore v. Wilshire*, 109 Ill. 103.

18. *Jordan v. Sayre*, 24 Fla. 1; *Sanford v. Kane*, 133 Ill. 199, 8 L. R. A. 724, 23 Am. St. Rep. 602, 24 N. E. 414; *Johnson v. Clarke*, (N. J. Ch.), 28 Atl. 558; *Cooper v. Newland*, 17 Abb. Prac. 342; *In re Pirie*, 198 N. Y. 209, 91 N. E.

587, 1144; *Orman v. North Alabama Assets Co.*, 204 Fed. 289.

19. *Post*, § 628(d).

20. See *Edell v. Stamford*, 3 Vt. 202.

21. *Pope v. Jacobus*, 10 Iowa, 262; *Merritt v. Bartholick*, 36 N. Y. 44, *Finch's Cas.* 1113 (*dictum*); *Cooper v. Newland*, 17 Abb. Pr. (N. Y.) 342; *Cleveland v. Cohrs*, 10 S. C. 224; *Miller v. Berry*, 19 S. D. 625, 104 N. W. 311.

narily used is of primary importance. The expression "assignment of mortgage" is almost universally used, not only by the general public, but also by the legislature, the courts, and the legal profession, to describe the transfer of the totality of the mortgagee's rights, that is, his right to the debt as well as to the lien securing it, and to hold, as these cases apparently do, that when one in terms assigns a mortgage, he intends, not an effective transfer of his rights as creditor against the land, but a transfer of his lien alone, which is an absolute nullity, not only ignores this ordinary use of the term "mortgage," but also is in direct contravention of the well recognized rule that an instrument shall if possible be construed so as to give it a legal operation.<sup>22</sup> There are several cases in apparent accord with the views above expressed.<sup>23</sup>

It has occasionally been asserted that while, if a note or bond was given for the debt secured, the debt does not pass by an assignment in terms of the mortgage, it does pass in case there is no debt or bond,<sup>24</sup> the theory obviously being that, if there is a note or

22. So in *Foster v. Johnson*, 39 Minn. 378, 40 N. W. 255, it is held that an averment that a mortgage was "assigned" is a sufficient averment of an assignment of the notes, since an assignment of the mortgage without the notes is nugatory. *Hamilton v. Browning*, 94 Ind. 242 is *contra*.

23. *Buell v. Underwood*, 65 Ala. 285; *Seabury v. Hemley*, 174 Ala. 116, 56 So. 530; *Loveridge v. Shurtz*, 111 Mich. 618, 70 N. W. 132 (*semble*); *Campbell v. Birch*, 60 N. Y. 214 (*semble*); *Andrews v. Townshend*, 56 N. Y. Super. Ct. 140, 1 N. Y. Supp. 421, 16 N. Y. St. Rep. 876; *Williams v. Teachey*, 85 N. C. 402. See *Syracuse Sav. Bank v. Merrick*, 96 N. Y. App. Div. 581,

89 N. Y. Supp. 238, rev'd, 182 N. Y. 387, 75 N. E. 232.

Occasionally it is said that an assignment in terms of the mortgage does not pass the debt unless an intention to that effect is shown (*Fletcher v. Carpenter*, 37 Mich. 412; *Earl v. Stumpf*, 56 Wis. 50), the objection to which is that it appears to impose upon the transferee in every case the burden of showing an intention to transfer the debt. Having regard to the ordinary use of the expression "assignment of mortgage," the presumption should be the other way.

24. *Carpenter v. O'Dougherty*, 67 Barb. (N. Y.) 397; *Earl v. Stumpf*, 56 Wis. 50, 13 N. W. 701.

bond, the failure to refer to it or to make a manual transfer thereof indicates an intention not to transfer the debt. But while the existence of the note or bond is a circumstance to be considered in construing the language used, and may serve to limit its scope, so as not to operate upon the debt, it should not, it is conceived, be conclusive in this regard. In spite of the frequent reference to a mortgage as securing a note or bond, the note or bond is merely evidence of, or additional security for, the debt,<sup>25</sup> and it is perfectly possible for one to intend to transfer the debt without making in terms a transfer of the note or bond, or relinquishing possession thereof.<sup>26</sup> The improbability that the mortgagee, desiring to transfer his beneficial interest in the debt as well as the mortgage lien, will fail to make a specific transfer of the note or bond is not so great, it is conceived, as is the improbability of his attempting to do such an utterly futile thing as to transfer to another a lien securing a debt, while himself retaining the debt.<sup>27</sup> It has occasionally been decided that the assignment in terms of the mortgage, though transferring the debt as well as the security, does not pass the legal title vested in the mortgagee.<sup>28</sup>

While a written assignment of a mortgage, so called, is nugatory if the name of the assignee does not appear,<sup>29</sup> it has been decided that it is validated by the insertion of such name by one acting under authority from the assignor, express or implied from circumstances,<sup>30</sup> a view which accords with that ordinarily

25. *Ante*, § 607(c).

26. *Campbell v. Birch*, 60 N. Y. 214, per Andrews, J.

27. That a testamentary disposition of a "mortgage" includes the debt, see *Johnson v. Goss*, 128 Mass. 433; *Klock v. Stevens*, 20 N. Y. Misc. 383, 45 N. Y. Supp. 603.

28. *Williams v. Teachey*, 85 N. C. 402; *Morton v. Blades Lumber*

Co., 154 N. C. 336, 70 S. E. 623;

*McCook v. Kennedy*, 146 Ga. 93, 96 S. E. 713. Compare *H. Well & Bros. v. Davis*, 168 N. C. 298, 84 S. E. 395.

29. *Curtis v. Cutler*, 76 Fed. 16, 22 C. C. A. 16, 37 L. R. A. 737.

30. *Phelps v. Sullivan*, 146 Mass. 36, 54 Am. Rep. 442, 2 N. E. 121; *Casserly v. Morrow*, 111

adopted as to the filling of blanks in other instruments of conveyance.<sup>31</sup>

— (d) **Transfer of land or legal title thereto.**

On the common-law theory of a mortgage, since the legal title is regarded as vested in the mortgagee, the only mode of transferring such title is by a formal conveyance similar to that required in the case of other transfers of estates in land, and, accordingly, such a conveyance is in some states necessary for the transfer of all the rights of the mortgagee.<sup>32</sup> But, as we have seen,<sup>32a</sup> the fact that the legal title to the land is not transferred does not ordinarily affect the right of one to whom the debt secured by the mortgage is transferred, to assert in a court of equity his claim against the mortgaged property for the purpose of security. It merely affects his standing in a court of law. Moreover, even though the legal title is transferred by the mortgagee to another, the transferee thereby acquires no beneficial interest, if the debt or obligation

Minn. 654, 111 N. W. 655; Koch v. Hinkle, 35 Pa. Super. Co. 421; Fidelity Insur. Co. v. Nelson, 30 Wash. 340, 70 Pac. 961; Friend v. Yahr, 126 Wis. 291, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 924, 104 N. W. 997.

31. *Ante*, § 434.

32. Sanders v. Cassady, 86 Ala. 246, 5 So. 503; Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; Douglass v. Durin, 51 Me. 121; Smith v. Kelley, 27 Me. 237, 46 Am. Dec. 595; Warden v. Adams, 15 Mass. 233; Adams v. Parker, 12 Gray (Mass.) 53; Williams v. Teachey, 85 N. C. 402; Torrey v. Deavitt, 53 Vt. 331. So in the case of an absolute conveyance given as security, the legal title vesting in the gran-

tee. Henry v. McAllister, 93 Ga. 667, 20 S. E. 66. An instrument under seal, purporting to assign the debt and mortgage, has been regarded as transferring the mortgagee's full legal title, in spite of the omission of words of inheritance. Barnes v. Boardman, 149 Mass. 106, 3 L. R. A. 785, 21 N. E. 308.

A transfer of the legal title vested in the mortgagee by the execution of the mortgage, does not pass an interest in the mortgaged land, which the mortgagee may happen to have, entirely distinct from and independent of the mortgage. Merritt v. Harris, 102 Mass. 326; Barnstable Sav. Bank v. Barrett, 122 Mass. 172.

32a. *Ante*, § 628(b), notes 4-6.



secured is not also transferred, but he holds the title merely in trust for the owner of the obligation, and can utilize it only for the benefit of the latter.<sup>33</sup> And occasionally it has been decided that, even though one has the legal title as mortgagee, since he has this merely for the purpose of securing his debt, a transfer by him of such title without a transfer of the debt secured, is an absolute nullity.<sup>34</sup>

Whether a particular transaction involving an express transfer of the mortgagee's legal title is also to have the effect of transferring the debt would seem to be primarily a question of the construction of the language used.<sup>35</sup> In several of the states in which the mortgagee has the legal title, a transfer by the mortgagee in terms of the mortgaged land, or of his interest in the land, has been regarded as sufficient to transfer, not only his legal title as mortgagee, but also the debt secured.<sup>36</sup> In one or two of such states, on the other hand, a transfer in such terms has been held to pass merely the legal title to the land,<sup>37</sup> and it can evidently have only such a limited operation when the transferor has already disposed of the debt to another.<sup>38</sup> In two of such states a conveyance in terms of the land is regarded as effective for any purpose

33. *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Farrell v. Lewis*, 56 Conn. 280, 14 Atl. 931; *Pettus v. Gault*, 81 Conn. 415, 71 Atl. 509; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Sanger v. Bancroft*, 12 Gray. (Mass.) 365; *Jackson v. Willard*, 4 Johns. (N. Y.) 40.

34. *Devlin v. Collier*, 53 N. J. L. 422, 22 Atl. 201; *Delano v. Bennett*, 90 Ill. 533.

35. See *Bulkley v. Chapman*, 9 Conn. 5.

36. *Welsh v. Phillips*, 54 Ala. 309; *Hooper & Nolen v. Birchfield*, 138 Ala. 423, 35 So. 351;

*Sadler v. Jefferson*, 143 Ala. 669, 39 So. 380; *Dearnaley v. Chase*, 136 Mass. 288; *Stark v. Boynton*, 167 Mass. 443, 45 N. E. 764; *Smith v. Hitchcock*, 130 Mass. 570; *Hinds v. Ballou*, 44 N. H. 619; *Webb v. Crouch*, 70 W. Va. 580, Ann. Cas. 1914 A, 728, 74 S. E. 730.

37. *Farrell v. Lewis*, 56 Conn. 280, 14 Atl. 931. (quit claim deed). In New Jersey, apparently, it does not have even this effect. *Devlin v. Collier*, 53 N. J. L. 422, 22 Atl. 201.

38. *Ruggles v. Barton*, 13 Gray (Mass.) 506; *Wolcott v. Winchester*, 15 Gray (Mass.) 461.

only when the mortgagee executing it is in possession of the land, though passing the debt as well as the legal title if the mortgagee is in possession.<sup>39</sup>

In case the mortgage was in the form of an absolute conveyance,<sup>40</sup> a conveyance in terms of the land by the mortgagee is ordinarily assumed to pass the mortgage debt with the incidental security of the land.<sup>41</sup>

In determining the operation of a conveyance of the land as transferring all the mortgagee's rights, in states retaining the title theory, the courts have, at times, referred to the character of the conveyance, it being occasionally said that a warranty deed is sufficient for this purpose,<sup>42</sup> and occasionally that a quitclaim deed is sufficient,<sup>43</sup> or that the latter is insufficient.<sup>44</sup> Even a mere release has been regarded as sufficient to transfer the debt as well as the legal title.<sup>45</sup>

The mode of execution of an instrument by which the mortgagee undertakes to transfer his legal title to the land is to be determined by the same considerations as control in the case of any conveyance of one's legal title to land in the particular jurisdiction. It has accordingly been decided, in particular jurisdictions, that the instrument must be sealed<sup>46</sup> and that acknowledg-

39. *Furbush v. Goodwin*, 25 N. H. 425; *Clark v. Clark*, 56 N. H. 105; *Hinds v. Ballou*, 44 N. H. 619; *Conner v. Whitmore*, 52 Me. 185; *Lunt v. Lunt*, 71 Me. 377; *Wyman v. Porter*, 108 Me. 110, 79 Atl. 371.

40. *Ante*, § 605.

41. See, *e. g.*, *Hawkins v. Elston*, 58 Colo. 400, 146 Pac. 254; *Gooch v. Phillips*, 46 Okla. 145, 148 Pac. 135.

42. *Hooper & Nolen v. Birchfield*, 138 Ala. 423, 35 So. 351; *Rugles v. Barton*, 13 Gray (Mass.) 506; *Woods v. Woods*, 66 Me. 206.

43. *Lamprey v. Nudd*, 29 N. H. 299; *Hinds v. Ballou*, 44 N. H. 619; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *Douglass v. Durin*, 51 Me. 121. See *Johnson v. Leonards*, 68 Me. 237.

44. *Farrell v. Lewis*, 56 Conn. 280, 14 Atl. 931.

45. *Welch v. Priest*, 8 Allen (Mass.) 165.

46. *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863; *Smith v. Kelley*, 27 Me. 237; *Dameron v. Eskridge*, 104 N. C. 421, 10 S. E. 700; *Dimon v. Di-*

ment and recording are necessary.<sup>47</sup>

In states in which the mortgagee has not the title to the land, a conveyance in terms only of the land or of his interest in the land is obviously nugatory as such, and such a conveyance has ordinarily been regarded as not operating to transfer the debt with its accompanying security,<sup>48</sup> occasionally subject to a qualification to the effect that such is the case in the absence of evidence of an intention to transfer the debt,<sup>49</sup> and subject also to an exception, it seems, in case the mortgage is in the form of an absolute conveyance. But though the cases do not ordinarily discuss the effect of such a conveyance by the mortgagee from that point of view, it would seem that, in most cases, the question is whether, when the conveyance is construed in the light of the surrounding circumstances, it shows an intention to transfer the debt secured. That, in the particular jurisdiction, the mortgagee has or has not the legal title may affect the construction in this regard, but it seems questionable whether, even in those states which adopt the "lien" theory of a mortgage, it should be assumed as an absolute rule of law that a conveyance in terms of the mortgagee's rights in the land cannot operate as a transfer of the debt. There is one case, it appears, in which the mortgage debt and security are regarded as passing

mon, 10 N. J. L. 156. See *Morrison v. Mendenhall*, 18 Minn. 232.

47. *Adams v. Parker*, 12 Gray (Mass.) 53; *Sanders v. Cassady*, 86 Ala. 246, 5 So. 503. And see *Partridge v. Partridge*, 38 Pa. St. 78.

48. *Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am. Dec. 134; *Jordan v. Sayre*, 29 Fla. 100, 10 So. 823; *Johnson v. Cornett*, 29 Ind. 59; *Swan v. Yapple*, 35 Iowa, 248; *Watson v. Hawkins*, 60 Mo. 550;

*Jackson v. Bronson*, 19 Johns. (N. Y.) 325. But see to the contrary. *Walkenhorst v. Lewis*, 24 Kan. 420; *Blessett v. Turcotte*, 20 N. D. 151, 127 N. W. 505; *Cooper v. Harvey*, 21 S. D. 471, 113 N. W. 717.

49. *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229; *McCament v. Roberts*, 87 Tex. 241, 27 S. W. 86; *Yankton Building & Loan Ass'n v. Dowling*, 10 S. D. 540, 74 N. W. 438.

by a conveyance in terms of the land, although the grantor has no intention to that effect, for the reason that he supposes himself vested with title to the land by a foreclosure sale which was in fact invalid. In such case he holds the debt and mortgage on the theory of subrogation,<sup>49a</sup> and when he undertakes to transfer the land to one who pays therefor, his grantee acquires the debt and incidental security,<sup>49b</sup> not, it is evident, because this was the intention, but rather, it seems, by an application of the doctrine of subrogation, or a doctrine analogous thereto.

— (e) **Delivery and acceptance.** In case the transfer of the mortgagee's rights is sought to be effected by means of a written instrument, it must, in order to be effective, be delivered,<sup>50</sup> as must any written conveyance of property rights, that is, an intention must in some way be indicated that the instrument shall be actually operative.<sup>51</sup>

As to the necessity of the acceptance of the transfer by the transferee, the doctrine not infrequently asserted, that in order to effect a valid transfer of a chattel, even by way of gift, an acceptance is necessary,<sup>52</sup> would render an acceptance necessary in the case of a transfer of the mortgage debt.<sup>53</sup> But the effect of the requirement of acceptance would, in this

49a. *Post*, § 646.

49b. *Robinson v. Ryan*, 25 N. Y. 320; *Cooke v. Cooper*, 18 Ore. 142, 22 Pac. 945; *Smithson Land Co. v. Brautigam*, 16 Wash. 174, 47 Pac. 434.

50. *Shurtleff v. Francis*, 118 Mass. 154; *Hutton v. Cuthbert*, 51 Mich. 229, 16 N. W. 386; *Kersten v. Kersten*, 114 Minn. 24, 129 N. W. 1051; *Ruckman v. Ruckman*, 33 N. J. Eq. 354; *Aldrich v. Ward*, 68 N. Y. App. Div. 647, 73 N. Y. Supp. 918; *Brown v. Johnston*, 7

Abb. N. Cas. 188; *Pringle v. Pringle*, 59 Pa. St. 281. But see *Aldridge v. Weems*, 2 G. & J. 36; 15 Am. Dec. 250.

51. *Ante*, § 461.

52. See the full discussion of the doctrine in an editorial note in 17 *Columbia Law Rev.* 427.

53. An acceptance is assumed to be necessary in *Aldrich v. Ward*, 68 N. Y. App. Div. 647, 73 N. Y. Supp. 918; *Brown v. Johnston*, 7 Abb. N. Cas. 188.

case, as in the case of a similar asserted requirement in the case of a conveyance of an estate in land,<sup>54</sup> be to a considerable extent nullified by the adoption of the fiction that the donee's acceptance may be presumed.<sup>55</sup>

**§ 629. Consideration for transfer.** In spite of occasional statements to the contrary,<sup>56</sup> a transfer of the mortgagee's rights is unquestionably valid, although not supported by a valuable consideration.<sup>57</sup> One has as much right to make a gift of a personal claim in his favor secured by mortgage as he has to make a gift of any other property. The absence of consideration will, however, affect the transferee's standing as a *bona fide* purchaser for value.<sup>58</sup> And the lack of consideration may preclude equity from giving effect to an intended assignment which lacks the proper legal formalities.<sup>59</sup>

That the consideration for the transfer was less than the amount of the debt secured does not affect the right of the assignee to assert a claim for the full amount.<sup>60</sup>

54. *Ante*, § 463.

55. In the English cases the validity of a gift without acceptance is sometimes based on the presumption of acceptance. See *London and County Banking Co. v. London & River Plate Bank*, 21 Q. B. D. 535, 542; *Mallott v. Wilson* (1903) 2 Ch. 494, 501, while sometimes it is merely said that acceptance is not necessary. See *Standing v. Bowring*, 31 Ch. D. 282.

56. See *Ambrose v. Drew*, 139 Cal. 665, 73 Pac. 543; *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; *Parker v. Thomas*, 126 Mich. 691, 86

N. W. 129; and 27 *Cyclopedia Law & Proc.* 1284.

57. *Farrell v. Lewis* 56 Conn. 280, 14 Atl. 931; *Croft v. Bunster*, 9 Wis. 503; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *Dyer v. Dean*, 69 Vt. 370, 27 Atl. 1113.

58. *Chancellor v. Bell*, 45 N. J. Eq. 538, 17 Atl. 684; *Twitchell v. McMurtrie*, 77 Pa. St. 383.

59. *Harriman, Contracts*, § 383.

60. *Johnson v. Beard*, 93 Ala. 96, 9 So. 535; *Pease v. Benson*, 28 Me. 336; *Urann v. Coates*, 117 Mass. 41; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *Donnington v. Meeker*, 11 N. J. Eq. 362 (*semble*); *Morris v. Tuthill*, 72

§ 630. **Transfer as subject to equities—(a) In favor of debtor.** The transferee of an obligation secured by mortgage is ordinarily in the position of any transferee of a non-negotiable chose in action, and takes it subject to all equities and defenses which exist in favor of the debtor, such as illegality, failure of consideration, part payment, and the like, irrespective of whether he has actual or constructive notice thereof.<sup>61</sup> And so it may be shown in defense to a foreclosure proceeding by such a transferee that though the mortgage purports to secure an indebtedness, no such indebtedness exists.<sup>62</sup>

The rule that the transferee of the mortgage debt takes subject to equities and defenses in favor of the debtor has been said not to extend to equities and defenses based on a matter or agreement "collateral" to the debt or mortgage.<sup>63</sup> And in so far as the trans-

N. Y. 575; *Wright v. Eaves*, 10 Rich. Eq. (S. Car.) 582; *Knox v. Galligan*, 21 Wis. 470; *Conrad v. Lepper*, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2; *Darcy v. Hall*, 1 Vern. 45; 2 Coote, Mortgages (8th Ed.) 849.

61. *Matthews v. Wallyn*, 4 Ves. 118; *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712; *Briggs v. Crawford*, 162 Cal. 124, 121 Pac. 381; *Foster v. McGuire*, 96 Ga. 447, 23 S. E. 398; *Olds v. Cummings*, 31 Ill. 188; *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Henry v. State Bank of Laurens*, 131 Iowa, 97, 107 N. W. 1034; *Frederick Central Bank v. Copeland*, 13 Md. 305, 81 Am. Dec. 597; *Fish v. French*, 15 Gray (Mass.) 520; *Nichols v. Lee*, 10 Mich. 526, 82 Am. Dec. 57; *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319, 73 N. W. 850; *Vredenburg v. Burnet*,

31 N. J. Eq. 229; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Crane v. Turner*, 67 N. Y. 437; *Nott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *Horstman v. Gerker*, 49 Pa. St. 282, 88 Am. Dec. 501; *Moffatt v. Hardin*, 22 S. C. 9.

62. *Brown v. Witts*, 57 Cal. 304; *Cumberland Coal, etc., Co. v. Parrish*, 42 Md. 598; *Brooke v. Struthers*, 110 Mich. 562, 35 L. R. A. 536, 68 N. W. 272; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Hill v. Hoole*, 116 N. Y. 299, 5 L. R. A. 620, 22 N. E. 547; *Rapps v. Gottlieb*, 142 N. Y. 164, 36 N. E. 1052; *Clowers v. Snowden*, 21 Okla. 476, 96 Pac. 596; *Carothers v. Sims*, 194 Pa. St. 386, 45 Atl. 47.

63. *McMasters v. Wilhelm*, 85

feree of a chose in action ordinarily takes free of collateral equities, such as set off, in any particular jurisdiction, a matter as to which the courts are not in accord,<sup>64</sup> the transferee of a claim secured by a mortgage would so take.

The assignment of a chose in action is not effective as against the debtor until he has notice thereof, and the assignee of a debt secured by mortgage, as of one not so secured, consequently takes subject to all equities and defenses which may have arisen in favor of the debtor before notice to the latter of the assignment, even though after the actual assignment.<sup>65</sup> The statement frequently found, that the assignee takes subject to equities existing at the time of the assignment, appears to be for the most part directed to cases in which the defense, as having arisen before the assignment, necessarily arose before notice thereof.<sup>66</sup>

In view of the fact that, as above stated, the transferee of a debt secured by mortgage ordinarily takes subject to equities and defenses in favor of the debtor, it follows that one is usually not safe in purchasing a mortgage obligation without first inquiring of the mortgagor whether there is any defense thereto in whole or in part.<sup>67</sup> If upon such inquiry he is answered in the negative or, presumably, if the mortgagor

Pa. St. 218. But see *Lane v. Smith*, 103 Pa. St. 415; *Colehour v. State Sav. Inst.*, 90 Ill. 152. See *Downing v. Sullivan*, 64 Conn. 1, 29 Atl. 130.

64. See cases cited, Wald's *Pollock, Contracts* (Williston's Ed.), 295, note.

65. See *Hammon, Contracts*, p. 735, note; Wald's *Pollock on Contracts* (Williston's Edition), 282, 284, 286, notes; 5 *Encyclopedia Law & Prac.* 936.

66. That the assignee of a mortgage debt takes free from equities

arising in favor of the assignor after the assignment, though based on a prior contract, was decided in *Bush v. Cushman*, 27 N. J. Eq. 131; *Merchants Bank of Buffalo v. Weill*, 163 N. Y. 486, 79 Am. St. Rep. 749, 57 N. E. 749, 29 N. Y. App. Div. 101, 52 N. Y. Supp. 37. See *Timms v. Shannon*, 19 Mo. 296, 81 Am. Dec. 632.

67. See *Bouton v. Cameron*, 205 Ill. 50, 68 N. E. 806; *Cooper v. Smith*, 75 Mich. 247, 42 N. W. 815; *Theyken v. Howe Mach. Co.*, 109 Pa. 95.

refuses to answer, he may with safety purchase the obligation. In some communities it is the recognized practice for an intending purchaser of a mortgage obligation to take the very proper precaution of requiring a written statement from the mortgagor to the effect that the whole sum purporting to be secured is actually owing, and that there are no defenses to the claim. After the purchase of the obligation upon the strength of such a declaration by the mortgagor, the latter is estopped to assert the contrary.<sup>68</sup> The mortgagor may also be estopped to assert any defenses as against a *bona fide* purchaser for value by his oral statements, or by conduct on his part, calculated to induce the purchase of the mortgage as a valid security for the whole sum named.<sup>69</sup> And it has been decided that the mortgagor, after executing a mortgage in fraud of creditors, is estopped, as against a *bona fide* assignee for value, to assert that it was given to secure merely a pretended debt.<sup>70</sup>

If a mortgage is executed without the creation of any debt, but merely to enable the nominal mortgagee to raise money for the mortgagor or for some particular purpose, and he does raise money by a sale of the mortgage obligation, the purchaser is not in the position of a transferee of a mortgagee's rights, so that he will take subject to the defense that the proceeds of the sale were applied by the nominal mortgagee for a purpose other than that designated by the mortgagor. The nominal transferee is in effect the mortgagee, and the

68. See *Payne v. Burnham*, 62 N. Y. 69; *Smyth v. Munroe*, 84 N. Y. 354; *Ashton's Appeal*, 75 Pa. 153; *Griffiths v. Sears*, 112 Pa. 523, 4 Atl. 492; *Nixon v. Haslett*, 74 N. J. Eq. 789, 70 Atl. 987.

69. *Barnett v. Zacharias*, 24 Hun (N. Y.) 304, 89 N. Y. 637; *Woodruff v. Morristown Sav. Inst.*, 34 N. J. Eq. 174; *Nixon v. Haslett*, 74 N. J.

Eq. 789, 70 Atl. 987; *Melendy v. Keen*, 89 Ill. 395; See *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150.

70. *Moffett v. Parker*, 71 Minn. 139, 70 Am. Rep. 319. 73 N. W. 850; See *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *Sleeper v. Chapman*, 121 Mass. 404.



nominal mortgagee is the mortgagor's agent clothed with apparent authority as owner to dispose of the mortgage obligation for any purpose whatsoever.<sup>71</sup>

In most jurisdictions, the general rule that the transferee of the mortgagee's rights takes subject to equities and defenses in favor of the debtor is subject to an important exception in case the debt is represented by a note negotiable in character, it being held that a *bona fide* purchaser for value of such a note before maturity, since he takes the note free, for the most part, from equities and defenses thereto in favor of the maker, is entitled likewise to enforce the security to the same extent, free from such equities and defenses to the claim.<sup>72</sup> This is merely an application of the general rule that the debt is the principal thing and the mortgage an accessory. The debt being enforceable to a certain amount in the hands of a *bona fide* purchaser of the note representing the debt, the security for the debt is enforceable to the same amount.

71. McIntire v. Yates, 104, Ill. 491; Davis v. Welch, 128 La. 785, 55 So. 372; Bogart v. Stevens, 69 N. J. Eq. 800, 115 Am. St. Rep. 627, 63 Atl. 246; Ferdon v. Miller, 34 N. J. Eq. 10; Guatelli v. Brown, 84 N. J. Eq. 33, 92 Atl. 904; Riggs v. Pursell, 89 N. Y. 608; Com. v. City of Pittsburg, 34 Pa. St. 496, 520. See Medlin v. Buford, 115 N. Car. 260; Volk v. Shoemaker, 229 Pa. 407, 78 Atl. 933.

72. Carpenter v. Longan, 36 Wall. (U. S.) 271, 21 L. Ed. 313; Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Lewis v. Kirk, 28 Kan. 497, 42 Am. Rep. 173; Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Duncan v. City of Louisville, 13 Bush (Ky.) 378, 26 Am. Rep. 201; Davis

v. Welch, 128 La. 785, 55 So. 372; Pierce v. Faunce, 47 Me. 507; Taylor v. Page, 6 Allen (Mass.) 86; Bon v. Graves, 216 Mass. 440, 193 N. E. 1023; Barnum v. Phenix, 60 Mich. 388; Borgess Inv. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567; Webb v. Hoselton, 4 Neb. 308, 19 Am. Rep. 638; Magie v. Reynolds, 51 N. J. Eq. 113, 26 Atl. 150; Paige v. Chapman, 58 N. H. 333; First Nat. Bank of St. Thomas v. Flath, 10 N. D. 281, 86 N. W. 867; Talbert v. Talbert, 97 S. C. 136, 81 S. E. 646; Keyes v. Wood, 21 Vt. 331; American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, Ann. Cas. 1913 A., 390, 116 Pac. 837; Mack v. Prang, 104 Wis. 1, 45 L. R. A. 407, 76 Am. St. Rep. 848, 79 N. W. 770.

In a few states, however, it is held that, as regards the enforcement of the mortgage security, as distinct from liability for the mortgage debt, the *bona fide* purchaser of a negotiable note given for the debt is in the same position as any other transferee of a debt secured by mortgage, and can consequently enforce the mortgage only to the extent to which the mortgagee could have done so, that is, for the purpose of enforcing the mortgage, he acquires the debt subject to the defenses to which it was subject in the hands of his transferor.<sup>73</sup> This latter view, though recognized in but a small minority of the states, appears, on principle, to be entitled to respectful consideration.<sup>73a</sup>

A note accompanying a mortgage is obviously negotiable to no greater extent than a note not so secured. Consequently, if the note is overdue, a purchaser thereof, though *bona fide* and for value, takes it for the most part subject to equities and defenses in favor of the maker.<sup>74</sup> And he must necessarily take the mortgage security also so subject, since security for a debt cannot be enforced to a greater amount than the debt itself.<sup>75</sup> And likewise, defenses sufficient even as

73. *Olds v. Cummings*, 31 Ill. 188; *Bartholf v. Bensley*, 234 Ill. 336, 84 N. E. 928; *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287; *Layman v. Vicknair*, 47 La. Ann. 679, 17 So. 265; *Johnson v. Carpenter*, 7 Minn. 176 (Gil. 120); *Watkins v. Goessler*, 65 Minn. 118, 67 N. W. 796; *Bailey v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385. See *Miller v. Larned*, 103 Ill. 562; *Peoria Etc., R. Co. v. Thompson* 103 Ill. 187, for asserted exceptions to this rule adopted in that state.

73 a. See article by William E. Britton, Esq. 16 Ill. Law Rev. 337, for an excellent review of the de-

cisions. In California, apparently, that the note is secured by a mortgage made at the time of the execution of the note renders it non negotiable as regards one taking with notice that it is so secured. *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Metropolis Trust & Savings Bank v. Monnier*, 169 Cal. 592, 147 Pac. 265.

74. Norton, Bills and Notes. 207, Daniel, Negotiable Instruments (6th Ed), § 724 A.

75. *Kerby v. Wade*, 101 Ark. 543, 142 S. W. 1121; *Howard v. Gresham*, 27 Ga. 347; *McMillan v. Gardner*, 88 Kan. 279, 128 Pac. 391; *Piersol v. Shelley*, 3 Kan. App. 386,

against a *bona fide* purchaser for value of a negotiable note, "real defenses,"<sup>76</sup> are no doubt effective as against a purchaser of such a note seeking to enforce the mortgage security.<sup>77</sup> Moreover, the transfer of a negotiable note, not payable to bearer, must, in order to enable the transferee to take free from equities, be by endorsement, that is, by writing on the note itself,<sup>78</sup> and consequently a transfer of the note and mortgage security, written on a separate paper, even on the mortgage instrument itself, will not enable the transferee to take free from equities and defenses in favor of the maker of the note.<sup>79</sup>

Though the *bona fide* holder for value of a negotiable note takes it free from defenses to the claim on the note, and is, if the note is secured by a valid mortgage, entitled to enforce the mortgage as security to the amount of the note, it does not seem that he is in any better position than the purchaser of a *non* negotiable note, to assert that the note is secured by a valid mortgage when as a matter of fact it is not so secured. If what purports to be a valid mortgage is not such when sought to be enforced by the original payee of the note, it cannot become such in favor of a *bona fide* purchaser of the note. This has perhaps been recognized in two or three cases,<sup>80</sup> while others, without dis-

42 Pac. 922; Willcox v. Foster, 132 Mass. 320; Robeson v. Robeson, 50 N. J. Eq. 465; Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 30 Am. Rep. 443, 12 N. E. 577; Kernohan v. Durham 48 Ohio, St. 1, 12 L. R. A. 41, 26 N. E. 982; British American Mortgage Co. v. Smith, 45 S. C. 83, 22 S. E. 747; Miller v. Bingham, 29 Vt. 82.

76. 2 Ames, Cas. Bills & Notes, p. 812; Norton, Bills & Notes, (3rd Ed.) 216.

77. Tabor v. Foy, 56 Iowa 539, 9 N. W. 897 (forgery); Mersman

v. Werges, 1 McCrary, 528, 3 Fed. 378, 112 U. S. 139, 28 L. Ed. 641 (material alteration).

78. Norton, Bills & Notes (3rd Ed.) pp. 9, 105, 197.

79. Fenn v. Harrison, 3 Term. Rep. 757; Doll v. Hollenbeck, 19 Neb. 639, 28 N. W. 286; Franklin v. Twogood, 18 Iowa, 515; Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

80. Berry v. Berry, 57 Kan. 691, 57 Am. St. Rep. 351, 47 Pac. 837; First Nat. Bank v. Bryan, 62 Iowa, 42, 17 N. W. 165, both

cussing the specific point, suggest at least a different view.<sup>81</sup>

The question of what constitutes a *bona fide* purchaser of a negotiable note is to be determined, it would seem, by the same rules when the note is secured by mortgage as when it is not so secured, and, at the present day the weight of authority is to the effect that in order to deprive the holder for value of such a note of the character of a *bona fide* holder, he must have had actual knowledge of the defect or equity, or must have had knowledge of such facts that his action in taking the note amounted to bad faith.<sup>82</sup>

— (b) **In favor of others than debtor.** The question whether the transferee of a debt secured by mortgage takes it, with the benefit of the mortgage security, free from equities in favor of persons other than the mortgage debtor, is determined by the general rule prevailing in that jurisdiction as to the rights of assignees of choses in action. The rule in this regard which has been adopted in the majority of the states is that the assignee of a chose in action takes it free from any latent equities in favor of third persons, for the

being cases of the mortgage of a homestead by a wife acting under duress. *Paulsen v. Koon*, 85 Minn. 240, 88 N. W. 760.

81. *O'Rourke v. Wahl*, 48 C. C. A. 360, 109 Fed. 276; *Jarvis Conklin Mort. Trust Co. v. Willhoit*, 84 Fed 514; *Beals v. Neddo*, 1 McCrary 206, 2 Fed. 41. See *Hayden v. Snow*, 9 Biss. 511, 14 Fed. 70.

82. *Norton, Bills & Notes* (3rd Ed.), 320; *Negotiable Instruments Law*, § 95. This view is applied in connection with a mortgage note in *Borgess Investment Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754.

In *Lockwood v. Noble*, 113 Mich.

418, 71 N. W. 856, it was decided that the fact that the first of a series of notes secured by one mortgage was not paid at maturity put a purchaser of other notes on inquiry as to equities affecting the notes. The decision is in terms based on *Abele v. McGuigan*, 78 Mich. 415, where it was decided that the fact that one of a series of notes was overdue put the purchaser of all of them on inquiry as to equities, a somewhat different case. The earlier decision is referred to with approval in *Pertuit v. Damare*, 50 La. Ann. 893, 24 So. 681.

reason, it is usually said, that there is no definite person, or definite number of persons, of whom the assignee can inquire in order to discover such equities, and consequently, if one did not take free from such equities, no assignment could ever be taken with safety.<sup>83</sup> This rule has been quite frequently applied in favor of a purchaser of an obligation secured by mortgage.<sup>84</sup> It has for instance been decided that the transferee of the mortgage debt takes free from latent equities in favor of third persons affecting the title of the mortgagor at the time of making the mortgage,<sup>85</sup> as when the mortgagor had obtained the property by fraud.<sup>86</sup> So the transferee may take free from the claim of a person entitled to share in the benefit of the mortgage obligation,<sup>87</sup> or of a subsequent mortgagee in favor of whom the transferor of the prior mortgage had relinquished the rights of priority.<sup>88</sup> And the equity of one to be subrogated to the benefit of the mortgage security does not affect a transferee of the mortgage obligation without notice thereof.<sup>89</sup>

83. The proper reason for the rule has been said to be that equity will not deprive a *bona fide* purchaser of a legal interest. Prof. J. B. Ames in 1 Harv. Law Rev. at p. 7, Lectures on Legal History, 259. See editorial notes, 12 Columbia Law Rev. at p. 152, 23 Harv. Law Rev. at p. 310.

84. Dulin v. Hunter, 98 Ala. 539, 13 So. 301; Silverman v. Bullock, 98 Ill. 11; Himrod v. Gilman, 147 Ill. 293, 35 N. E. 373; First Nat. Bank v. Garlich, 137 La. 282, 68 So. 610; Economy Sav. Bank v. Gordon, 90 Md. 486, 48 L. R. A. 63, 45 Atl. 176 (*semble*); Losey v. Simpson, 11 N. J. Eq. 246; Vredenburg v. Burnet, 31 N. J. Eq. 229; Mott v. Clark, 9 Pa. St. 399, 49 Am. Dec. 566; Sweetzer v. Clark, 100 Pa. St. 18.

85. Mott v. Clark, 9 Pa. 399, 49 Am. Dec. 566.

86. Warren v. Hayes, 74 N. H. 355, 68 Atl. 193; Humble v. Curtis, 160 Ill. 193, 43 N. E. 749; Bloomer v. Henderson, 8 Mich. 295, 77 Am. Dec. 453; Robertson v. United States Live Stock Co., 164 Iowa, 230, 145 N. W. 535. In Burns v. Cooper, 72 C. C. A. 25, the fraud was apparent on an inspection of the records.

87. Tate v. Security Trust Co., 63 N. J. Eq. 559, 52 Atl. 313; Pryor v. Wood, 31 Pa. St. 142.

88. Vredenburg v. Burnet, 31 N. J. Eq. 229; Cook v. Stone, 63 Iowa, 352, 19 N. W. 280; *Contra*, Brewing Co. v. Iba, 155 N. Y. 224, 49 N. E. 677.

89. Tison v. Peoples Savings & Loan Ass'n, 57 Ala. 323. *But aliter*

This protection from equities in favor of persons other than the mortgage debtor applies only as against equities of which the transferee had no notice, either actual or constructive.<sup>90</sup> And, accordingly he takes subject to equities the existence of which would appear upon an investigation of the mortgagor's title to the land,<sup>91</sup> or with knowledge of which he is chargeable by reason of their appearance on the records.<sup>92</sup> Moreover, no protection exists in favor of one who is not a purchaser for value.<sup>93</sup> It has, furthermore, been decided that the rule that the assignee takes free from such latent equities cannot operate to place him in a more favorable position than that which he occupies according to the records, its only application being to prevent him from being dislodged from the position which, according to the records, he apparently holds.<sup>94</sup>

In a few states the rule obtains that the purchaser of a non negotiable chose in action takes subject to all equities of whatsoever character existing in favor of third persons as well as of the obligor, and consequently the transferee of a debt secured by mortgage, and not represented by a negotiable note, stands in exactly the same position as regards such equities as did his transferor.<sup>95</sup>

when he is chargeable with notice of the equity. *Albion State Bank v. Knickerbocker*, 125 Mich. 311, 84 N. W. 311.

90. *County Bank of San Luis Obispo v. Fox*, 119 Cal. 61, 51 Pac. 11; *Sumner v. Waugh*, 56 Ill. 531; *Albion State Bank v. Knickerbocker*, 125 Mich. 311, 84 N. W. 311; *Vredenburgh v. Burnet*, 31 N. J. Eq. 229; *Goodell v. Munroe*, 87 N. J. Eq. 328, 100 Atl. 238; *Rayburn v. Davisson*, 22 Ore. 242, 29 Pac. 738; *Mott v. Clark*, 9 Pa. 399, 44 Am. Dec. 566; *Bigley v. Jones*, 114 Pa. St. 510, 7 Atl. 54.

91. *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *United States Mortgage Co. v. Gross*, 93 Ill. 483; *Bigley v. Jones*, 114 Pa. St. 510, 7 Atl. 54.

92. See *post*, § 631.

93. *Vann v. Marbury*, 100 Ala. 438, 23 L. R. A. 325, 46 Am. St. Rep. 70, 14 So. 273; *Tate v. Security Trust Co.*, 63 N. Y. Eq. 559, 52 Atl. 313; *Hovey v. Hill*, 3 Lans. (N. Y.) 167.

94. *Davis v. Piggott*, 57 N. J. Eq. 619, 42 Atl. 768.

95. *Bush v. Lathrop*, 22 N. Y. 535; *Trustees of Union College*

While, in the majority of states, as just stated, an assignee of a debt secured by mortgage, as of any other debt, takes it free from equities in favor of third persons, he has no superior right as against one having the legal title to the land. The one who has the legal title has the legal right, and he cannot be deprived thereof because another person undertakes to create a mortgage on the land, and the debt intended to be secured by the mortgage is assigned to another.<sup>96</sup>

**§ 631. Record and priorities.** An "assignment of mortgage," that is, a transfer of the debt secured by mortgage, together with an express transfer of the mortgage security,<sup>97</sup> is usually regarded as within the operation of the recording acts, this being sometimes expressly provided by statute.<sup>98</sup> The requirement that such an assignment shall be recorded does not render an unrecorded assignment invalid, but it prevents the assignee from asserting any rights by reason of the

*v. Wheeler*, 61 N. Y. 88; *Reid v. Sprague*, 72 N. Y. 457; *Owen v. Evans*, 134 N. Y. 514, 31 N. E. 999; *Central Trust Co. of New York v. West India Improvement Co.*, 169 N. Y. 314, 324, 62 N. E. 387; *Kernohan v. Durham*, 48 Ohio St. 1, 12 L. R. A. 41, 26 N. E. 982 (*semble*); *Patterson v. Rabb*, 38 S. C. 138, 19 L. R. A. 831, 17 S. E. 463.

96. *Lockwood v. Noble*, 113 Mich. 418, 71 N. W. 856.

97. *Ante*, § 628(b).

98. *Newman v. Fidelity Savings & Loan Ass'n*, 14 Ariz. 354, 128 Pac. 53; *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586; *Bank of Indiana v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Swasey v. Emerson*, 168 Mass. 118,

3 R. P.—18

60 Am. St. Rep. 368, 46 N. E. 426; *Robbins v. Larson*, 69 Minn. 436, 65 Am. St. Rep. 572, 72 N. W. 456; *Jones v. Fisher*, 88 Neb. 627, 130 N. W. 269; *Bacon v. Van-Schoonhoven*, 87 N. Y. 446; *Henniges v. Paschke*, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 250; *Pepper's Appeal*, 77 Pa. St. 373; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43; *Torrey v. Deavitt*, 53 Vt. 331; *Fallass v. Pierce*, 30 Wis. 443. The word "conveyance" in a recording act has been held to include an assignment of mortgage. *Decker v. Boice*, 83 N. Y. 220; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43; *Burns v. Berry*, 42 Mich. 176, 3 N. W. 924; *Contra*, *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566;

assignment as against persons who, not knowing of the assignment, and seeing no assignment of record, acted on the assumption that there had been no assignment.<sup>99</sup>

In order that the assignment of a mortgage, that is, a transfer of the debt with the benefit of the security, be placed upon the records, so that the assignee may be protected, the assignment must involve an express transfer of the mortgage security, or of an interest in the mortgaged land. A transfer in terms of the debt secured carries the benefit of the mortgage security, but it is not ordinarily susceptible of record among the land records, since it does not purport to transfer any interest in land.

As between the assignee of the mortgagee's rights and the holder of another mortgage upon the same land, the assignee ordinarily takes in priority over the other mortgage if the assigned mortgage was entitled to such priority in the hands of the assignor, and only then.<sup>1</sup> But it may happen that the assignee takes free from a mortgage to which his assignor's rights were subject, as when, while the assignor had notice of the other mortgage, the assignee has no such notice,<sup>2</sup> or when, while the assignor had notice of equities existing in favor of the other mortgage, the assignee has no such notice.<sup>3</sup> Or this may be the result, under the re-

*Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Ore. 474, 8 Pac. 548; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782. As to the construction of the New York recording law in connection with the assignment of mortgages, see 6 *Columbia Law Rev.* 546.

99. *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Greene v. Warnick*, 64 N. Y. 220; *Bridges v. Bidwell*, 20 Neb. 185, 29 N. W. 302; *Sprague v. Rockwell*, 51 Vt. 401; *Building Ass'n v. Clark*, 43 Ohio St. 427, 2 N. E. 846.

1. *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685, 41 Atl. 862.

2. *Dulin v. Hunter*, 98 Ala. 539, 13 So. 301; *Jackson v. Reid*, 30 Kan. 10, 1 Pac. 308; *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782; *Sprague v. Drew*, — N. J. Ch. —, 6 Atl. 307; *Morris v. Beecher*, 1 N. D. 130. But under the New York recording law the assignment must be recorded in order to acquire such priority. *Decker v. Boice*, 83 N. Y. 215.

3. See *ante*, § 628(b), note 88.



ording law of the particular state, of the record of the assignment before the record of the prior mortgage.<sup>4</sup> On the other hand, it may happen, under some recording laws, that, by reason of the record of the other mortgage before the assignment, such mortgage, even though not entitled to priority as against the assignor, is so entitled as against the assignee.<sup>5</sup> But that the assignee has notice, otherwise than by record, of the prior mortgage, would not ordinarily postpone his mortgage if his assignor had no such notice,<sup>6</sup> the rule being that a purchaser with notice from a purchaser without notice is in the same position as the latter.<sup>7</sup>

As against a purchaser of the mortgaged property after the assignment of the mortgage debt, the assignee would ordinarily be entitled to priority if his assignor was so entitled, even though the assignment is not recorded at the time of the execution or record of the subsequent conveyance. It is immaterial to the purchaser that a mortgage to which the land is subject has changed ownership prior to his purchase, and there is consequently no reason for postponing the assignee by reason of his failure to record the assignment. There are a number of decisions to this effect.<sup>8</sup> Statements

But under the New York rule, by which an assignment of a chose in action is subject to equities in favor of third persons, the assignee's ignorance of equities in favor of another mortgagee is immaterial. *Crane v. Turner*, 67 N. Y. 437.

4. *Decker v. Boice*, 83 N. Y. 215; *Smyth v. Knickerbocker Life Ins. Co.*, 84 N. Y. 589.

5. See *Brower v. Witmeyer*, 121 Ind. 83, 22 N. E. 975; *Rumery v. Loy*, 61 Neb. 755, 86 N. W. 478; *Westbrook v. Gleason*, 79 N. Y. 23; *Butler v. Bank of Mazeppa*, 94

Wis. 351, 68 N. W. 998.

6. *Conrad v. Kelley*, 119 Fed. 841, 56 C. C. A. 353; *Landigan v. Nayer*, 32 Ore. 245, 67 Am. St. Rep. 521, 51 Pac. 649; *Contra*, *Rogis v. Barnatowich*, 36 R. I. 227, 89 Atl. 838; *Bergen Savings Bank v. Barrows*, 30 N. J. Eq. 85.

7. *Ante*, § 575.

8. *Zehner v. Johnston*, 22 Ind. App. 452, 53 N. E. 1080; *Neosho Valley Inv. Co. v. Sharpless*, 63 Kan. 885, 65 Pac. 667; *Wilson v. Campbell*, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278; *Wilson v.*

made in the courts of two or three states that it is necessary to record the assignment as against a subsequent purchaser of the land,<sup>9</sup> are, it seems, to be viewed with reference to the circumstances of the particular case, and not as asserting a contrary doctrine.<sup>10</sup>

Where there are conflicting assignments of a chose in action, they rank as between themselves according to the order in date of the assignments or, in a minority of the jurisdictions, according to the dates at which the respective assignees may have given notice of the assignment to the debtor.<sup>11</sup> And the same rule would no doubt apply, in the absence of statutes to the contrary, to conflicting assignments of an obligation secured by mortgage, and in the application of such a rule the knowledge or ignorance of the later assignee as regards the previous assignment is immaterial. The application of this rule to conflicting assignments of the mortgagee's rights is, however, usually excluded by the provisions of the recording laws which in terms, or by judicial construction, are made applicable to such assignments. Under these statutes, the later assignee will ordinarily take subject to the previous assignment if he has notice of the earlier assignment,<sup>12</sup> and he is affected with notice thereof, in most states at least, by the record of the earlier assignment.<sup>13</sup> The fact, more-

Kimball, 27 N. H. 300; Bamberger v. Geiser, 24 Ore. 203, 33 Pac. 609; Bridges v. Bidwell, 20 Neb. 185, 29 N. W. 302; Curtis v. Moore, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168.

9. Bacon v. Schoonhoven, 87 N. Y. 446; Merrill v. Luce, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. E. 43.

10. See Curtis v. Moore, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168; Merrill v. Luce, 6 S. D. 354, at p. 362, 55 Am. St. Rep.

844, 61 N. E. 43.

11. Wald's *Follock*, *Contracts*. (Williston's Ed.) 381

12. Hoyt v. Thompson, 19 N. Y. 207; English v. Waples, 13 Iowa, 57; Bunker v. International Harvester Co. of America, 148 Iowa, 708, 127 N. W. 1016; Potter v. Stransky, 48 Wis. 235, 4 N. W. 95.

13. English v. Waples, 13 Iowa, 57; Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; Pepper's Appeal, 77 Pa. St.

over, that the assignor has not in his possession the note or bond representing the debt secured, or even the mortgage instrument, has been regarded as putting the assignee on inquiry as to the ownership thereof, with the result of charging him with notice that the mortgage obligation has previously been transferred to another.<sup>14</sup> But it has been decided, in at least two states, that although the assignor has possession of the note or bond, the assignee is charged with notice of a previous assignment to another which is of record.<sup>15</sup> If the later assignee has no notice of the previous assignment either from the records or otherwise, he will, being a purchaser for value, ordinarily take priority thereover.<sup>16</sup> In one or two jurisdictions, however, even

273; *Viele v. Judson*, 82 N. Y. 32. But see *Western Maryland Railroad, Land & Improvement Co. of Baltimore City v. Goodwin*, 77 Md. 271, 26 Atl. 319, apparently *contra*.

14. *O'Muicahy v. Holley*, 28 Minn. 31, 8 N. W. 906; *Kellogg v. Smith*, 26 N. Y. 18; *Appeal of Kitchin*, 196 Pa. St. 321, 46 Atl. 418; *Byles v. Tome*, 39 Md. 461 (*semble*); *Richards Trust Co. v. Rhomberg*, 19 S. D. 595, 104 N. W. 268; *Miller Brewing Co. v. Manasse*, 99 Wis. 99, 67 Am. St. Rep. 854, 74 N. W. 535; compare *Blunt v. Norris*, 123 Mass. 55, 25 Am. Rep. 14.

Though the cases usually refer to the possession or nonpossession of the mortgage instrument, as well as of the note or bond, as being material in this connection, the latter would seem to be the important consideration. The mere acquisition of the mortgage instrument cannot protect one claiming as assignee as against a

prior or subsequent assignee in good faith in possession of the note or bond. *Adler v. Sargeant*, 109 Cal. 42, 41 Pac. 799; *Morris v. Bacon*, 123 Mass. 58, *Syracuse Sav. Bank v. Merrick*, 182 N. Y. 387, 75 N. E. 232; *Kernohan v. Manss*, 53 Ohio St. 118, 29 L. R. A. 317, 41 N. E. 258; *Boyle v. Lybrand*, 113 Wis. 79, 88 N. W. 904.

15. *Strong v. Jackson*, 123 Mass. 60, 25 Am. St. Rep. 19; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Stein v. Sullivan*, 31 N. J. Eq. 409; *Mott v. Newark German Hospital*, 55 N. J. Eq. 722, 37 Atl. 757. But if one purchased a note secured by mortgage without any knowledge, actual or constructive, that it was so secured, he would presumably take a good title to the note, as against a prior purchaser thereof who had allowed it to remain in the hands of the vendor. See the Massachusetts cases last cited.

16. *Welch v. Priest*, 8 Allen

though the previous assignment is not of record at the time of the subsequent assignment, and the person claiming under the latter has no notice otherwise of the former, he would seem to take in priority thereover only if his assignment is recorded before the previous assignment is recorded.<sup>17</sup>

As against a judgment subsequent to the mortgage, the assignee is in the same position as the mortgagee, and holds free therefrom, if the mortgagee so held.<sup>18</sup>

Under some circumstances the failure to record an assignment may result prejudicially to the assignee in case the assignor undertakes to foreclose, or in case of a foreclosure of a prior mortgage or other lien.<sup>19</sup>

**§ 632. Transfer of part of debt.** The principle that an assignment of the debt involves an assignment of the mortgage security applies in the case of an assignment of a part only of the debt, which is usually effected by a transfer of one of several notes or bonds evidencing the debt, and in such cases the assignee is ordinarily entitled to share in the benefit of the mortgage security.<sup>20</sup> Difficult questions, however, arise as between the assignor and his assignee, and between different

(Mass.) 165; *Pierce v. Faunce*, 47 Me. 507.

17. See *Greene v. Warnick*, 64 N. Y. 220; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. 95; *Wiley v. Williamson*, 68 Me. 71.

18. *Martinez v. Lindsey*, 91 Ala. 334, 8 So. 787; *Moore's Appeal*, 7 Watts. & S. (Pa.) 298; *Converse v. Michigan Dairy Co.*, 45 Fed. 18; *Cutler v. Clementson*, 67 Fed. 409 (*semble*).

19. *Citizen's State Bank of Noblesville v. Julian*, 153 Ind. 655, 55 N. E. 1007; *Swift v. Edson*, 5 Conn. 531; *Hasselman v. Yandes*, Wills. (Ind.) 276; *Gillian v. McDowall*, 66 Neb. 814, 92 N. W.

991; *Merrill v. Luce*, 6 S. D. 354, 55 Am. St. Rep. 844, 61 N. W. 43.

20. *Phelan v. Olney*, 6 Cal. 478; *Smith v. Stevens*, 49 Conn. 181; *Sargent v. Howe*, 21 Ill. 148; *Norton v. Palmer*, 142 Mass. 433, 8 N. E. 346; *Anderson v. Baumgartner*, 27 Mo. 80; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500, 30 N. W. 686; *Page v. Pierce*, 26 N. H. 317; *Miller v. Campbell Commission Co.*, 13 Okla. 75, 74 Pac. 507; *Patrick's Appeal*, 105 Pa. St. 356; *Muller v. Waddington*, 5 S. C. 342; *Miller v. Rutland & W. R. Co.*, 40 Vt. 399, 94 Am. Dec. 414.

assignees of parts of the debt secured, as regards the application of the mortgaged property or its proceeds in case it is insufficient in value to satisfy the entire debt.

We will first consider the question as between the transferee of a part of the debt secured, and the transferor, retaining a part thereof. Their respective rights in regard to the application of the security may in the first place be determined by a provision of the mortgage instrument fixing the rights in this regard of different parts of the debt secured.<sup>21</sup> Or their rights as to the application of the security may be determined by an agreement entered into by the parties to the transfer that the mortgaged property shall be first applied in satisfaction of the part of the debt transferred, or of the part retained, or otherwise.<sup>22</sup> And the fact that the instrument of transfer in terms transfers the mortgage or the transferor's interest therein, as well as the debt secured, has ordinarily been regarded as showing an agreement on the part of the transferor to give priority to that part of the debt which is the subject of the transfer.<sup>23</sup>

If the transferor, in making the transfer of part of the debt, makes himself expressly liable, by guaran-

21. *McVay v. Bloodgood*, 9 Port. (Ala.) 547; *Ellis v. Lammie*, 42 Mo. 153; *Bank of England v. Tarleton*, 23 Miss. 173.

22. *Cullum v. Erwin*, 4 Ala. 452; *Arnett v. Willoughby*, 190 Ala. 530, 67 So. 426 (agreement inferred from circumstances); *Grattan v. Wiggins*, 23 Cal. 16; *Walker v. Dement*, 42 Ill. 272; *Morgan v. Kline*, 77 Iowa, 681, 42 N. W. 558; *Howard v. Schmidt*, 29 La. Ann. 129; *Chew v. Buchanan*, 30 Md. 367; *Bank of England v. Tarleton*, 23 Miss. 173; *Ellis v. Lamme*, 42 Mo. 153; *Vredenburg v. Burnet*,

31 N. J. Eq. 229, 34 Id. 252; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *McLean's Appeal*, 103 Pa. St. 255; *Rolston v. Brockway*, 23 Wis. 407.

23. *Noyes v. White*, 9 Kan. 640; *Chew v. Buchanan*, 30 Md. 367; *Bryant v. Damon*, 6 Gray (Mass.) 564; *Foley v. Rose*, 123 Mass. 557; *Solberg v. Wright*, 33 Minn. 224, 22 N. W. 381; *Langdon v. Keith*, 9 Vt. 300; *Miller v. Washington Sav. Bank*, 5 Wash. 200, 31 Pac. 712. But see *Henderson v. Herrod*, 10 Sm. & M. (Miss.) 631, 49 Am. Dec. 41.

tee or otherwise, for the payment of that part, as, for instance, he may do by indorsing part of the notes given for the debt, he cannot assert any right to participate in the mortgage fund, until the part of the debt for which he is thus liable has been paid.<sup>24</sup> The more difficult question arises when there is no express guarantee on the part of the transferor, nor any language susceptible of construction as bearing on the respective rights of the transferor and the transferee, when, for instance, there is merely an assignment of a part of the debt in the simplest terms, without any mention of the mortgage. Whether the assignee is in such case entitled to payment in full, out of the mortgaged land, of the part of the debt assigned, before any part of that retained is paid, would seem properly to depend on whether, in that jurisdiction, the assignor of a chose in action is ordinarily to be regarded as impliedly warranting the payment of the claim. If he is so to be regarded, there is a clear equity in favor of the assignee that the assignor shall not, by asserting a conflicting claim against a fund from which it is payable, interfere with its payment in full,<sup>25</sup> while, on the other hand, if no warranty is to be implied, it is somewhat difficult to perceive any ground for raising an equity in favor of the assignee as to the application of the mortgage security, in the absence of language showing an agreement to give him priority. As to whether there is an implied warranty of payment upon the part of the assignor of a chose in action, the decisions are not in accord,<sup>26</sup> and consequently it might have been anticipated, as is the case, that the decisions would not

24. *Dixon v. Clayville*, 44 Md. 573; *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 894; *Fourth Nat. Bank's Appeal*, 123 Pa. St. 473, 16 Am. St. Rep. 538, 16 Atl. 779; *Donley v. Hays*, 17 Serg. & R.

(Pa.) 400; *Cannon v. McDaniel*, 46 Tex. 303.

25. See *Mohler's Appeal*, 5 Pa. 418; *Dixon v. Clayville*, 44 Md. 573.

26. 5 *Encyclopedia Law & Practice*, 952; 5 *Corpus Juris*, 969

be in accord as to whether the assignee of a part of the mortgage debt is entitled to priority over his assignor.<sup>27</sup> It cannot be said, however, that the decisions asserting that the assignee is entitled to priority of payment as against his assignor are specifically based on the existence of an implied warranty on the assignment of a debt.<sup>28</sup> They are more usually based on a broad statement that the transferee having, presumably, paid value for the assignment, it would be contrary to good faith for the assignor to assert any claim calculated to interfere with the payment of the debt assigned.<sup>29</sup> The analogy occasionally suggested, in favor of this view, of the right of the transferee of a part of mortgaged land to demand that the mortgage be enforced first against the land of the mortgagor, appears to be entirely inapplicable, this being based

27. That the assignee is entitled to such priority, see *Cullum v. Erwin*, 4 Ala. 452; *Alabama Gold Life Ins. Co. v. Hall*, 58 Ala. 1; *Knight v. Ray*, 75 Ala. 383; *Farmers' Sav. Bank v. Murphree*. — Ala. —, 76 So. 932; *Wilber v. Buchanan*, 85 Ind. 42 (legacy of part of debt); *Parkhurst v. Watertown Steam Engine Co.*, 107 Ind. 594, 8 N. E. 635; *Barkdull v. Herwig*, 30 La. Ann. 618; *Anderson v. Sharp*, 44 Ohio St. 260, 6 N. E. 906 (*dictum*); *Lawson v. Warren*, 34 Okla. 94, 42 L. R. A. (N. S.) 183, Ann. Cas. 1914C. 139, 124 Pac. 46; *Waterman v. Hunt*, 2 R. I. 298 (*semble*); *Thomas v. Linn*, 40 W. Va. 122; *McClintic v. Wise*, 25 Gratt. Va. 448, 18 Am. Rep. 533. And see *Van Rensselaer v. Stafford*, *Hopkins' Ch.* (N. Y.) 569, 9 Cow. 316.

That the assignee is not entitled to priority, see *McClanahan*

*v. Chambers*, 1 T. B. Mon. (Ky.) 43 (compare *Forwood v. Dehoney*, 5 Bush (Ky.) 174; *Dixon v. Clayville*, 44 Md. 573; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127; *Wilson v. Eigenbrodt* 30 Minn. 4, 13 N. W. 907; *Green v. Morris*, 117 Miss. 635, 78 So. 550; *Donley v. Hays*, 17 Serg. & R. (Pa.) 400 (Gibson, C. J., dissenting); *Patrick's Appeal*, 105 Pa. 356; *Keys v. Wood*, 21 Vt. 331. And see *Lane v. Davis*, 14 Allen (Mass.) 225.

28. In *McClintic v. Wise*, 25 Gratt. (Va.) 448, 18 Am. Rep. 533, it is expressly denied that it is so based.

29. Gibson, C. J., in his dissenting opinion in *Donley v. Hays*, 17 Serg. & R. (Pa.) 400, admits that the assignor is not personally liable as upon a warranty of payment, and asserts that there is an equity in favor of

either on the personal liability of the transferor or on a covenant by him.<sup>30</sup>

As to the respective rights of transferees of different parts of the debt, usually assignees of different notes or bonds given for the debt, in case the mortgaged land is not sufficient to pay the whole debt secured, the cases are likewise in distinct conflict. In the majority of the states, the transferees of parts of the debt secured are regarded as entitled to share in the proceeds of the mortgaged land in proportion to the amounts of their respective claims, without reference to the time of their maturity.<sup>31</sup> The courts adopting this rule find its justification in the well recognized maxim that "equality is equity," and in its accordance with what may be presumed to be the intention of the parties to a mortgage, that it shall secure one part of the debt to the same extent as any other part.

In some states the rule has been adopted that, if parts of the debt in the hands of different persons mature at different times, as is usually the case when notes are given, they are entitled to priority, as regards the benefit of the mortgage, in the order of their maturity.<sup>32</sup> This rule is, by the courts adopting it,

the assignee based on a moral obligation upon the part of the assignor.

30. *Ante*, § 625.

31. *Lovell v. Cragin*, 136 U. S. 136, 147, 34 L. Ed. 372; *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15; *Grattan v. Wiggins*, 23 Cal. 16; *Georgia Realty Co. v. Bank of Covington*, 19 Ga. App. 219, 91 S. E. 267; *Moore v. Moberly*, 7 B. Mon. (Ky.) 299; *Dixon v. Clayville*, 44 Md. 573; *Eastman v. Foster*, 8 Metc. (Mass.) 19; *Jennings v. Moore*, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127; *Wilson v. Eigen-*

*brodt*, 30 Minn. 4, 13 N. W. 907; *Parker v. Mercer*, 6 How (Miss.) 320, 38 Am. Dec. 438; *State Bank of O'Neill v. Mathews*, 45 Neb. 659, 50 Am. St. Rep. 565, 63 N. W. 930; *Page v. Pierce*, 26 N. H. 317; *Granger v. Crouch*, 86 N. Y. 494 (*semble*); *Donley v. Hays*, 17 Serg. & R. (Pa.) 400; *Perry's Appeal*, 22 Pa. St. 43, 60 Am. Dec. 63; *Gordon v. Hazzard*, 32 S. C. 351, 17 Am. St. Rep. 857, 11 S. E. 100; *First Nat. Bank of Aberdeen v. Andrews*, 7 Wash. 261, 38 Am. St. Rep. 885, 34 Pac. 913.

32. *Wilson v. Hayward*, 6 Fla. 171; *Funk v. McReynold's Adm'r's*,



sometimes based on the theory that the right of the holder of a part of the debt, in case of its non payment at maturity, to proceed immediately to foreclose for the purpose of satisfying his claim, without reference to any other part subsequently to become due, entitles him to a preference as regards the distribution of the security; while sometimes it is said that the holders of distinct parts of the debt are in effect distinct and separate mortgagees, and that those whose installments last fall due are to be regarded as subsequent mortgagees. The difficulty with the latter defense of the doctrine appears to be that it involves an assumption not warranted by the facts. One who makes a mortgage securing several notes does not intend to make, nor does he make, as many mortgages as there are notes, and the fact that the notes pass into different hands cannot change the character of the mortgage in this respect. As has been judicially remarked, "the different installments are not secured by different mortgages of different dates, but by one mortgage executed equally for the benefit of all the instalments. The date of the lien is the date of the mortgage, and not the date of the maturity of the debt."<sup>33</sup> As regards the former theory, that the right of the holder of one installment to foreclose immediately on non payment entitles him to priority as against owners of other installments, it appears to assume that the later installments cannot share in the benefit of the foreclosure, that, in other words, the holder of the claim first due can, by instituting the foreclosure proceeding, exclude the holders of

33 Ill. 481; *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447, 46 Am. Dec. 486; *Minor v. Hill*, 58 Ind. 176, 26 Am. Rep. 71; *Grapengether v. Fejervary*, 9 Iowa, 163, 74 Am. Dec. 330; *Isett v. Lucas*, 17 Iowa, 503, 85 Am. Dec. 572; *Mitchell v. Ladew*, 36 Mo. 526, 88 Am. Dec. 156; *Winters v. Franklin Bank*

of Cincinnati, 33 Ohio St. 250; *Anderson v. Sharp*, 44 Ohio St. 260, 6 N. E. 900; *Shaw v. Crandon State Bank*, 145 Wis. 639, 129 N. W. 794.

33. *Mitchell, J.*, in *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. 907.

the other claims from sharing in the security until his claim is satisfied. It would seem, however, that the owners of the installments subsequently falling due would, by the practice in many states, have a right to insist upon being made parties to the foreclosure proceeding and to have this carried through for the satisfaction of such later installments as well as of the earlier one, provided at least they become due before the decree for sale, and perhaps, in some circumstances, to have the decree reopened for this purpose.<sup>34</sup> It is, in fact, only by assuming that the holder of the installment first falling due is entitled to priority, that a court can well justify itself, on foreclosure by such holder, in ignoring the claims of the holders of other installments to share equally in the proceeds of sale.

It has been decided, in at least three of the states which recognize the rule that the date of maturity fixes the order of priority, that its application is excluded by a provision that, on default in payment of one of several notes, they shall all become due, the theory being that in such case the notes in effect all mature at the same time.<sup>35</sup> In others of these states a contrary view has been adopted, on the ground that to give such an effect to a provision of this character would render the value of the notes uncertain and enable the mortgagor and the holder of the last note to destroy, by collusion, the priority otherwise existing in favor of the first note.<sup>36</sup> And this view has in one case been based on the ground that such a provision is intended merely to enable the mortgage fund to be all distributed at one time, and not to change the order of priority.<sup>37</sup>

34. *Post*. § 654, notes 91-99.

35. *Bushfield v. Meyer*, 10 Ohio St. 334; *Pierce v. Shaw*, 51 Wis. 216, 8 N. W. 209; *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 894.

36. *Leavitt v. Reynolds*, 79

Iowa, 348, 7 L. R. A. 365, 44 N. W. 567; *Horn v. Bennett*, 135 Ind. 158, 24 L. R. A. 800, 34 N. E. 321, 956.

37. *Hurck v. Erskine*, 45 Mo. 484.

In states in which it has been decided that, in case of the transfer of part of the debt, the transferor retaining the other part, the transferee is entitled to satisfaction of his part out of the mortgaged property before the transferor can share therein,<sup>38</sup> it might have been anticipated that as between transferees of different parts of the debt, their priorities would be determined by the respective dates of the transfers. But in only two of such states, apparently, has this view been asserted.<sup>39</sup> If, upon transfer of part of the debt, the part retained by the transferor is entitled to share in the security only after satisfaction of the part transferred, it is difficult to see how the part so retained is entitled to any greater equity when subsequently transferred to another. The equity of the first transferee being fixed upon the transfer, it should not be affected by the act of the transferor in transferring, without his consent, the balance of the debt to another person, and the transferor should not be able to transfer to another any greater right than he himself had. The second transferee would ordinarily have constructive notice of the rights of the first transferee, since he knows that there is a part of the debt not transferred to him, and it is his duty to ascertain by inquiry in whose hands such part is outstanding. Ordinarily the different parts of the mortgage debt are represented by separate notes and bonds, and one purchasing one of such notes or bonds would, in the exercise of ordinary prudence, inquire as to the others, and finding these in the hands of a prior transferee, he would take with notice of such prior transferee's superior claim.

In case the mortgage itself contains stipulations as to the respective priorities of different parts of the debt secured, these will no doubt control as between the

38. *Ante*, this section, notes 24-29.

39. *Cullum v. Erwin*, 4 Ala.

452; *Alabama Gold Life Ins. Co. v. Hall*, 58 Ala. 1; *Gordon v. Fizzugh*, 27 Gratt. (Va.) 835.

transferees of those parts. And any stipulation entered into on the making of a transfer of any part of the debt, giving priority to the part transferred over the part retained, will be binding on a subsequent transferee of the latter part, who takes with notice thereof,<sup>40</sup> and the record of the previous transfer of a part of the debt with the mortgage security would ordinarily be sufficient to charge him with notice.<sup>41</sup> In states in which an assignee of a chose in action takes subject to equities in favor of third persons,<sup>42</sup> a subsequent transferee of a part of the debt would take subject to such an agreement irrespective of whether he has notice thereof.<sup>43</sup>

## V. PRIORITY OF LIEN.

§ 633. **General considerations.** Apart from the recording acts, a mortgage made by the owner of land would ordinarily take priority over any conveyance or mortgage thereafter made by him. If the prior mortgage involves a transfer of the legal title, as it usually does in some states,<sup>44</sup> the mortgagor having thus disposed of the legal title to one person cannot thereafter dispose of it to another.<sup>45</sup> And even in those states in which a mortgage does not involve a transfer of the legal title, it ordinarily creates, it seems, a legal, as distinguished from an equitable, lien,<sup>46</sup> and such a legal lien could not be displaced by the action of the mortgagor in subsequently conveying the legal title or in creating another lien. It is only when the mortgage creates an equitable lien merely that a subsequent pur-

40. *Redman v. Purrington*, 65 Cal. 271, 3 Pac. 883; *Walker v. Dement*, 42 Ill. 272; *McLean's Appeal*, 103 Pa. 255.

41. *Morgan v. Kline*, 77 Iowa, 681, 42 N. W. 558.

42. *Ante*, § 630(b).

43. See *Bank of England v. Tarleton*, 23 Miss. 173.

44. *Ante*, § 598.

45. *Ante*, § 566(a).

46. See articles by Professor Edgar N. Durfee, 10 Mich. Law Rev. 587, 11 Id. 495.

chaser or mortgagee acquiring the legal title can assert priority, and this he can do only if he is a purchaser or mortgagee for value without notice.<sup>47</sup>

The foregoing remarks as to the question of priority apart from the recording acts have but little practical application in this country, for the reason that a mortgage is, in all the states, within these acts and consequently, if not recorded, is invalid as against a subsequent purchaser or mortgagee for value without notice, provided, in many of the states, the conveyance to such subsequent purchaser is recorded before the prior mortgage is recorded.<sup>48</sup> And, on the other hand, by force of the recording acts, a subsequent purchaser or mortgagee, even though for value, takes subject to a duly recorded mortgage, as affected with constructive notice thereof, though actually ignorant of its existence.<sup>49</sup>

A mortgagee of land is a "purchaser" within the general rule that a purchaser for value takes free from equities of which he has no notice.<sup>50</sup> Whether he is a purchaser for value if the mortgage was made to secure a preexisting debt, is a question as to which the authorities are not in accord.<sup>51</sup>

**§ 634. Contemporaneous mortgages.** If two or more mortgages upon the same property are executed

47. *Post*, § 661.

48. *Ante*, § 567(m).

49. *Ante*, § 567(l).

50. *Alston v. Marshall*, 112 Ala. 638, 20 So. 850; *Austin v. Pulschen*, 112 Cal. 528, 44 Pac. 788; *Broward v. Hoeg*, 15 Fla. 370; *Parker v. Barnesville Sav. Bank*, 107 Ga. 650, 34 S. E. 365; *Bradley v. Luce*, 99 Ill. 234; *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934; *Michener v. Bengel*, 135 Ind. 188, 34 N. E. 664, 816; *Parsons v. Crocker*, 128 Iowa, 641, 105 N. W. 162; *State v. Matthews*, 44

Kan. 596, 10 L. R. A. 308, 25 Pac. 36; *Mairs v. Oxford Bank*, 58 Miss. 919; *Cook v. Jack*, 78 N. J. Eq. 584, 81 Atl. 1110; *Farmers' & Merchants' Nat. Bank v. Wallace*, 45 Ohio St. 152, 166, 12 N. E. 439; *Landigan v. Mayer*, 32 Ore. 245, 67 Am. St. Rep. 521, 51 Pac. 649; *Simmons Hardware Co. v. Kaufman*, 77 Tex. 131, 8 S. W. 283; *Yancey v. Blakemore*, 95 Va. 263, 28 S. E. 336; *Bader v. Johnson*, 78 Wash. 350, 139 Pac. 32.

51. *Ante*, § 574(b).

and delivered on the same day, somewhat difficult questions of priority may arise.<sup>52</sup> Occasionally the courts have indicated an unwillingness to consider fractions of a day in this connection,<sup>53</sup> but such a tendency does not appear in the later decisions. If the different mortgages constitute entirely distinct transactions, one not being made with reference to the making of the other, the fact that one was executed and delivered earlier than the other may have a controlling effect.<sup>54</sup> Quite usually, however, when mortgages are thus executed on the same day, they are not independent transactions, but each mortgagee takes his mortgage with knowledge of the other, and they are consequently regarded as constituting one transaction. In such case, if no showing is made as to an understanding between the parties as to priorities, they would ordinarily share *pro rata* in the proceeds of foreclosure,<sup>55</sup> while if any such understanding is shown it will control.<sup>56</sup>

52. In some states (see *ante*, § 602) the time of acceptance may be decisive on the question of priority, though the mortgages are delivered simultaneously. See *Utley v. Dunkelberger*, 86 Iowa, 469, 53 N. W. 408.

53. *Russell v. Carr*, 38 Ga. 459; *Gilman v. Moody*, 43 N. H. 23.

54. *Sanely v. Crapenhof*, 1 Neb. (Unof.) 8, 95 N. W. 532; *Gigson v. Keyes*, 112 Ind. 568, 14 N. E. 591; *Wood v. Lordier*, 115 Ind. 519, 18 N. E. 34.

55. See *Lampkin v. First Nat. Bank*, 96 Ga. 487, 23 S. E. 390; *Schaepfi v. Glade*, 195 Ill. 62, 62 N. E. 874; *Koevenig v. Schmitz*, 71 Iowa, 175, 32 N. W. 320; *Dahlstrom v. Unknown Claimants*, 156 Iowa, 187, 39 L. R. A. (N. S.) 524, 135 N. W. 567; *Swayze v. Schuyler*, 59 N. J. Eq. 75, 45 Atl.

347; *Granger v. Crouch*, 86 N. Y. 494; *Perry's Appeal*, 22 Pa. St. 43, 60 Am. Dec. 63; compare *Naylor v. Throckmorton*, 7 Leigh (Va.) 98, 30 Am. Dec. 492.

56. *Coleman v. Carhart*, 74 Ga. 332; *Trustees of Iowa College v. Fenno*, 67 Iowa, 244, 25 N. W. 152; *Corbin v. Kincaid*, 33 Kan. 649, 7 Pac. 145; *Pomeroy v. Latting*, 15 Gray (Mass.) 435; *Gilman v. Moody*, 43 N. H. 23; *Jones v. Phelps*, 2 Barb. Ch. (N. Y.) 440; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316; *Thomas v. Equitable Building & Loan Ass'n*, 215 Pa. 259, 64 Atl. 531; *Trompezynski v. Struck*, 105 Wis. 437, 81 N. W. 650. In *Pomeroy v. Latting*, 15 Gray (Mass.) 435, such an understanding was inferred from the purposes for which and the circumstances

In regard to the effect of priority of record upon the priority of mortgages thus executed on the same day, it is to be observed that if their execution is simultaneous, one cannot be regarded as *subsequent* to the other and consequently neither would come within the protection of the ordinary recording law.<sup>57</sup> And such law, moreover, is not applicable when, as is frequently the case, one mortgagee takes his mortgage with notice of the other.<sup>58</sup>

§ 635. “Waiver” of priority. It appears to be well established that a creditor whose debt is secured by a mortgage may, without relinquishing his lien, give priority to one whose incumbrance would otherwise be junior to his own.<sup>59</sup> The courts, however, in giving effect to such a relinquishment of priority, do not consider the legal principles involved. If the prior mortgagee makes a contract with a junior incumbrancer, on a valid consideration, not to assert his mortgage as against the junior incumbrance, it is but to be anticipated that a court of equity would not allow him, in violation of his contract, to enforce his

under which the mortgages were given.

57. *Greene v. Warnick*, 64 N. Y. 220. See *Walker v. Buffandeau*, 63 Cal. 312.

58. *Rhoades v. Canfield*, 8 Paige (N. Y.) 545 (agent taking mortgages for different principals); *Saneley v. Crapenhof*, 1 Neb. (Unof.) 8, 95 N. W. 352; *Vredenburg v. Burnet*, 31 N. J. Eq. 229 (mortgages to same person).

59. *Bolling v. Roman*, 95 Ala. 518, 10 So. 553; *Jorammon v. McPhee*, 31 Colo. 26, 71 Pac. 419; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401,

26 N. E. 640; *McCaslin v. Advance Mfg. Co.*, 155 Ind. 298, 58 N. E. 68; *Rose v. Provident Savings, Loan & Investment Ass'n*, 28 Ind. App. 25, 62 N. E. 293; *Dye v. Forbes*, 34 Minn. 13, 24 N. W. 309; *Barnum v. Bobb*, 68 Mo. 619; *Loewen v. Forsee*, — (Mo.) —, 35 S. W. 1138; *Brown v. Barber*, 244 Mo. 138, 148 S. W. 892; *Shaw v. Abbott*, 61 N. H. 254; *Mut. Life Ins. Co. v. Sturges*, 33 N. J. Eq. 378; *Hendrickson v. Wooley*, 39 N. J. Eq. 307; *Stover v. Hellyer*, 68 N. J. Eq. 734, 62 Atl. 698; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 327; *Taylor v. Wing*, 84 N. Y. 471; *Raleigh Nat.*

mortgage to the detriment of such incumbrance. In the absence, however, of a contract on valid consideration, the "waiver" of priority would seem properly to be effective only on the theory of estoppel, and conceding this to be the case, it would be necessary that the junior incumbrancer should have changed his position by reason of the language or conduct of the senior incumbrancer in order to deprive the latter of his preexisting priority. A difficulty in the application of the doctrine of estoppel in this connection would seem to exist, however, by reason of the general rule that a mere statement of intention is not sufficient to form the basis of an estoppel.<sup>60</sup>

One who has a mortgage on land which is duly recorded is under no obligation to inform a subsequent purchaser or mortgagee of his mortgage, and is consequently, by his failure to do so, not estopped to assert the mortgage as against the latter.<sup>61</sup> One may however, by misrepresentations to an intending purchaser or mortgagee in regard to the existence or amount of his mortgage, be estopped thereafter to assert it as against the person deceived.<sup>62</sup>

*Rank v. Moore*, 94 N. C. 734; *Horne v. Scott*, 242 Pa. 432, 89 Atl. 555; *Parker v. Parker*, 52 S. C. 382, 29 S. E. 805; *Clason v. Shepherd*, 6 Wis. 369.

60. *Bigelow*, Estoppel (6th Ed.) 636; *Ewart*, Estoppel, 68; 16 *Cyclopedia Law & Proc.* 752. But there seems to be some authority in this country to the effect that a declaration of an intention not to enforce an existing right may operate by way of estoppel. See *dictum* in *Union Mut Life Ins. Co. v. Mowry*, 96 U. S. 544, 546, 24 L. Ed. 674; *Faxton v. Faxon*, 28 Mich. 159; *Banning v. Kreiter*, 153 Cal. 33, 94 Pac. 246.

61. *Mayo v. Cartwright*, 30 Ark. 467; *Carter v. Champion*, 8 Conn. 549, 21 Am. Dec. 695; *Clabaugh v. Byerly*, 7 Gill (Md.) 354, 48 Am. Dec. 575; *Collier v. Miller*, 137 N. Y. 332, 33 N. E. 374; *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538. See *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; *Palmer v. Palmer*, 48 Vt. 69.

62. *Freeman v. Brown*, 96 Ala. 301, 11 So. 249; *Lasselle v. Barnett*, 1 Blackf. (Ind.) 150, 12 Am. Dec. 217; *Platt v. Squire*, 12 Metc. (Mass.) 494; *Newman v. Mueller*, 16 Neb. 523, 20 N. W. 843; *Morris v. Beecher*, 1 N. D.



§ 636. **Purchase money mortgage.** In most states, if the purchaser of land, upon receiving a conveyance thereof, as a part of the same transaction executes a mortgage to the vendor to secure a part or the whole of the purchase price, such mortgage, to the extent to which it actually secures purchase money,<sup>63</sup> is entitled to priority over any preexisting claims, which may be asserted in favor of another person against such land as the property of the purchaser.<sup>64</sup> The vendor is under no obligation to examine the records to discover such claims,<sup>65</sup> and as against such preexisting claims it is immaterial when he records his purchase money mortgage, since the prior claimant is not a subsequent purchaser within the protection of the recording laws.<sup>66</sup> So the purchase money mortgage has been held to take priority over any mortgage executed by the purchaser before or simultaneously with the making of the conveyance to him,<sup>67</sup> even though the latter mortgage was made to secure the repayment of money

130, 45 N. W. 496. See *Chester v. Greer*, 5 Humph. (Tenn.) 26.

63. *Dillon v. Byrne*, 5 Cal. 455; *Greeno v. Barnard*, 18 Kan. 522; *Roby v. Bismark Nat. Bank*, 4 N. D. 156, 50 Am. St. Rep. 623, 59 N. W. 719; *New Jersey Building, Loan & Investment Co. v. Bachelior*, 54 N. J. Eq. 600, 35 Atl. 745.

64. *Hassell v. Hassell*, 129 Ala. 326, 29 So. 695; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; *Courson v. Walker*, 94 Ga. 175, 21 S. E. 287; *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Koon v. Tramel*, 71 Iowa, 132, 32 N. W. 243; *Ely v. Pingrey*, 56 Kan. 17, 42 Pac. 330; *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430; *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684; *Turk v.*

*Funk*, 68 Mo. 18, 20 Am. Rep. 771.

65. *Ante*, § 567(e).

66. *Elder v. Derby*, 98 Ill. 228; *Continental Investment & Loan Society v. Wood*, 168 Ill. 421, 48 N. E. 221; *Brown v. Witmeyer*, 121 Ind. 83, 22 N. E. 975; *McKecknie v. Hoskins*, 37 Mich. 274; *Schoch v. Birdsall*, 48 Minn. 441, 51 N. W. 382; *Protection Building & Loan Ass'n v. Knowles*, 54 N. J. Eq. 519, 34 Atl. 1083, 55 N. J. Eq. 822, 41 Atl. 1116; *Appeal of Williamsport Nat. Bank*, 91 Pa. St. 163. *Contra, semble*, *Koevenig v. Schmitz*, 71 Iowa, 175, 32 N. W. 320.

67. *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 223; *Elder v. Derby*, 98 Ill. 228; *Clark v.*

borrowed by the purchaser for the purpose of making a cash payment upon the purchase.<sup>68</sup> The purchase money mortgage has likewise been given priority over an earlier judgment against the mortgagor,<sup>69</sup> over a mechanic's lien arising under a contract with him for improvements on the property,<sup>70</sup> and over any rights of dower,<sup>71</sup> or homestead,<sup>72</sup> in favor of the wife of the mortgagor.

This priority given to a purchase money mortgage appears to have its basis to a great extent in the equity and justice of requiring that one who has parted with his property on the strength of an agreement that payment of the price shall be secured upon the property shall have the first lien thereon.<sup>73</sup> The reason

Brown, 3 Allen (Mass.) 509; Heffron v. Flanigan, 37 Mich. 274; Bolles v. Carli, 12 Minn. 113; Jacoby v. Crowe, 36 Minn. 93, 30 N. W. 441; Wendler v. Lambeth, 163 Mo. 428, 63 S. W. 684; Hinton v. Hicks, 156 N. C. 24, 71 S. E. 1086.

68. Brower v. Witmeyer, 121 Ind. 83, 22 N. E. 975; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771; Truesdale v. Brennan, 153 Mo. 600, 55 S. W. 147; Protection Building & Loan Ass'n v. Knowles, 54 N. J. Eq. 519, 34 Atl. 1083, 55 N. J. Eq. 822, 41 Atl. 1116; Dusenbury v. Hulbert, 59 N. Y. 541; Boies v. Benham, 127 N. Y. 620, 14 L. R. A. 55, 28 N. E. 657; Jeans v. Hizer, 186 Pa. St. 523; United States v. New Orleans R. Co., 12 Wall. (U. S.) 362, 20 L. Ed. 434.

69. Courson v. Walker, 94 Ga. 175, 21 S. E. 287; Wehrheim v. Smith, 226 Ill. 346, 80 N. E. 908; Wendler v. Lambeth, 163 Mo. 428.

63 S. W. 684; Pope v. Mead, 99 N. Y. 201, 1 N. E. 671; Weil v. Casey, 125 N. C. 356, 74 Am. St. Rep. 644, 34 S. E. 506; *Cake's* Appeal, 23 Pa. St. 186, 62 Am. Dec. 328; Cowardin v. Anderson, 78 Va. 88.

70. Huber v. Diebold, 25 N. J. Eq. 170; Wilsen v. Lubke, 176 Mo. 210, 98 Am. St. Rep. 503, 75 S. W. 602; Saunders v. Bennett, 160 Mass. 48, 39 Am. St. Rep. 456, 35 N. E. 111; Rees v. Ludington, 13 Wis. 276, 80 Am. Dec. 741; Rochford v. Rochford, 188 Mass. 108, 108 Am. St. Rep. 465, 74 N. E. 299; New Hampshire Sav. Bank v. Varner, 132 C. C. A. 631, 216 Fed. 721.

71. *Ante*, § 211.

72. Allen v. Hawley, 66 Ill. 164; Amphlett v. Hibbard, 29 Mich. 298; Smith v. Lackor, 23 Minn. 454; Roby v. Bismark Nat. Bank, 4 N. D. 156, 50 Am. St. Rep. 633, 59 N. W. 719.

73. See 2 Pomeroy, Eq. Jur., § 725, note 5, and New Jersey B. L.

occasionally asserted, that the mortgagee acquires a merely transitory seisin or title, it passing out of his hands at the same moment that it passes into them, cannot well apply in states in which a mortgage creates merely a lien on the land.

To what extent the priority of the purchase money mortgage as against a mortgage or other incumbrance previously created is dependent on the vendor's ignorance thereof at the time of taking his mortgage, does not appear from the cases. While reference is not infrequently made to the fact that the vendor had neither actual or constructive notice of the previous incumbrance, there is at least one case<sup>74</sup> in which such notice on his part is said to be immaterial, and this view would seem to accord with the general attitude of the courts as regards the preference to be accorded to a vendor on account of the unpaid purchase money.

As against claims subsequently arising, the purchase money mortgagee is in the same position as any other mortgagee, and must ordinarily record his mortgage in order to secure priority as against subsequent purchasers or, in some states, subsequent creditors.<sup>75</sup>

Not only is a mortgage executed in favor of the vendor for the purchase money given priority, but a mortgage in favor of a third person, given by the purchaser to secure money loaned to the latter by the

& *Inv. Co. v. Bachelor*, 54 N. J. Eq. 600, 35 Atl. 745; *Dusenbury v. Hurlbert*, 59 N. Y. 541; *Trigg v. Vermillion*, 113 Mo. 230, 20 S. W. 1047; *Jackson v. Reid*, 30 Kan. 10, 1 Pac. 308; *Spring v. Shoot*, 90 N. Y. 538; *Stansell v. Roberts*, 13 Ohio, 148.

74. *Rogers v. Tucker*, 94 Mo. 346, 7 S. W. 414.

75. *Roane v. Baker*, 120 Ill. 368, 11 N. E. 246; *Protection Bldg. & Loan Ass'n v. Knowles*, 54 N. J. Eq. 519, 34 Atl. 1083, 55 N. J. Eq.

822, 41 Atl. 1116; *Quinnerly v. Quinnerly*, 114 N. C. 145, 19 S. E. 99; *Thorpe v. Helmer*, 275 Ill. 86, 113 N. E. 954; *Colonial Trust Co. v. Sterchie Bros.*, 169 N. C. 21, 85 S. E. 40. But that an unrecorded purchase money mortgage takes precedence of a subsequent judgment in spite of the statute protecting creditors against unrecorded conveyances, see *Charlottesville Hardware Co. v. Perkins*, 118 Va. 34, 86 S. E. 869.

former, to be used, and actually used, in payment for the property, is also given priority,<sup>76</sup> provided the mortgage can be regarded as a part of the same transaction as the conveyance.<sup>77</sup>

The conveyance of the land and the mortgage may be parts of the same transaction, so as to entitle the mortgage to protection as a purchase money mortgage, though there is an interval of several days between the dates of their execution.<sup>78-79</sup> It is only necessary, it seems, that the mortgage should be agreed upon at the time of the delivery of the conveyance, and not be a mere "after thought."

In some states there is a statutory provision expressly giving priority to a purchase money mort-

76. *Blevins v. Rogers*, 32 Ark. 258; *Western Tie & Timber Co. v. Campbell*, 113 Ark. 570, Ann. Cas. 1916C, 943, 169 S. W. 253; *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322; *Missouri State Life Ins. Co. v. Barnes Const. Co.*, 147 Ga. 677, 95 S. E. 244 (*semble*); *Austin v. Underwood*, 37 Ill. 438; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Laidley v. Aikin*, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384; *Nichols v. Overacker*, 16 Kan. 54; *Warren Mortgage Co. v. Winters*, 94 Kan. 615, 146 Pac. 1012; *Clarke v. Munroe*, 14 Mass. 351; *Jacoby v. Crowe*, 36 Minn. 93, 30 N. W. 441; *Marin v. Knox*, 117 Minn. 428, 40 L. R. A. (N. S.) 272, 136 N. W. 15; *Bradley v. Bryan*, 43 N. J. Eq. 396, and note; *Franklin Soc. for Home Bldg. & Savings v. Thornton*, 85 N. J. Eq. 525, 96 Atl. 921; *Boies v. Benham*, 127 N. Y. 620, 12 L. R. A. 452, 24 Am. St. Rep. 429, 27 N. E. 826; *Moring v. Dickerson*, 85 N. C. 466. Compare *Van*

*Leben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266. *Contra* in Pennsylvania, unless the mortgage is made to a third person by arrangement with the vendor. *Albright v. Lafayette Bldg. etc. Ass'n*, 102 Pa. 411.

77. *Cohn v. Hoffman*, 50 Ark. 108; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571; *Small v. Stagg*, 95 Ill. 39; *Nicholson v. Aney*, 127 Iowa, 278, 103 N. W. 201; *Libbey v. Tidden*, 192 Mass. 175, 7 Ann. Cas. 617, 78 N. E. 313; *Hickson Lumber Co. v. Gay Lumber Co.*, 150 N. C. 282, 63 S. E. 1045 (*semble*).

78-79. *Stewart v. Smith*, 36 Minn. 82, 1 Am. St. Rep. 651, 30 N. W. 430; *Marin v. Knox*, 117 Minn. 428, 40 L. R. A. (N. S.) 272, 136 N. W. 15; *Demeter v. Wilcox*, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613; *Spring v. Short*, 90 N. Y. 538; *Snyder's Appeal*, 91 Pa. 477 (*semble*); *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654; *Sum-*

gage as against a judgment previously recovered against the mortgagor. And this has usually been held to apply to a mortgage to a third person as well as to the vendor.<sup>80</sup>

§ 637. **Mortgage for future advances.** A mortgage given to secure advances which may be made in the future to the mortgagor, or liabilities to be assumed for him by the mortgagee in the future, is valid, even as against creditors and subsequent purchasers.<sup>81</sup> It is, by the weight of authority, sufficient if the mortgage states that it is to secure future advances, without stating the total amount of such advances, since a subsequent purchaser or incumbrancer is thereby put on inquiry as to the debt secured;<sup>82</sup> while the failure

mers v. Darne, 31 Gratt. (Va.) 791. But see Ahern v. White, 39 Md. 409.

80. Hopler v. Cutler, — N. J. Eq. —, 34 Atl. 746; Beebe v. Austin, 15 Johns. (N. Y.) 477; Kneen v. Halin, 6 Idaho, 621, 59 Pac. 14. *Contra*, Fleusler v. Nickum, 38 Md. 270.

81. Shirras v. Caig, 7 Cranch (U. S.) 34, 3 L. Ed. 260; Jones v. Guaranty & Indemnity Co., 101 U. S. 622, 25 L. Ed. 1030; Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102; Boswell v. Goodwin, 31 Conn. 74, 81 Am. Dec. 169; Collins v. Carlile, 13 Ill. 254; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 370, 35 Am. Dec. 322; Summers v. Roos, 42 Miss. 749, 2 Am. Rep. 653; James v. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; Robinson v. Williams, 22 N. Y. 380; Kramer v. Trustees of Farmers' & Mechanics' Bank of Steubenville, 15 Ohio, 253; Nicklin v. Betts Spring Co., 11 Ore. 406,

50 Am. Rep. 477, 5 Pac. 51; McDaniels v. Colvin, 16 Vt. 300, 42 Am. Dec. 512; Heal v. Evans Creek Coal & Coke Co., 71 Wash. 225, 128 Pac. 211. In New Hampshire a statutory provision prohibits mortgages to secure future advances. Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Staniels v. Witcher, 72 N. H. 451, 57 Atl. 678.

82. Jarratt v. McDaniel, 32 Ark. 598; Allen v. Lathrop, 46 Ga. 133; Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 266; Robinson v. Williams, 22 N. Y. 381; Keyes v. Bump's Adm'r, 59 Vt. 391, 9 Atl. 598. But see North v. Belden, 13 Conn. 376, 35 Am. Dec. 83; Balch v. Chaffee, 73 Conn. 318, 84 Am. St. Rep. 155, 47 Atl. 327, to the effect that such a mortgage is not effective as against a subsequent incumbrancer without actual notice that advances have been made thereunder. In Maryland the statute provides that no mort-

to state that future advances are secured is immaterial if the total amount of the possible indebtedness to be secured is named.<sup>83</sup>

A mortgage securing future advances is, it is agreed, valid, as against subsequent purchasers and incumbrancers with notice thereof, to the amount to which the mortgagee may have made advances before acquiring notice of the rights of such third persons.<sup>84</sup>

As to whether the mortgage constitutes a lien for advances made by the mortgagee, as against an incumbrance in favor of a third person, of which he has notice at the time of making the advances, the cases are not in accord. If the mortgagee is under no obligation to make advances, but the mortgage merely undertakes to secure him in so far as he may make them, he is, by the great weight of authority, not entitled to make them and claim a lien as against an intervening

gage to secure future loans or advances shall be valid unless the amount or amounts thereof and the times at which they are to be made are specifically stated in the mortgage. Code Pub. Gen. Laws, art. 66, § 2.

83. *Shirras v. Caig*, 7 Cranch (U. S.) 34, 3 L. Ed. 260; *Kirby v. Raynes*, 138 Ala. 194, 100 Am. St. Rep. 39, 35 So. 118; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102; *Collins v. Carlile*, 13 Ill. 254; *Louisville Banking Co. v. Leonard*, 90 Ky. 106, 13 S. W. 521; *Summers v. Roos*, 42 Miss. 749, 2 Am. Rep. 653; *Foster v. Reynolds*, 38 Mo. 553; *Griffin v. New Jersey Oil Co.*, 11 N. J. Eq. 49; *Bell v. Fleming*, 12 N. J. Eq. 13, 490; *Hendrix v. Gore*, 8 Ore. 406; *Elackmar v. Sharp*, 23 R. I. 412,

50 Atl. 852; *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

84. *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Shirras v. Caig*, 7 Cranch (U. S.) 34, 51, 3 L. Ed. 260; *Tapia v. Demartini*, 77 Cal. 383, 71 Am. St. Rep. 288, 19 Pac. 641; *Boswell v. Goodwin*, 31 Conn. 74; *United States Trust Co. v. Ianahan*, 50 N. J. Eq. 796, 27 Atl. 1032; *Robinson v. Williams*, 22 N. Y. 380; *Ackerman v. Hunsicker*, 85 N. Y. 43; *Huntington v. Kneeland*, 102 N. Y. App. Div. 284, 92 N. Y. Supp. 944; *Union Nat. Bank of Oshkosh v. Moline, Milburn & Stoddard Co.*, 7 N. D. 201, 73 N. W. 527; *Spader v. Lawler*, 17 Ohio, 37, 49 Am. Dec. 461; *McDaniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Alexandria Sav. Inst. v. Thomas*, 29 Gratt. (Va.) 483.

purchaser or incumbrancer of whose rights he had notice at the time of making the advances.<sup>85</sup> This view appears to accord in principle with the view ordinarily adopted that a mortgage, whatever the amount of the indebtedness which it purports to secure, operates to secure only the actual amount of the indebtedness.<sup>86</sup> It is furthermore supported by the practical considerations that otherwise the mortgagor, though unable to demand advances from the mortgagee, would be unable to borrow on the property from another, by reason of the possibility that, after the making of a mortgage to the latter, the prior mortgagee might make advances to the mortgagor, which would take priority over the claim of such other. And furthermore the contrary view might to a considerable extent deprive one, who has made a mortgage for future advances, from subsequently alienating the property mortgaged, since no one would care to purchase property subject to a mortgage, the amount of which can not be ascertained at the time of the purchase.

85. *Hopkinson v. Rolt*, 9 H. L. C. 514; *London & County Banking Co. v. Ratcliffe*, 6 App. Cas. 722; *Bradford Banking Co. v. Briggs*, 12 App. Cas. 29; *Hughes v. Building Society* (1906), 2 Ch. 607; *Saving & Loan Soc. v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Frye v. State Bank*, 11 Ill. 367; *Erinkmeyer v. Browneller*, 55 Ind. 487; *Gray v. McClellan*, 214 Mass. 92, 100 N. E. 1093; *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Germania Bldg. & Loan Ass'n v. Fraenkel Realty Co.*, 82 N. J. Eq. 49, 88 Atl. 305; *Scheurer v. Brown*, 67 N. Y. App. Div. 567, 73 N. Y. Supp. 877; *Merchants' State Bank of Fargo v. Tufts*, 14 N. D. 238, 116 Am. St.

Rep. 682, 102 N. W. 760; *Spader v. Lawler*, 17 Ohio St. 371, 49 Am. Dec. 461; *Seaman v. Fleming*, 7 Rich. Eq. (N. J.) 283; *Chester Nat. Bank v. Gunhouse*, 17 S. C. 489. But see, *contra*, to the effect that the mortgagee may, even against an incumbrance of which he has notice, make advances and assert a lien therefor. *Witeczinski v. Everman*, 51 Miss. 841; *Wilson v. Russell*, 13 Md. 495; *Rowan v. Manufacturing Co.*, 29 Conn. 282. *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 3, 2 Eq. Cas. Abr. 598, is as reported, to the same effect, but is overruled in this regard by *Hopkinson v. Rolt*, 9 H. L. Cas. 514.

86. *Ante*, § 606, notes 69, 70.

In case the mortgagee is bound to make the advances, he might, it seems, be protected in making them, without reference to whether he has notice of intervening incumbrances in favor of others, on the theory that he has no right, even if he has such notice, to refuse to make the advances. The cases are generally to this effect.<sup>87</sup> In England, however, a different view is taken, to the effect that if the mortgagor incumbers the property in favor of another, or conveys it to another, he thereby relieves the mortgagee from his obligation to make advances, and consequently, the fact that the mortgagee has agreed to make advances becomes immaterial, and the same rule applies as where there was no such agreement in the first place.<sup>88</sup>

The courts are not in accord upon the question whether the mortgagee is to be regarded as charged with notice of an intervening conveyance or incumbrance at the time that he makes the advances, by the fact that it is apparent of record, some decisions being to the effect that he is not so charged,<sup>89</sup> and others

87. *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Gerrity v. Wareham Sav. Bank*, 202 Mass. 214, 88 N. E. 1084; *Ladue v. Detroit, etc., R. Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Hyman v. Hauff*, 138 N. Y. 48, 33 N. E. 738; *Land Title & Trust Co. v. Shoemaker*, 257 Pa. 213, 101 Atl. 335; *Blackmar v. Sharp*, 23 R. I. 412, 50 Atl. 852; *Alexandria Sav. Inst. v. Thomas*, 29 Gratt. (Va.) 483; *Ripley v. Harris*, 3 Biss. (U. S.) 199, Fed. Cas. No. 11,853. Compare *Norwood v. Norwood*, 36 S. C. 331, 31 Am. St. Rep. 875, 15 S. E. 559.

88. *West v. Williams* (1899) 1 Ch. 488. *Allen Co. v. Emerton*,

108 Me. 221, 79 Atl. 905, is perhaps to this effect.

89. *The Seattle*, 170 Fed. 284, 95 C. C. A. 480; *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; *Frye v. Bank of Illinois*, 11 Ill. 367; *Schmidt v. Zahrndt*, 148 Ind. 447; *Nelson's Heirs v. Boyce*, 7 J. J. Marsh (Ky.) 401; *Ward v. Cooke*, 17 N. J. Eq. 93; *Ackerman v. Huniscker*, 85 N. Y. 43, 39 Am. Rep. 621; *Union Nat. Bank of Oshkosh v. Moline, Milburn & Stoddard Co.*, 7 N. D. 201, 73 N. W. 527; *Daniels v. Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Hall v. Williamson Grocery Co.*, 69 W. Va. 671, 72 S. E. 780; *Simms v. Ramsey*, 79 W. Va. 267, 90 S. E. 842.



regarding him as bound to consult the records before making any advance.<sup>90</sup>

§ 638. **Right to question prior mortgage.** The right of the transferee of land to question the validity of an asserted mortgage thereon has been the subject of a number of decisions, and is a matter of considerable difficulty. It is ordinarily stated, either expressly or by implication, that if the transfer of land is subject to a mortgage, the transferee cannot question the validity of the mortgage.<sup>91</sup> And it is also stated that a transferee who assumes the mortgage is incapacitated in this regard.<sup>92</sup> Since one who assumes a mortgage necessarily takes subject thereto, the latter statement is in effect included in the first. The one or the other of these statements has been made in connection with various asserted defenses against the enforcement of a mortgage, among them being violation of the federal land laws,<sup>93</sup> coverture,<sup>94</sup> lack of corporate capacity,<sup>95</sup> insufficiency of execution,<sup>96</sup> extinguishment

90. *Ladue v. Detroit & M. R. Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Spader v. Lawler*, 17 Ohio, 371, 49 Am. Dec. 461; *Parker v. Jacoby*, 3 Grant (Pa.) 300; *Ter Hoven v. Kerns*, 2 Pa. 96; *Bank of Montgomery County's Appeal*, 36 Pa. St. 170.

91. See cases cited 3 Pomeroy, Eq. Jur., § 1205, 2 Jones, Mortgages, § 735; *Moore v. Boise Land & Orchard Co.*, 31 Idaho, 390, 173 Pac. 117; *Ostran v. Bond*, — Okla. —, 172 Pac. 447.

92. 3 Pomeroy, Eq. Jur., § 1206; 2 Jones, Mortgages, § 744.

93. *Forgy v. Merryman*, 14 Neb. 513, 16 N. W. 836; *Green v. Houston*, 22 Kan. 35; *Skinner v. Reynick*, 10 Neb. 323, 35 Am. Rep. 479, 6 N. W. 369. So where the

land was part of an Indian allotment. *Jones v. Perkins*, 43 Okla. 734, 144 Pac. 183; *United States Bond & Mortgage Co. v. Keahey*. — Okla. —, L. R. A. 1917C, 829, 155 Pac. 557.

94. *Riley v. Rice*, 40 Ohio St. 441; *Hadley v. Clark*, 8 Idaho, 497, 69 Pac. 319; *Kennerly v. Brown*, 61 Ala. 296.

95. *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, 40 Pac. 27; *American Water Works Co. v. Farmers' Loan & Trust Co.*, 73 Fed. 956, 20 C. C. A. 133; *Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co.*, 71 N. J. Eq. 221, 65 Atl. 980; *Moore v. Boise Land & Orchard Co.*, 31 Idaho, 390, 173 Pac. 117.

96. *Pidgeon v. Trustees of*

by lapse of time or otherwise.<sup>97</sup>

In the majority of cases any attack which the transferee may seek to make upon the validity of the mortgage involves merely the assertion of a right to have the mortgage set aside, and this right may not be available to the transferee, either because it is in its nature personal to the mortgagor, the party to the original transaction, or because it was evidently not intended to pass by the conveyance of the land. In asserting, however, that the transferee cannot question the validity of the mortgage, the courts evidently do not intend to restrict the statement to the case of a voidable, as distinguished from a void mortgage, and we will accordingly assume, for the purpose of discussion, that it means that, although an attempt to create a mortgage was utterly ineffectual, or a mortgage legally created has been extinguished, a transferee of the land who, mistakenly assuming that a mortgage was created, or that a mortgage created has never been extinguished, takes in terms subject to such supposed mortgage, cannot thereafter assert, as against one seeking to enforce such supposed mortgage, that it has no legal existence. Such a view finds its most effective support, it is conceived, in the theory of an equitable lien or charge.

If a transfer of land is in terms subject to a charge in favor of a third person, for an ascertained amount, the transferee will, in the view of a court of equity, hold the land so subject.<sup>98</sup> And so, it is conceived, if

Schools, 44 Ill. 501; John v. Thompson, 129 Mass. 398; Alt v. Banholzer, 36 Minn. 57, 29 N. W. 674; Christian v. John, 111 Tenn. 92, 76 S. W. 906; Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068; Scheiter v. Hooker, 94 Wash. 642, 162 Pac. 981. *Contra*, Goodman v. Randall, 44 Conn. 321; Thompson

v. Morgan, 6 Minn. 292. See editorial notes, 4 Columbia Law Rev. 222, 17 Harv. Law Rev. 497.

97. See Bennett v. Bates, 97 N. Y. 354; Tuite v. Stevens, 98 Mass. 305; Foster v. Wightman, 123 Mass. 100, West v. Miller, 125 Ind. 70, 25 N. E. 143.

98. *Post*, § 660.

a transfer of land is in terms subject to a mortgage to A, and there has never been an attempt to create such a mortgage, or there has been an attempt, but it was nugatory, or such a mortgage has been created but subsequently extinguished, the language of the transfer might usually be construed as indicating an intention to create a charge in favor of the nominal mortgagor, equivalent to the supposed mortgage. If there is no language in the instrument itself sufficient to create a charge in favor of the nominal mortgagee or other third person, the question of its existence would depend upon whether there are any circumstances in the case upon which a court of equity will lay hold to support such a charge. If one purchases land, and pays a reduced price therefor by reason of the fact that a debt, for which the transferor is personally liable, is supposed to be secured by a mortgage on the land, thus making the transfer subject to the mortgage, though it is not so expressed in terms,<sup>99</sup> the propriety of denying to the transferee the right to question the existence of the supposed mortgage, and so to throw the burden of the debt on the transferor personally, is sufficiently evident.<sup>1</sup> In such a case equity may well regard the land as charged, in the hands of the transferee, and persons claiming under him, with the payment of the debt, irrespective of the validity of the mortgage securing the debt.

It may happen that the transferee who has taken the property "subject to" the mortgage, or has assumed payment of the mortgage debt, undertakes to assert, as against the mortgage creditor seeking to foreclose, not that the mortgage is invalid for the pur-

99. *Ante*, § 622, note 19.

1. *Sherman v. Goodwin*, 11 Ariz. 141, 89 Pac. 517; *Fuller v. Hunt*, 48 Iowa, 163; *Selby v. Sanford*, 7 Kan. App. 781, 54 Pac. 17; *Green v. Houston*, 22 Kan. 35;

*Alt v. Banholzer*, 36 Minn. 57, 29 N. W. 674; *Flanders v. Jones*, 30 N. H. 154; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Sand v. Church*, 6 N. Y. 355.

pose of securing a valid debt, but that the debt which it purports to secure is invalid or non-existent in whole or in part. There are quite a number of cases to the effect that a transferee who takes subject to a mortgage cannot question the existence of the debt which the mortgage purports to secure, as against the creditor seeking to foreclose,<sup>2</sup> the courts not generally distinguishing such a case from that of an attack upon the mortgage itself. There is, however, it is submitted, a substantial difference. If a mortgage, though purporting to secure \$1000, actually secures but \$500, because that is the extent of the indebtedness, the mere accident of a transfer of the land in terms subject to the mortgage seems an insufficient reason for allowing the creditor to assert a lien for the larger sum. There is in such case no equity in favor of the creditor, the mortgagee, and while the transferor has an equity to demand that his personal liability shall not be increased as the result of an adjudication in favor of the transferee's contention, he will be protected in this regard, if made a party to the proceeding, since the adjudication will then be available in his favor as well as in favor of the transferee. All the persons in-

2. *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, Ann. Cas. 1914A, 173, 58 So. 599; *Lang v. Dietz*, 191 Ill. 161, 60 N. E. 841 (*semble*); *Foy v. Armstrong*, 113 Iowa, 629, 85 N. W. 753 (*semble*); *Johnson v. Thompson*, 129 Mass. 398 (*semble*); *Crawford v. Edwards*, 33 Mich. 354; *Moulton v. Haskell*, 50 Minn. 367, 52 N. W. 960; *Camden Safe Deposit & Trust Co. v. Citizens' Ice & Cold Storage Co.*, 71 N. J. Eq. 221, 65 Atl. 980; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Freeman v. Auld*, 44 N. Y. 450; *Ritter v. Phillips*, 53 N. Y. 586; *Ostran v. Bond*,

— Okla. —, 172 Pac. 447. So it has generally been held that one who takes a transfer subject to the mortgage, or with an assumption clause, cannot assert usury in the loan secured. See cases cited 39 *Cyclopedia Law & Proc.* 1068, 1069. The defense of usury may however be regarded as *sui generis*, and these decisions are based, to a great extent, on the personal character of this defense, and the fact that the conveyance under such circumstances is evidently not intended to confer on the transferee the right to assert such defense.

interested being parties, the court, in order to prevent the transferee from acquiring, by such defense, a benefit to which he is not equitably entitled, can establish, in favor of the transferor, on his payment of the amount actually due, a lien upon the property for a greater amount, that is, for the nominal amount of the mortgage debt, subject to which he transferred the property. In one of the cases above cited, adverse to the transferee's right to assert such a defense,<sup>3</sup> it is said that to the extent to which the sum collected by the mortgage creditor exceeds the amount actually due, he holds it in trust for the transferor, and this view accords in result with that above suggested, provided the transferor is able to have the trust established by decree in the proceeding to foreclose. It would seem, however, simpler, and more in accord with fundamental principles, to allow the mortgage to be enforced only for the actual amount of the indebtedness, rather than to allow its enforcement for a greater amount, merely for the purpose of implying a trust to the extent of the excess.

If the mortgage purports to secure an indebtedness which is either wholly or in part illegal in its inception, as when it is a gambling debt, or a debt created in consideration of illegal cohabitation,<sup>4</sup> it seems hardly probable that a court would recognize the mortgage as securing the full amount of the nominal indebtedness. In such a case the transferee would, it is conceived, always be allowed to show the character of the indebtedness, provided, at least, the transferor is made a party, so that he may be able to avail himself of any adjudication in this regard.

It has occasionally been decided that, although the transfer is subject to a mortgage, the transferee may show that the debt has been wholly or partially paid.<sup>5</sup>

3. *Freeman v. Auld*, 44 N. Y. 50.

4. *Ante*, § 603.

5. *Briggs v. Seymour*, 17 Wis. 255; *Hartley v. Tatham*, 2 Abb. Dec. 333; *Huston v. Stringham*, 21

It is difficult to reconcile these with the decisions, above referred to, that the transferee cannot show that the nominal indebtedness is wholly or in part non-existent because never created, but they are, it is submitted, essentially correct.

It has been decided that if the conveyance is not subject to the mortgage, by reason of an express statement to that effect or of the deduction of the amount of the mortgage debt from the purchase price, and there is no assumption clause, the transferee may question the validity of the mortgage.<sup>6</sup> And occasionally the fact that the transfer was in terms "subject" to the mortgage was held to be immaterial in this regard provided the consideration paid for the transfer was not reduced on account of the existence of the mortgage.<sup>7</sup>

Since, if a transfer of mortgaged land is not subject to the mortgage, the transferee is not precluded from questioning its validity, it does not seem that one claiming under such transferee should be so precluded. Suppose, for instance, a transfer to A not subject to the mortgage, and a subsequent transfer by A to B in terms subject thereto. There is in such a case no equity in favor of the mortgagor which requires A to refrain from attacking the mortgage, and

Iowa, 36. And see *Chaffe v. Wilson*, 59 Miss. 42. The head note to *Ritter v. Phillips*, 53 N. Y. 586, is *contra*, but is not supported by the opinion.

6. *Welbon v. Webster*, 89 Minn. 177, 94 N. W. 550; *Bennett v. Keehn*, 57 Wis. 582, 15 N. W. 776. It has been so decided with reference to the defense of usury. *Lillenthal v. Champion*, 58 Ga. 158; *Maher v. Lanfrom*, 86 Ill. 513; *Van Winkle v. Earl*, 26 N. J. Eq. 242; *Camden Fire Ins. Co. v. Reed*, — (N. J. Ch.) —, 38 Atl.

667; *Chamberlain v. Dempsey*, 9 Bosw. (N. Y.) 212, 36 N. Y. 144 (But see *Berdan v. Sedgwick*, 40 Barb. (N. Y.) 359, 44 N. Y. 626); *Union Bank v. Bell*, 14 Ohio St. 200; *Lewis v. Farmers' Loan & Building Ass'n*, 183 Mo. 351, 81 S. W. 887.

7. *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209 (usury); *Brunswick Realty Co. v. University Investment Co.*, 43 Utah, 75, 134 Pac. 608.

so, it would seem, there is no equity in his favor which requires B so to refrain. In such a case the last transfer, although expressed to be subject to the mortgage, is not properly so, since it cannot operate to throw upon the land the primary liability which has, by the previous transaction, been established against the mortgagor himself. Even though the second transferee pays a reduced price by reason of the mortgage, he does not, properly speaking, take subject to the mortgage.

If there are covenants of title sufficient to render the transferor liable in damages by reason of the mortgage, with no language excepting the mortgage from the operation thereof, it would seem to be not only the right of the transferee to assert any invalidity in the mortgage, but also his duty to do so in behalf of the transferor. It is perhaps for this reason that occasionally decisions adverse to the transferee's right to question the mortgagor emphasize the fact that the transfer was by quit claim deed.<sup>8</sup>

That the mortgage is expressly excepted from the covenants for title has been regarded as not involving such an assertion of the existence of the mortgage as to preclude the transferee from questioning its validity.<sup>9</sup>

A statement in an instrument of transfer that it is subject to all liens, or to all incumbrances, without specifying any particular lien or incumbrance, has been regarded as referring only to valid liens and incumbrances, and as consequently not precluding the transferee

8. *Forgy v. Merriman*, 14 Neb. 513, 16 N. W. 836; *Fairfield v. McArthur*, 15 Gray (Mass.) 526; *Fuller v. Hunt*, 48 Iowa, 163.

9. *Calkins v. Copley*, 29 Minn. 471, 13 N. W. 904; *Stough v. Badger Lumber Co.*, 70 Kan. 713, 79 Pac. 737; *Boyer v. Price*, 45 Wash. 667, 88 Pac. 1106. In *Weed Sewing Machine Co. v. Emerson*,

115 Mass. 554, it was held that the description of the premises as subject to the mortgage, taken in connection with the exception of the mortgage from the covenants, was merely to protect the transferee from liability on the covenants, and did not preclude the latter from asserting the invalidity of the mortgage.

from questioning the validity of any particular lien or incumbrance.<sup>10</sup>

The general rule, as stated, that a transferee subject to a mortgage cannot question its validity, has been asserted as against a purchaser at execution sale, it being held that if the sale is expressly subject to the mortgage, or the price is adjusted with reference to the existence thereof, such purchaser cannot question its validity,<sup>11</sup> and the same rule has been asserted as against one purchasing at such sale the equity of redemption *eo nomine*.<sup>12</sup> A considerable proportion of these cases involved merely the right of the purchaser at execution sale to have the mortgage set aside as in fraud of creditors, but the language of the decisions is sufficiently broad to cover an attack upon the mortgage as wholly or in part non existent. The considerations which bear upon this point would appear to be as follows: In case the execution debtor is the mortgagor, or is otherwise personally liable for the mortgage debt, the purchaser at the execution sale, taking expressly subject to the mortgage or obtaining a reduction in price by reason of the mortgage, may well be precluded from questioning the validity of the mortgage for the purpose of throwing the burden of the obligation upon the execution debtor. Likewise if the execution debtor acquired the land by a transfer

10. Purdy v. Coar, 109 N. Y. 448, 4 Am. St. Rep. 491, 17 N. E. 352; Murray v. Jones, 50 Ga. 109; Robinson Bank v. Miller, 153 Ill. 244, 27 L. R. A. 449, 46 Am. St. Rep. 883, 38 N. E. 1078.

11. Yaeger & Bethel Hardware Co. v. Pritz, 69 Fla. 8, 67 So. 231; Willis v. Terry, 15 Ky. L. Rep. 753, 24 S. W. 621; Messmore v. Huggard, 46 Mich. 558, 9 N. W. 853; Knoop v. Kelsey, 102 Mo. 291, 22 Am. St. Rep. 777, 14 S.

W. 110; Koch v. Losch, 31 Neb. 625, 48 N. W. 471; Flanders v. Jones, 30 N. H. 154; Brinsmade v. Hurst, 3 Duer (N. Y.) 206; Steele v. Walters, 204 Pa. St. 257, 53 Atl. 1097. *Contra*, Osborne v. Rice, 107 Ga. 281, 33 S. E. 54.

12. Lord v. Sill, 23 Conn. 319; Brown v. Snell, 46 Me. 490; Russell v. Dudley, 3 Metc. (Mass.) 147; Freeland v. Freeland, 102 Mass. 475. See Stebbins v. Miller, 94 Mass. 591.



subject to the mortgage, the purchaser at the execution sale must also take it so subject, and he is to the same extent precluded from questioning the mortgage, for the purpose of throwing the burden of the obligation on another, the original mortgagor, for instance. But the case is different if the execution debtor acquired the land after the making of the mortgage but not subject thereto, the primary liability for the debt still remaining upon the mortgagor personally. In such case the execution debtor had a right to question the mortgage,<sup>13-14</sup> and one claiming under him, whether as a purchaser at execution sale or otherwise, should have a like right, even though the levy or sale is in terms subject to the mortgage, and the purchaser pays a reduced price by reason of the mortgage. The intention is ordinarily to sell whatever interest the execution debtor may have in the property, and an essential part of such interest is the right to show that an asserted incumbrance thereon is not a valid incumbrance. There is no equity in favor of the mortgagor, which should forbid the purchaser from attacking the mortgage, since the mortgagor's primary liability as between him and the land is already established, and there is no equity in favor of the execution debtor, since he is, *ex hypothesi*, not subject to any liability. And there is no equity in the nominal mortgagee, which entitles him to assert a non-existent mortgage against the land, even though the land was sold and purchased under the mistaken supposition that the mortgage did exist.

A transferee who has assumed a debt which purports to be secured by a mortgage can obviously not assert, in defense to an action to enforce his personal liability, that the mortgage itself is invalid. The invalidity of the mortgage has no bearing on his personal liability under his contract. Whether he can assert that the debt is in whole or in part non

13-14. *Ante*, this section, note 6.

existent appears properly to depend on whether he assumed the payment of a particular sum, the nominal amount of the debt, or whether he assumed the payment of such sum as his transferor might owe.<sup>15</sup>

In the ordinary case a junior mortgagee is entitled to contest the validity of a prior mortgage, or to question the amount of the debt secured thereby.<sup>16</sup> His lien is subject to the prior lien only in so far as the prior lien is a valid lien. It may occur, however, that the subsequent mortgage is in terms "subject" to the prior mortgage, and it has been decided in several cases that such a clause precludes the second mortgagee from questioning the prior mortgage.<sup>17</sup> These cases merely apply, without discussion, the rule ordinarily asserted with reference to an absolute transfer subject to a mortgage. But there is, it would seem, a considerable difference between an absolute transfer and a mortgage so subject. A mortgage in terms subject to a supposed prior mortgage cannot be regarded as creating an equitable lien or charge equivalent to the supposed mortgage, nor can it operate to throw the primary liability for the debt upon the land in exoneration of the mortgagor.<sup>18</sup> Nor does it indicate, as ordinarily an absolute transfer so subject does

15. See Wald's *Pollock on Contracts* (Williston's Ed.) p. 275.

16. *Carpentier v. Brenham*, 40 Cal. 221; *Alley v. Bay*, 9 Iowa, 569; *Nicholson v. Aney*, 127 Iowa, 278, 103 N. W. 201; *Howell v. McCrie*, 36 Kan. 636, 59 Am. Rep. 584, 14 Pac. 257; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; *Dye v. Mann*, 10 Mich. 291; *Gadsden v. Thrush*, 56 Neb. 565, 45 L. R. A. 654, 76 N. W. 1060; *Prouty v. Price*, 50 Barb. (N. Y.) 344.

17. *Pratt v. Nixon*, 91 Ala. 192, 8 So. 751; *Gow v. Collin & Parker*

*Lumber Co.*, 109 Mich. 45, 66 N. W. 676; *Hardin v. Hyde*, 40 Barb. (N. Y.) 435; *Mississippi Valley Trust Co. v. Washington Northern R. Co.*, 212 Fed. 776; *Central Trust Co. v. Columbus, etc., R. Co.*, 87 Fed. 815; *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283, 17 L. Ed. 725. But see *Nicholson v. Aney*, 127 Iowa, 278, 103 N. W. 201; *Atchison Sav. Bank v. Wyman*, 65 Kan. 314, 69 Pac. 326; *Ault v. Blackman*, 8 Wash. 624, 36 Pac. 694.

18. *Ante*, § 622, note 48.

indicate, that the mortgagee (the transferee) has reduced his payment by the nominal amount of the mortgage. Such a clause in a mortgage, it is submitted, constitutes merely a recognition of the prior mortgage in so far as it may constitute a valid and existing lien and no further, and does not operate to give to the beneficiary of the supposed mortgage the right to enforce it to its nominal amount, without reference to its validity or the existence of the indebtedness which it purports to secure.

§ 639. **Tacking and consolidation.** By the doctrine of "tacking," which has long prevailed in England, a mortgagee, having the legal estate, may, upon making a further advance or acquiring a further charge on the same land, tack or add the further charge to his original debt, and hold the legal estate as against intermediate incumbrances until he is satisfied in full; and, by an extension of the same doctrine, a third mortgagee, who has advanced his money without notice of a second mortgage or charge, may, on taking an assignment of the first mortgage, and thus acquiring the legal title, "tack" it to the third mortgage, and "squeeze out" the intervening mortgage or charge. The doctrine is based on the theory that the equities of the second and third incumbrances are equal, and that therefore the legal title will prevail.<sup>18a</sup> The third mortgage must, however, be without notice of the second mortgage or incumbrance at the time of making the advance, and it results from this requirement that in the United

If one accepts a mortgage in terms subject to another mortgage to a third person, he takes it subject to such mortgage as subsequently corrected by a court of equity on account of a mistake in the description. *Herring v. Fitts*, 43 Fla. 54, 99 Am. St. Rep. 108, 30

So. 804; *Council Bluffs Lodge v. Billups*, 67 Iowa, 674, 25 N. W. 846.

18a. *Marsh v. Lee*, 2 Vent. 337, 1 White & T. Lead Cas. Eq. 837, notes; *Brace v. Malborough*, 2 F. Wms. 491; 2 Robbins, *Mortgages*, 1219.

States, where constructive notice of the second incumbrance is given to the third incumbrancer by the record, there is no room for the application of the principle;<sup>19</sup> and even apart from the question of notice, it could have no application in states in which a mortgage does not convey a legal title.

The doctrine of "consolidation," as applied to mortgages in England, consists in the right of the holder of two mortgages on different pieces of land, which belong to the same person, to retain each mortgage as a subsisting lien on the land until the debts secured by both the mortgages are paid.<sup>20</sup> The equity of the doctrine, especially against innocent purchasers, has been frequently questioned, and by a modern enactment it applies to mortgages only when an intention that it shall apply is apparent.<sup>21</sup> It has never been adopted in this country.<sup>22</sup>

## VI. EXTINCTION OF THE MORTGAGE.

§ 640. Discharge of obligation secured—(a) **General considerations.** The discharge of the obligation secured, either by payment or otherwise, has necessarily the effect of extinguishing the mortgage lien. The principal having ceased to exist, the accessory must also cease to exist. This is so even in jurisdictions in which the legal title to the land is in the mortgagee,<sup>23</sup> but there it may happen that though

19. *Osborn v. Carr*, 12 Conn. 208; *Averill Guthrie*, 8 Dana (Ky.) 84; *Loring v. Cooke*, 3 Pick. Mass.) 48; *Grant v. Bissett*, 1 Caines Cas. (N. Y.) 112; *Brazee v. Lancaster Bank*, 14 Ohio, 321; *Anderson v. Neff*, 11 Serg. & R. (Pa.) 223; *Siter v. McClanahan*, 2 Grat. (Va.) 280; 4 Kent's Comm. 178; 1 White & T. Lead Cas. Eq. 853, Amer. notes.

20. 2 Robbins, Mortgages, §55; Williams, Real Prop. 441; 4 Kent's

Comm. 179, note 1(d) B.

21. Conveyancing and Law of Property Act 1881, § 17.

22. See 2 Jones, Mortgages, § 1083.

23. *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334; *Redmond v. Packenham*, 66 Ill. 434; *Sherman v. Sherman*, 3 Ind. 337; *Armitage v. Wickliffe*, 12 B. Mon. (Ky.) 488; *Hussey v. Fisher*, 94 Me. 301, 47 Atl. 525; *Marriott v. Handy*, 8 Gill (Md.) 31; *Carter v. Van Bokkelen*,

the lien of the mortgage is extinguished by the discharge of the obligation, the bare legal title remains in the mortgagee, to divest him of which a reconveyance by him is necessary.<sup>24</sup>

The possible modes of discharge of an obligation secured by mortgage are the same as those of an obligation not so secured, and what these are is a matter for consideration in connection with the law of contracts rather than of mortgages. Consequently but a brief reference thereto will here be made.

The obligation secured may be discharged by a release executed by the creditor;<sup>25</sup> and a release or discharge in terms of the mortgage will be presumed to be intended to operate on the debt, so as to discharge the personal liability thereon, in the absence of evidence of a contrary intention.<sup>26</sup>

As it is possible to execute a mortgage to secure an obligation not involving any personal liability,<sup>27</sup> so it is possible for the mortgage creditor to release the preexisting personal liability of the mortgagor, without discharging the obligation itself or the mortgage security therefor, the obligation remaining thereafter against the land only.<sup>28</sup> And *à fortiori* is the

73 Md. 175, 20 Atl. 781; Grimes v. Kimball, 3 Allen 518; Wilbur v. Jones, 80 N. J. 520, 86 Atl. 796; Blake v. Broughton, 107 N. C. 220, 12 S. E. 127; Perkins v. Dibble, 10 Ohio 433; Anderson v. Neff, 11 Serg. & R. (Pa.) 208.

24. *Post*, this subsection, note 76.

25. An undertaking by the mortgage creditor to save the purchaser harmless from all cost and damage by the mortgage has been regarded as in effect a release, it being similar in this respect to a covenant not to sue. Proctor v. Thrall, 22 Vt. 262;

Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514. See Wald's Pollock on Contracts, (Williston's Ed.) § 12. As to a "parol release," so called, see Achla v. Achla, 6 Pa. 228.

26. Burke v. Snell, 42 Ark. 57; Security Loan & Trust Co. v. Matern, 131 Cal. 326, 63 Pac. 482; Chappell v. Allen, 38 Mo. 213; Sells v. Tootle, 160 Mo. 593, 61 S. W. 579; Robinson v. Sampson, 121 N. C. 99, 28 S. E. 189; Fleming v. Parry, 24 Pa. St. 47; Seiple v. Seiple, 133 Pa. St. 460, 19 Atl. 406.

27. *Ante*, § 607 (b).

28. See Donnelly v. Simon-

mortgage not extinguished by the release of one of two or more persons liable for the debt, as when the debt has been assumed by a transferee of the mortgaged land and the creditor thereafter releases the transferor from liability.<sup>29</sup>

The physical redelivery to the mortgage debtor of the bond or note secured will operate to discharge the debt, if made with this intention,<sup>30</sup> though it may be shown that the redelivery was made for another purpose.<sup>31</sup>

It has been held that the creditor may forgive a part of the debt, and so extinguish the mortgage to that extent, by the delivery to the debtor of a receipt for part of the sum secured<sup>32</sup> or by indorsements of part payments on the note evidencing the debt.<sup>33</sup> And a forgiveness of the debt secured has been inferred from directions by the creditor to his executor to cancel the bond and mortgage.<sup>34</sup>

A bond and mortgage given to secure the payment of an indebtedness under a contract of sale are discharged by a rescission of such contract, since the indebtedness under the contract is thereafter non-existent.<sup>35</sup>

The obligation secured by a mortgage is almost invariably the payment of money, but it may be the

ton, 13 Minn. 301; First Nat. Bank v. Gallagher, 119 Minn. 463, 138 N. W. 681; Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218, 36 N. E. 132.

29. Tripp v. Vincent, 3 Barb. Ch. (N. Y.) 613; Bentley v. Vanderheyden, 35 N. Y. 677.

30. Thomas v. Fuller, 68 Hun (N. Y.) 361, 22 N. Y. Supp. 862; Sherman v. Sherman, 3 Ind. 337; Richards v. Symms, 2 Eq. Cas. Abr. 617.

31. Bourland v. Wittich, 38 Ark. 167; Dixfield v. Newton, 41

Me. 221; Killops v. Stephens, 66 Wis. 571, 29 N. W. 390.

32. Carpenter v. Soule, 88 N. Y. 251.

33. Green v. Langdon, 28 Mich. 221.

34. Weeks v. Weeks, 16 Abb N. Cas. 143. But that an oral forgiveness of the debt is a nullity, see Tulane v. Clifton, 47 N. J. Eq. 351, 20 Atl. 1086, 48 N. J. Eq. 310, 24 Atl. 131.

35. Eveland v. Wheeler, 37 N. Y. 244; Wanzer v. Cary, 76 N. Y. 526.

doing of some other act, and in such case the doing of the act will obviously discharge the obligation. So in the case of a mortgage made to secure a contract to care for and support the mortgagee during the balance of his life, the contract is discharged, and also the mortgage, if the care and support are furnished until the mortgagee's death.<sup>36</sup> So in the case of a mortgage given to another to indemnify the latter against a possible liability, the mortgage is discharged when there is no further possibility of liability.<sup>37</sup>

Occasionally the mortgage instrument provides that it shall be void in a certain contingency other than the payment of the debt secured, as, for instance, in case of the death of the mortgagee,<sup>38</sup> or in case of the sale of certain property.<sup>39</sup> Such a provision will no doubt ordinarily be construed as discharging the obligation secured as well as the mortgage lien, in case such contingency comes to pass. So a provision that a note and mortgage given to secure the payments on a building contract should be cancelled on failure to construct the building as agreed has been given effect,<sup>40</sup> as has a provision that a mortgage given to secure the performance of work as agreed should be void in case the mortgagee failed to furnish work.<sup>41</sup> In such cases the provision discharging the obligation secured, and incidentally the security, is in effect a condition subsequent.<sup>42</sup> There may on the other hand

36. *Munson v. Munson*, 30 Conn. 425. So in the case of a mortgage to secure an annuity, *Power v. Jenkins*, 13 Md. 443.

37. *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586; *Abbott v. Upton*, 19 Pick. (Mass.) 434; *Gibbs v. Haughwout*, 207 Mo. 384, 105 S. W. 1067; *Aschambeau v. Green*, 21 Minn. 520; *Richard v. Talbird*, Rice Eq. (S. C.) 158; *Nichols v. Cabe*, 3 Head (Tenn.) 92; *Newell*

*v. Hurlburt*, 2 Vt. 351.

38. *Hollis v. Hollis*, 84 Me. 96, 24 Atl. 581.

39. *Fiske v. Ruggles*, 4 Gray (Mass.) 528.

40. *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740.

41. *McClellan v. Coffin*, 93 Ind. 456.

42. See *Hammon*, Contracts, § 422. So where there was an agreement that the mortgage debt be

be a condition precedent to the effectiveness of the obligation secured and the incidental security, by reason of an extraneous agreement that the obligation shall not legally exist until an event named has come to pass.<sup>43-44</sup>

Although a discharge in bankruptcy relieves the bankrupt from personal liability for a debt, it does not put an end to the debt,<sup>45</sup> and consequently a mortgage securing the debt,<sup>46</sup> as any other lien therefor,<sup>47</sup> is not affected by the discharge. This is *à fortiori* the case if the mortgage is made to secure the debt of a person other than the mortgagor. The mortgagor is in such case, as regards his land, in the position of a surety, and the ordinary rule that the discharge in bankruptcy of the principal debtor does not terminate the liability of the surety would apply.<sup>48</sup>

— (b) **Payment.** Although the obligation secured is for the payment of money, payment in another medium may be substituted with the consent of the creditor, as for instance when it is made by the delivery of specified articles of a chattel character,<sup>49</sup> or by the conveyance to the mortgage creditor of the mortgaged land.<sup>50</sup> Such a payment, if made at or before the

paid from the sale of certain land, held in trust by the mortgagee for the mortgagor, and, the former refusing to make sale, it was decided that, to the extent of the proceeds of sale which might have been obtained, the mortgage was satisfied, the court in effect introduced by construction a condition subsequent. See *Cook v. Bell*, 114 Mich. 283, 72 N. W. 174.

43-44. Wald's *Pollock*, on Contracts (Williston's Ed.) 311; 4 Wigmore, Evidence, § 2410.

45. *Newton v. Scott*, 9 M. & W. 434; *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498.

46. *Begein v. Brehm*, 123 Ind.

160, 23 N. E. 496; *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270.

47. *Remington*, Bankruptcy, § 2668.

48. *Burtis v. Wait*, 33 Kan. 478, 6 Pac. 783; *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121.

49. *Neylan v. Green*, 82 Cal. 128, 23 Pac. 42; *Smith v. Williams-Brooke Co.*, 111 Miss. 393, 71 So. 648; *Ketchum v. Gulick*, — (N. J. Ch.) —, 20 Atl. 487; *Very v. Levy*, 13 How. (U. S.) 345, 14 L. Ed. 173; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 19 L. Ed. 554.

50. *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975; *Bassett v. Mason*,



maturity of the debt, operates, strictly speaking, by way of substituted performance, while if made after maturity, it operates by way of accord and satisfaction.<sup>51</sup> Payment may also be made, if so agreed between the debtor and creditor, by the application of a claim or claims in favor of the debtor against the creditor,<sup>52</sup> by the performance of services by the former for the latter,<sup>53</sup> or by the creation of another debt, differently secured.<sup>54</sup>

The receipt by the creditor of the proceeds of a sale of a part of the mortgaged property, which sale was made with the former's consent, constitutes in effect a payment *pro tanto* upon the debt secured.<sup>55</sup>

The possession by the debtor of a note or bond evidencing a debt secured by mortgage, as of one not so secured, is *prima facie* evidence that the debt has been paid.<sup>56</sup> And payment may usually be pre-

18 Conn. 131; Ernest v. McChesney, 186 Ill. 617, 58 N. E. 399; Chapman v. Lester, 12 Kan. 592; Leary v. Clayton, 131 Md. 545, 102 Atl. 765; Dickason v. Williams, 129 Mass. 182; Quick v. Raymond, 116 Mich. 15, 74 N. W. 189; Milnor v. Home Savings & Loan Ass'n, 64 Minn. 500, 67 N. W. 346; Collins v. Stocking, 98 Mo. 290, 11 S. W. 750; Jennings v. Wood, 20 Ohio, 261; *In re Miller's Estate*, 251 Pa. 201, 96 Atl. 473.

51. Anson, Contracts (Huffcut's Ed.) 347, 349; Hammon, Contracts 865, 943.

52. Davis v. Thompson, 118 Mass. 497; Gallup v. Jackson, 47 Mich. 475, 11 N. W. 277; Holcomb v. Campbell, 118 N. Y. 46, 22 N. E. 1107.

53. Gescheidt v. Drier, 63 Hun. (N. Y.) 627, 17 N. Y. Supp. 741;

Stoel v. Flanders, 68 Wis. 256, 32 N. W. 114.

54. Baker v. Cent. Nat. Bank, 86 Kan. 293, 120 Pac. 549.

55. Pratt v. Waterhouse, 158 Pa. St. 45, 27 Atl. 855; Fredonia Nat. Bank v. Borden, 166 Pa. St. 177, 30 Atl. 975, 976; Wilkens v. Potts, — (Tex. Civ. App.) —, 54 S. W. 279; Field v. Doyon, 64 Wis. 560, 25 N. W. 653; Vaughn v. Smith, 148 Ky. 531, 146 S. W. 1094. In some of these cases it is said that by such receipt of the proceeds of sale, the creditor is estopped to that extent to assert his claim. The introduction of the doctrine of estoppel appears unnecessary.

56. Richardson v. Cambridge, 2 Allen (Mass.) 118, 79 Am. Dec. 767; Ormsby v. Barr, 21 Mich. 474; Johnson v. Nations, 26 Miss. 147; Smith v. Smith, 15 N. H. 55;

sumed in the case of a debt so secured, as of other debts, from the mere lapse of a period of twenty years from the time at which the debt became due.<sup>57</sup>

— **Payment at maturity.** Even by the strict principles of the common law, the payment of the sum named in the mortgage, or other compliance with the terms of the condition therein, if made at the time named therein, operates to terminate the right of the mortgagee, and the absolute title becomes revested in the mortgagor, upon entry by him, without any reconveyance or other act on the part of the mortgagee,<sup>58</sup> except when, as is the practice at the present day in England, the mortgage expressly provides for the making of a reconveyance.

In equity, and in those states in which the equitable theory of mortgages has been adopted, the payment of the mortgage debt at maturity, by a person whose duty it is to pay it, necessarily extinguishes the lien.<sup>59</sup>

— **Payment before maturity.** In the case of a debt secured by mortgage, as in the case of any other debt,<sup>60-70</sup> the debtor has no right to insist upon making payment before the maturity of the debt,<sup>71</sup> even though he tenders the principal and also the interest calculated up to the time of maturity.<sup>72</sup> If payment is

Braman v. Bingham, 26 N. Y. 483;  
Mynes v. Mynes, 47 W. Va. 681,  
35 S. E. 935.

57. *Post*, § 649, note 60.

58. Litt, §§ 333, 334; 4 Kent's  
Comm. 193; Stewart v. Crosby, 50  
Me. 130; Merrill v. Chase, 3 Allen  
(Mass.) 339; Grover v. Flye, 5  
Allen (Mass.) 543; Crowley v.  
Adams, 226 Mass. 582, 116 N. E.  
241; McNair v. Picotte, 33 Mo.  
57; Perkins' Lessee v. Dibble, 10  
Ohio, 433.

59. Mullins v. Greer, 145 Ky.

121, 140 S. W. 35; Brown v. Hall,  
32 S. D. 225, 142 N. W. 854.

60-70. See cases cited, 22 Am.  
& Eng. Encyclopedia Law 530.

71. Brown v. Cole, 14 Sim. 427,  
9 Jur. 290; Smiddy v. Grafton,  
163 Cal. 16, Ann. Cas. 1913E, 921,  
124 Pac. 433; Weldon v. Tallman,  
67 Fed. 986; Bowen v. Julius, 141  
Ind. 310, 50 N. E. 700; Moore v.  
Kime, 43 Neb. 517, 61 N. W. 736;  
Pyross v. Fraser, 82 S. C. 498, 64  
S. E. 407.

72. Brown v. Cole, 14 Sim. 429,

so made with the consent of the mortgage creditor, the effect in discharging the mortgage lien is the same as if made at maturity.<sup>73</sup> But if the debt secured is evidenced by a negotiable note, payment of the note before maturity, though it is effective as between the parties, is no defense as against a *bona fide* purchaser of the note for value.<sup>74</sup>

— **Payment after default.** At common law, since, by the breach of condition, an absolute estate became vested in the mortgagee, a payment after maturity, that is, after default, although accepted by the mortgagee, could not revest the legal title in the mortgagor, and a reconveyance or release was necessary for this purpose.<sup>75</sup> This view has been accepted in some of the states in which the common-law theory of mortgages is adopted,<sup>76</sup> though not in all.<sup>77</sup> But even in jurisdictions in which the mere payment of the debt secured after maturity is not regarded as revesting the legal title in the mortgagor, such title cannot, it has been held, after such payment, be utilized for the pur-

9 Jur. 290; Abbe v. Goodwin, 7 Conn. 377.

73. Co. Litt. 212b; Burgaine v. Spurling, Cro. Car. 283; Holman v. Bailey, 3 Metc. (Mass.) 55; Flye v. Berry, 181 Mass. 442, 63 N. E. 1071.

74. Morley v. Culverwell, 7 Mees. & W. 174; Watson v. Wyman, 161 Mass. 96, 36 N. E. 692.

75. Litt. § 332; 4 Kent's Comm. 193. Reading on Mortgages, by Judge Trowbridge, 8 Mass. 551, 553, 558.

76. Phelps v. Sage, 2 Day (Conn.) 151; Doton v. Russell, 17 Conn. 146; Stewart v. Crosby, 50 Me. 130; Parsons v. Welles, 17 Mass. 419; Smith v. Doe, 26 Miss. 291; Shields v. Lozear, 34 N. J.

L. 496, 3 Am. Rep. 256; Brobst v. Brock, 10 Wall. (U. S.) 519, 536, 19 L. Ed. 1002.

77. Morgan's Lessee v. Davis, 2 Har. & McH. (Md.) 917; Brown v. Stewart, 56 Md. 430; Perkins' Lessee v. Dibble, 10 Ohio, 433; Schilling v. Darmody, 102 Tenn. 429, 73 Am. St. Rep. 892, 52 S. W. 291. In some states, payment has, by statute, the effect of revesting title in the mortgagor, without reference to whether it is made before or after maturity. See Maxwell v. Moore, 95 Ala. 166, 36 Am. St. Rep. 190, 10 So. 444. Hussey v. Fisher, 94 Me. 301, 47 Atl. 525; Griffin v. Lovell, 42 Miss. 402; Swett v. Horn, 1 N. H. 332.

pose of foreclosing the mortgage or depriving the mortgagor of the possession of the land.<sup>78</sup>

Even though the payment of the debt secured after maturity does not of itself revest the legal title in the mortgagor, such payment extinguishes the mortgage in the view of a court of equity,<sup>79</sup> except when the mortgage lien is regarded as still existing for the protection of the person making the payment, on the principle of subrogation.<sup>80</sup> And so, in those states which have adopted the equitable or lien theory of mortgages, the payment of the debt after default ordinarily extinguishes the lien, and there being no title or estate in the mortgagee, no act on his part is necessary to free the land from all claim by him.<sup>81</sup>

In states in which the legal title is vested in the mortgagee, or in case a conveyance in terms of the legal title to the land is made for purposes of security, a court of equity will, upon payment of the debt after as before maturity, require the mortgagee to reconvey the legal title.<sup>82</sup>

— **Payment in exoneration of land.** In the absence of a statutory provision to the contrary, or a different intention apparent from the will, the heir or devisee may require the executor or administrator to pay off a mortgage on the land securing a debt for which the deceased was personally liable, the theory being that it was the personal estate which received the benefit from the creation of the debt, and that it

78. *Robinson v. Cross*, 22 Conn. 171; *Stewart v. Crosby*, 50 Me. 130; *Wade v. Howard*, 11 Pick. (Mass.) 289; *Baker v. Gavitt*, 128 Mass. 93; *Harrison v. Eldridge*, 7 N. J. Law, 392, 407; *Shields v. Lozear*, 34 N. J. L. 496, 3 Am. Rep. 256.

79. *Post*, this section, note 82.

80. *Post*, § 646.

81. *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Potts v. Plaisted*, 30 Mich. 149.

82. *Robinson v. Cross*, 22 Conn. 171; *Redmond v. Packenham*, 66 Ill. 434; *Cooper v. Cooper*, 256 Ill. 160, 99 N. E. 871; *Gibbs v. Haughwout*, 207 Mo. 384, 105 S. W. 1067;

therefore should pay it.<sup>83</sup> This rule is now changed in England by statute.<sup>84</sup> In a number of states in this country, likewise, the matter is covered by statutory provisions of varying character, prescribing the order of payment of a decedent's debts, and determining the order of liability of the different classes of property and rights of contribution between them.<sup>85</sup>

The common-law rule never applied to cases in which the mortgage debt was neither created by the deceased nor in some way made by him his own debt;<sup>86</sup> and the right does not usually exist in favor of the heir or devisees as against a legatee, other than the residuary legatee.<sup>87</sup>

Sherwood v. Wilson, 2 Sweeny (N. Y.) 684; Hamilton v. Hamer, 99 S. C. 31, 82 S. E. 997; Smith v. Orton, 21 How. (U. S.) 241, 16 L. Ed. 104.

83. Lutkins v. Leigh, Cas. t. Talb. 54; Ancaster v. Mayer, 1 Brown Ch. 454, 1 White & T. Lead. Cas. Eq. 881, notes; Sutherland v. Harrison, 86 Ill. 363; *In re Brackey's Estate*, 166 Iowa, 109, 147 N. W. 188; Brown v. Baron, 162 Mass. 56, 44 Am. St. Rep. 331, 37 N. E. 772; Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; Hoff's Appeal, 24 Pa. St. 200; Gould v. Winthrop, 5 R. I. 319; 2 Woerner, Administration, § 494; 9 Am. & Eng. Enc. Law (2d Ed.) 1317 *et seq.*

84. 17 & 18 Vict. c. 113 (Locke King's Act, A. D. 1854.)

85. See 11 Am. & Eng. Enc. Law (2d Ed.) 1063; 19 Am. & Eng. Enc. Law (2d Ed.) 1333; 2 Woerner, Administration, § 497.

86. 2 Williams, Executors (9th Ed.) 1565 *et seq.*; Evelyn v. Evelyn, 2 P. Wms. 659; Scott v.

Beecher, 5 Madd. 96; Stieglitz v. Migatz, 182 Ind. 549, 105 N. E. 465; *In re Brackey's Estate*, 166 Iowa, 109, 147 N. W. 188; Creesy v. Willis, 159 Mass. 249, 34 N. E. 265; Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; Hoff's Appeal, 24 Pa. St. 200; *In re Hunt*, 19 R. I. 139, 61 Am. St. Rep. 743, 32 Atl. 204; Minter v. Burnett, 90 Tex. 245, 38 S. W. 350; Pleasants v. Flood, 89 Va. 96, 15 S. E. 504.

87. 2 Williams, Executors, 1564; Hamilton v. Worley, 2 Ves. Jr. 65; Hoff's Appeal, 24 Pa. St. 206; Thomas v. Thomas, 17 N. J. Eq. 356; Mollan v. Griffith, 3 Paige (N. Y.) 402. In Massachusetts the devisee or heir is exonerated as against a general legatee. Hewes v. Dehon, 3 Gray (Mass.) 205; Plimpton v. Fuller, 11 Allen (Mass.) 139; Brown v. Baron, 162 Mass. 56, 44 Am. St. Rep. 331, 37 N. E. 772. And see *In re Brackey's Estate*, 166 Iowa, 109, 147 N. W. 188.

— (c) **Payment to assignor after assignment.**

After the mortgage debt has been assigned, the assignor, retaining no beneficial interest, is not entitled to receive any payments on account of the mortgage,<sup>88</sup> and if he does receive any such payment, he will no doubt hold the money or property received for the benefit of the assignee.<sup>89</sup>

The important question in connection with a payment on account of the mortgage obligation, made to the assignor of the obligation after the assignment, is whether such payment is effective in favor of the person making it, ordinarily the mortgagor or his transferee, so as to extinguish the obligation in whole or in part. If the assignor has actual or apparent authority as agent of the assignee to receive payments on account of the debt secured, a payment made to him is obviously good and effective as against the assignee, and extinguishes the debt to that extent.<sup>90</sup> The following remarks as to the effectiveness of a payment to the assignor are not intended to apply to cases in which such an agency exists.

In case a payment is made to the assignor with notice, on the part of the person making it, of the previous assignment, it is nugatory, and does not operate to extinguish the debt or the mortgage security as against the assignee, who may still assert a claim for the full amount as if no such payment had been made.<sup>91</sup> Notice on the part of the person making

88. *Keohane v. Smith*, 97 Ill. 156; *Chase v. Brown*, 32 Mich. 225; *Eggert v. Beyer*, 43 Neb. 711, 62 N. W. 57; *Emery v. Gordon*, 33 N. J. Eq. 447; *Mitchell v. Cook*, 29 Barb. (N. Y.) 243.

89. *Robbins v. Larson*, 69 Minn. 436, 65 Am. St. Rep. 572, 72 N. W. 456.

90. *Pennypacker v. Latimer*, 10 Idaho, 618, 81 Pac. 55; *McAu-*

*liffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 36; *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590; *Pine v. Mangus*, 76 Neb. 83, 107 N. W. 222.

91. *Lehman v. McQueen*, 65 Ala. 570; *Daggett v. Flanagan*, 78 Ind. 253; *Koetter v. German American Title Co.*, 21 Ky. L. Rep. 813, 53 S. W. 32; *Mitchell v.*

the payment may be inferred from facts calculated to put him on inquiry.<sup>92</sup>

On the question whether the recording laws make the record of the assignment of a mortgage constructive notice to one who may thereafter undertake to make a payment on the mortgage obligation, diverse views have been asserted. In several states the person making payment has been held to be charged with notice of the assignment by the fact of its record.<sup>93</sup> And that he is to so charged may be regarded as implied in occasional decisions that a payment to the assignor was good and effective in view of the failure to record the assignment.<sup>94</sup> In a few states the decisions are to the effect that the mortgagor or his transferee is under no obligation to search the records for an assignment before making a payment, and that the failure to record the assignment is immaterial in this regard.<sup>95</sup>

Burnham, 44 Me. 286; Cutler v. Haven, 8 Pick. (Mass.) 490; Lord v. Schaumlöffel, 50 Mo. App. 360; Barclay v. Blodget, 5 Cow. (N. Y.) 202. And see *post*, § 642(d).

92. Vann v. Marbury, 100 Ala. 438, 23 L. R. A. 325, 46 Am. St. Rep. 70, 14 So. 273; Foster v. Beals, 21 N. Y. 247; Barnes v. Long Island Real Estate Exch. & Inv. Co., 88 N. Y. App. Div. 83, 84 N. Y. Supp. 951.

93. Detwilder v. Heckenlaible, 63 Kan. 627, 66 Pac. 653; Merriam v. Bacon, 5 Metc. (Mass.) 95 (payment by mortgagor not personally liable); Robbins v. Larson, 69 Minn. 436, 65 Am. St. Rep. 527, 72 N. W. 456; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Emery v. Gordon, 33 N. J. Eq. 447; Fritz v. Simpson, 34 N. J. Eq. 436;

Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323. See Pennypacker v. Latimer, 10 Idaho, 618, 625, 81 Pac. 55.

94. See McKinley-Lanning Loan & Trust Co. v. Gordon, 113 Iowa, 481, 85 N. W. 816; Fidelity Trust & Safety Vault Co. v. Carr, 24 Ky. L. Rep. 156, 66 S. W. 990; Mitchell v. Burnham, 44 Me. 286; Randall v. Glendenning, 19 Okla. 475, 92 Pac. 158; Barry v. Stover, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

95. Garrett v. Fernauld 63 Fla. 434, 57 So. 671; Murphy v. Barnard, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29 (compare Merriam v. Bacon, 5 Metc. (Mass.) 95); Wilson v. Campbell, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278; Foster v. Carson, 159 Pa. St. 477, 29 Am. St. Rep. 696, 28 Atl. 356;

In a number of states there is an express statutory provision that the record of the assignment of a mortgage shall not, of itself, constitute notice to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by either of them to the mortgagee. Such a statute, it has been decided, does not change the rule as to the effect of a payment to the assignor, in the case either of a non-negotiable chose in action or of a debt represented by a negotiable note. It merely prevents the record from operating as notice to the mortgagor so as to invalidate a payment made by him to the assignor in ignorance of the assignment.<sup>96</sup> The statute, it has been decided, is applicable to a payment made on behalf of the mortgagor,<sup>97</sup> but not to one made by a transferee of the mortgaged land,<sup>98</sup> or by a second mortgagee.<sup>99</sup> Whether, in the case of a payment by a transferee of the land, there is a distinction to be made according as the transfer is made before or after the record of the assignment, does not clearly appear. One who takes a transfer of the land after the record of the assignment may well be charged with notice thereof, while one who takes such a transfer before the record of the assignment would seem, apart from the statute, to be entitled to the same immunity as the mortgagor, from the necessity of searching the records before making

*Williams v. Paysinger*, 15 S. C. 171; *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462.

96. *Williams v. Keyes*, 90 Mich. 290, 30 Am. St. Rep. 438, 51 N. W. 520; *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 571; see *Burhans v. Hutcheson*, 25 Kan. 625; *Eggert v. Beyer*, 43 Neb. 711, 62 N. W. 57.

97. *Goodale v. Patterson*, 51 Mich. 532, 16 N. W. 890. That the statute applies to a payment by

conveyance of property see *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975;

98. *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; *Eggert v. Beyer*, 43 Neb. 711, 62 N. W. 57; *Bettle v. Tiedgen*, 77 Neb. 795, 799, 116 N. W. 959.

99. *Robbins v. Larson*, 69 Minn. 711, 62 N. W. 57.



a payment.<sup>1</sup> In some states, an otherwise similar statute, for the words "to the mortgagee," substitutes the words "to the person holding such note, bond, or other instrument."<sup>1a</sup> This latter phraseology evidently does not afford the same protection to the mortgagor as does that before referred to.

In case there is no agency on the part of the assignor for the assignee, and there is no notice of the assignment, actual or constructive, on the part of the person making the payment, the effectiveness of the payment to the assignor as against the assignee is ordinarily determined by the same considerations as would control in the case of an obligation not secured by mortgage. These considerations are as follows: The general rule, in the case of the assignment of a non negotiable chose in action, is that the assignment is, as against the debtor, not complete until he has notice of the assignment, and consequently a debtor who performs his contract by making payment to his creditor before he has notice of an assignment by the latter, is discharged from liability to the extent of such payment.<sup>2</sup> This rule, most properly, it would seem, has been applied in connection with a debt secured by mortgage, when represented by a non negotiable bond or note.<sup>3</sup> In some states, however, payments made to the

1. In *Brewster v. Carnes*, 103 N. Y. 556, 9 N. E. 323, and *Eggert v. Beyer*, 43 Neb. 711, 62 N. W. 57, the payment was by one who acquired the mortgaged premises after the record of the assignment. In *Robbins v. Larson*, 69 Minn. 436, 65 Am. St. Rep. 572, 72 N. W. 456, the court refers to the fact that the second mortgage, by the holder of which the payment was made, was subsequent to the record of the assignment, and in *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598,

81 Pac. 4, that the transfer of the land was so subsequent is referred to.

1a. *Rogers v. Peckham*, 120 Cal. 238, 52 Pac. 483; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

2. Anson, *Contracts* (Huff cut's Ed.) p. 294; *Hammon, Contracts*, § 358; *Norton, Bills & Notes* (3d Ed.) 11; 5 *Encyclopedia Law & Practice*, 936.

3. *Williams v. Sorrell*, 4 Ves. 389; *McAuliffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *McKinley-*

mortgagee by the mortgage debtor, even before notice to the latter of the assignment, have been regarded as ineffective as against the assignee, by reason of the failure of the debtor to demand the production by the mortgagee of the non negotiable note or bond secured,<sup>4</sup> thus applying, in the case of such a note or bond evidencing a debt secured by a mortgage, a requirement as to the production of the note or bond which, while concededly applicable in the case of a negotiable note,<sup>5</sup> has usually been regarded as inapplicable in the case of a non negotiable instrument.<sup>6</sup>

— **In case of a negotiable instrument.** A negotiable note is, in respect to the effect of a payment thereon to one who has previously transferred it to another, as it is in other respects, governed by a rule entirely different from that which more usually controls in the case of a non negotiable chose in action.<sup>7</sup>

Lanning L. & T. Co. v. Gordon, 113 Iowa, 481, 85 N. W. 816; Mutual Life Ins. Co. v. Hall, 20 Ky. L. Rep. 1880, 50 S. W. 254 (*semble*); Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Mitchell v. Burnham, 44 Me. 286; Castle v. Castle, 78 Mich. 298, 44 N. W. 378; Brooke v. Struthers, 110 Mich. 562, 35 L. R. A. 536, 68 N. W. 272; Breck v. Meeker, 68 Neb. 99, 93 N. W. 993; Van Keuren v. Corkins, 66 N. Y. 77; Horstman v. Gerker, 49 Pa. St. 282, 88 Am. Dec. 501; Foster v. Carson, 159 Pa. St. 477, 39 Am. St. Rep. 696, 28 Atl. 356; Barry v. Stover, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

4. Clinton Loan Ass'n. v. Merritt, 112 N. C. 243, 17 S. E. 296; Assets Realization Co. v. Clark, 205 N. Y. 105, 41 L. R. A. (N. S.) 462, 98 N. E. 457; In Mead v. Leavitt, 59 N. H. 476; Williams v.

Paysinger, 15 S. Car. 171, in which the mortgagor was regarded as under an obligation to require the production of the notes, it does not appear whether they were or were not negotiable.

5. *Post*, this subsection, notes 8, 9.

6. Johnson v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180; Shields v. Taylor, 25 Miss. 13; Hart v. Freeman, 42 Ala. 567. That there is no obligation on the mortgagor, making a payment on the non negotiable bond or note secured by mortgage, to demand the production of the bond or note, see Vann v. Marbury, 100 Ala. 438, 23 L. R. A. 325, 46 Am. St. Rep. 70, 14 So. 273.

7. The distinction above stated, as between negotiable notes on the one hand and non negotiable notes or bonds on the other, is

The holder of a negotiable note is the person entitled to receive payment thereof, and the debtor is, *prima facie*, protected in making payment only if he makes it to the holder.<sup>8</sup> This rule has been applied in a number of cases involving negotiable notes given for debts secured by mortgage, and it has ordinarily been held that the person making a payment on such a note to a former holder thereof cannot assert the payment as against a subsequent *bona fide* holder thereof if he failed, when making the payment, to call upon the former to produce the note.<sup>9</sup> But a mere delivery, without endorsement, by the payee to another of the possession of the note, even though with the purpose of transferring the title, does not make such other a "holder" of the note, within the meaning of the law of negotiable instruments,<sup>10</sup> and consequently he cannot assert the invalidity of a payment made to the payee without notice of the transfer.<sup>11</sup>

In two states, that a negotiable note is secured by mortgage is regarded as relieving the mortgagor from the obligation ordinarily required in the case of a

in effect prescribed by statute in a number of states. See *e. g.*, *Downing v. Gibson*, 53 Iowa, 517, 5 N. W. 699; *Cornish v. Wolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; *Fritz v. Simpson*, 34 N. J. Eq. 436; *Barry v. Stover*, 20 S. D. 459, 129 Am. St. Rep. 941, 107 N. W. 672.

8. Norton, Bills & Notes (3d Ed.) 12; 2 Daniels, Negot. Inst. § 1230.

9. *Scott v. Taylor*, 63 Fla. 612, 58 So. 30; *Baumgartner v. Petersen*, 93 Iowa, 572, 62 N. W. 27; *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274; *Hoffacker v. Manufacturer's Nat. Bank (Md.)*, 23 Atl. 579; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785;

*Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Williams v. Keyes*, 90 Mich. 290, 36 Am. St. Rep. 438, 51 N. W. 520; *Wilson v. Campell*, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278; *Joerdens v. Schrimpf*, 77 Mo. 383; *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590; *Snell v. Margritz*, 64 Neb. 6, 91 N. W. 274; *Hayden v. Speakman*, 20 N. M. 513, 150 Pac. 292; *Bantz v. Adams*, 131 Wis. 152, 120 Am. St. Rep. 1030, 111 N. W. 69; *Windle v. Bonebrake*, 23 Fed. 165.

10. Norton Bills & Notes (3rd Ed.) 26; 2 Daniel, Negot. Inst. § 1230a.

11. *Fox v. Cipra*, 5 Kan. App. 312, 48 Pac. 452; *McKinley-Lann-*

negotiable note, of making payment only to the holder of the note, the payment being apparently regarded as being not on account of the note but on account of the mortgage.<sup>12</sup>

— **Diligence necessary.** Accepting the law as stated in the previous paragraphs, the assignee of a non negotiable note or bond representing a debt secured by mortgage, or, as it might be otherwise, though less accurately, expressed, the assignee of a mortgage not securing a negotiable note, should protect himself against a subsequent payment to his assignor, by immediately notifying the mortgage debtor of the assignment.<sup>13</sup> In a number of states such notification can be effected by the mere record of the assignment,<sup>14</sup> and this appears to be the only mode in which the assignee can effectually protect himself as against a payment to his assignor by a subsequent transferee of the mortgaged land, conceding that a payment made by such transferee in ignorance of the assignment would be effective as against the assignee.<sup>15</sup> In the case, on the other hand, of a negotiable note secured by mortgage, still retaining its negotiability, it is not necessary for a sub-

ing *Loan & Trust Co. v. Gordon*, 113 Iowa, 481, 85 N. W. 816; *Vann v. Marbury*, 100 Ala. 438, 23 L. R. A. 325, 46 Am. St. Rep. 70, 14 So. 273. But see remarks in *Hayden v. Speakman*, 20 N. M. 513, 150 Pac. 292.

12. *Napieralski v. Simon*, 198 Ill. 384, 64 N. E. 1042; *Johnson v. Carpenter*, 7 Minn. 176; *Olson v. Northwestern Guaranty Loan Co.*, 65 Minn. 475, 68 N. W. 100; But see *Keohane v. Smith*, 97 Ill. 156; *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 517.

13. *Vann v. Marbury*, 100 Ala. 438, 23 L. R. A. 325, 46 Am. St. Rep. 70, 14 So. 273; *Napieralski*

*v. Simon*, 198 Ill. 384, 64 N. E. 1042; *McCabe v. Farnsworth*, 27 Mich. 52; *Van Keuren v. Corkins*, 66 N. Y. 77; *Horstman v. Gerker*, 49 Pa. St. 282, 88 Am. Dec. 501; *Foster v. Carson*, 159 Pa. 477, 39 Am. St. Rep. 696, 28 Atl. 356.

14. *Ante*, this subsection, note 93.

15. In *Schultz v. Sroelowitz*, 191 Ill. 249, 61 N. E. 92, it appears to be decided that a payment by such subsequent transferee of the land to the assignor is not good, as against the assignee, since the latter was under no obligation to notify such transferee of the assignment.

sequent holder thereof to notify the mortgage debtor of the transfer to him,<sup>16</sup> except in such states as refuse to recognize an obligation, in the case of such a note so secured, to make payment only to the holder of the note<sup>17</sup>

— (d) **Tender.** It has been decided in a number of states that a tender of the debt secured by the mortgage, after default in payment, is, even though not kept good, effective to extinguish the mortgage lien, leaving the mortgage creditor to his personal remedy against the debtor.<sup>18</sup> These decisions are based on the assumption that such a tender on the day of maturity will extinguish the mortgage, and it is argued that, under the modern view of a mortgage as subject to redemption at any time before foreclosure, there should be no distinction between the effect of a tender at and after maturity. There are on the other hand, decisions which deny such an effect to a tender after maturity<sup>19</sup>

16. *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29.

17. *Ante*, this subsection, note 12.

18. *Caruthers v. Humphrey*, 12 Mich. 470; *Potts v. Plaisted*, 30 Mich. 149; *Ferguson v. Popp*, 42 Mich. 115, 3 N. W. 287; *Moore v. Norman*, 43 Minn. 428, 9 L. R. A. 55, 19 Am. St. Rep. 247, 45 N. W. 857; *Willard v. Harvey*, 5 N. H. 252 (*dictum*); *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Salinas v. Ellis*, 26 S. C. 337, 2 S. E. 121; *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840 (tender before suit to foreclose). So in the case of a debt secured by chattel mortgage. *Bartel v. Lope*, 6 Ore. 321; *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash.

560, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945, 15 Ann. Cas. 494, 94 Pac. 116.

19. *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444; *Himmelman v. Fitzpatrick*, 50 Cal. 650; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Smith v. Williams-Brooke*, 111 Miss. 393, 71 So. 648; *Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co.*, 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450; *Knollenberg v. Nixon*, 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 41; *Shields v. Lozean*, 34 N. J. L. 496; *Lincoln Sav. Bank v. Ewing*, 12 Lea (Tenn.) 598 (*semble*). See *New South Wales v. O'Connor*, 14 App. Cas. 273, to the effect that a tender refused is not equivalent to payment.

or, which is in practical effect the same, deny such an effect to a tender after maturity unless the tender is kept good.<sup>20</sup>

The view indicated in the decisions first referred to, that no distinction should be made in this regard between a tender at maturity and a tender thereafter, is, it is submitted, a proper and sensible one, and this irrespective of whether the legal title is or is not vested in the mortgagee, since it is the equitable and not the legal view which controls in determining the rights of the parties to a mortgage. But the assumption that a tender at maturity, not kept good, extinguishes the mortgage, though made in decisions denying such an effect to a tender after maturity,<sup>21</sup> as well as in others,<sup>22</sup> is, it is submitted, open to question. It is based, directly or indirectly, upon the statements by Littleton and Coke,<sup>23</sup> that when a man enfeoffs another upon condition that if the feoffor pays a sum of money he may re-enter, and the latter tenders such sum, the condition is discharged. In the times of those writers this was a necessary consequence of the effect of a breach of the condition in causing an absolute forfei-

20. *Maxwell v. Moore*, 95 Ala. 166, 36 Am. St. Rep. 190, 10 So. 444, and *Matthews v. Lindsay*, 20 Fla. 962; *Parker v. Beasley*, 116 N. C. 1, 33 L. R. A. 231, 21 S. E. 955; *Security State Bank v. Waterloo Lodge*, 85 Neb. 255, 122 N. W. 992 (*semble*).

21. *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Shields v. Lozeau*, 34 N. J. L. 496; *Merritt v. Lambert*, 7 Paige (N. Y.) 344, *Dickerson v. Simmons*, 141 N. C. 325, 8 Ann. Cas. 361, 53 S. E. 850; The language of the majority of the decisions cited *ante*, this subsection, notes 19, 20, appears to be that a tender even at maturity,

if not kept good, will not extinguish the mortgage lien.

22. *Shearff v. Dodge*, 33 Ark. 346; *McClellan v. Coffin*, 93 Ind. 456 (*semble*); *Darling v. Chapman*, 14 Mass. 101; *Eslow v. Mitchell*, 26 Mich. 500; *Moore v. Norman*, 43 Minn. 428, 9 L. R. A. 55, 19 Am. St. Rep. 247, 45 N. W. 857; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Salinas v. Ellis*, 26 S. C. 337, 2 S. E. 121; *McDaniels v. Reed*, 17 Vt. 674; *Mitchell v. Roberts*, 5 McCrary (U. S.) 425.

23. Litt. §§ 335, 338; Co. Litt. 209b; 9 Co. Rep. 79.

ture of the feoffor's rights. Had such an effect not been given to a tender at maturity, one of two results must have followed, either that the mortgagee would always have it in his power, by refusing a tender, to compel a forfeiture, or that a payment after maturity would have the same effect in preventing a forfeiture as would a payment at maturity, a view entirely at variance with the rigid judicial attitude towards conditions which then prevailed. But after equity came to recognize the mortgagor's right of redemption, and to treat the mortgagor's interest as that of a lienor merely, there was no necessity for giving such an effect to a tender in order to protect the mortgagor against possible bad faith on the part of the mortgagee in refusing to accept a tender of the sum due. The purpose and effect of a tender is ordinarily to throw upon the creditor the risk of further litigation, he being subjected, upon refusal of a rightful tender, to subsequently accruing interest and costs, and in some cases to liability for damages by reason of this refusal. And as this is sufficient for protection as against a claim not secured by mortgage, it is, it is conceived, sufficient for protection as against a claim which is so secured. In support of the view that a tender of the debt extinguishes the mortgage lien, reference is sometimes made, by way of analogy, to the doctrine that the right of distress is extinguished by tender of the rent and its refusal. But a tender of the rent does not render a distress unlawful unless it is kept good, that is, it takes away the right to distrain only until a subsequent demand of the rent is made.<sup>24</sup> Reference by way of analogy is also made to the common law doctrine that the tender of a debt secured by pledge extinguishes the rights of the pledgee, so that, if he refuses to return the property, the pledgor may bring

24. *Pimm v. Greville*, 6 Espin. 95; *Hunter v. Le Conte*, 6 Cow. (N. Y.) 729. See forms of pleading to an avowry in 3 Chitty, Pleading (5th Ed) 1192, 1229; Archbold, Landlord & Ten. 297.

trover or detinue,<sup>25</sup> a doctrine which, in conjunction with the asserted rule in regard to mortgages which we are now considering, has been made the basis in this country of several decisions that after a tender the pledgor is entitled to the return of the property without paying the debt.<sup>26</sup>

It is sometimes suggested that if a tender does not effect a discharge of the lien, the mortgage creditor may, by refusing a tender, and so keeping the land subject to the incumbrance, seriously hamper the owner of the land, the mortgagor or his transferee, in subsequently dealing with the land. But it is conceded, even by courts which regard the refusal of a tender as sufficient to extinguish the mortgage for purposes of a foreclosure, that the refusal has no such effect for the purpose of a suit by the mortgagor or his transferee to have the mortgage cancelled or discharged, it being necessary, it is said, for one coming into equity to be relieved from the mortgage, to do equity by paying the debt secured.<sup>27</sup> And this being so, it appears that the mortgage creditor can, by merely refraining from seeking foreclosure, and thus avoiding an

25. *Ratcliff v. Davies*, Cro. Jac. 244, Yelv. 179; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Ryall v. Rowles*, 1 Atk. 165. See editorial note in 10 *Columbia Law Rev.* at p. 252.

26. *Loughborough v. McNevin*, 74 Cal. 250, 5 Am. St. Rep. 435, 14 Pac. 369, 15 Pac. 773; *Latta v. Tutton*, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844; *Norton v. Baxter*, 41 Minn. 146, 4 L. R. A. 305, 16 Am. St. Rep. 679, 42 N. W. 865; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263; *Hyams v. Bamberger*, 10 Utah, 3, 26 Pac. 202; *Mitchell v. Roberts*, 5 McCrary (U. S.) 425. But that in an action for damages by the pledgor in such case the amount

of recovery must be reduced by the amount of the debt, see *Hancock v. Franklin Insurance Co.*, 114 Mass. 155; *Cass v. Higenbotam*, 100 N. Y. 248, 252, 3 N. E. 189 (*dictum*); *De Clark v. Bell*, 10 Wyo. 1, 65 Pac. 852 (*dictum*).

27. *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Cowles v. Marble*, 37 Mich. 158; *Tuthill v. Morris*, 81 N. Y. 94; *Werner v. Tuch*, 127 N. Y. 217, 24 Am. St. Rep. 443, 27 N. E. 845; *Nelson v. Loder*, 132 N. Y. 288, 30 N. E. 369; *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 480. A similar view has been taken as regards a writ of entry by the mortgagor, *Bailey v. Metcalf*, 6 N. H. 156.



adjudication adverse to his right, subject the land to a continuance of the mortgage incumbrance, in spite of his previous refusal of the tender.

In one or two of the states in which it has been decided that a tender after maturity extinguishes the mortgage lien for the purpose of foreclosure, the possible hardship resulting to a creditor who refuses the tender has been relieved by decisions that to have this effect the refusal of the tender must have been in bad faith or at least without adequate excuse.<sup>28</sup> This affords relief against possible hardship upon a creditor who refuses the tender in good faith, but introduces a consideration, that of the creditor's intention, which has no place in the law of tender generally. Without such qualification of the rule, there is an obvious possibility of hardship upon a mortgage creditor who in good faith refuses the tender, or perhaps thoughtlessly seeks, by reason of a pressure of business or otherwise, to postpone until the next day a calculation and adjustment of the amount due. We find no English decision or judicial assertion, since the time of Coke, to the effect that the tender of the debt extinguishes the mortgage, and the existing decisions that it operates to deprive the creditor of subsequently accruing interest and costs, without any suggestion that it may have

28. *Waldron v. Murphy*, 40 Mich. 668; *Renard v. Clark*, 91 Mich. 1, 30 Am. St. Rep. 458; *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286 (Michigan); *Reynolds v. Price*, 88 S. C. 525, 71 S. E. 51; *Easton v. Littooy*, 91 Wash. 648, 158 Pac. 531; *Weigell v. Gregg*, 161 Wis. 413, L. R. A. 1916B, 856, 54 N. W. 645. *Contra*, *Campbell v. Society*, 43 Mo. App. 23. In *Harris v. Jex*, 55 N. Y. 421, the refusal of a tender was held not to extinguish the

mortgage, when based upon the decision in *Hepburn v. Griswold*. 8 Wall. (U. S.) 603, 19 L. Ed. 513, that the statutes making United States notes legal tender in payment of pre-existing debts were unconstitutional, the tender having been made before the latter decision was overruled by *Knox v. Lee*, 12 Wall. (U. S.) 457, 20 L. Ed. 287. And in *Tuthill v. Morris*, 81 N. Y. 94, there is a *dictum* that the tender, to extinguish the mortgage, must have been "delib-

a further operation,<sup>29</sup> would seem to indicate that it has in that country no such effect.

Even conceding that a tender of the debt at maturity may operate to discharge the mortgage lien, a tender, unless kept good, will not have such an effect, it has been decided, if made by a purchaser of the land, who as not having assumed the debt, is under no personal obligation in reference thereto.<sup>30</sup> In jurisdictions where payment after default is insufficient to divest the mortgagee's legal title,<sup>31</sup> a mere tender of payment after default can obviously have no greater effect.<sup>32</sup>

— (e) **Merger.** The question whether the acquisition of the mortgaged land and of the mortgage debt by one person has in the particular case the effect of discharging the debt and extinguishing the mortgage lien is frequently one of some difficulty. When such is the result of the union of the two interests in one person, it is said that a "merger" of the mortgage occurs, or that the mortgage is "merged." The words "merge" and "merger," as used in this connection, are calculated to suggest false analogies drawn from the doctrine of merger of a less in a greater estate upon their acquisition by one person,<sup>33</sup> but there appear to be no other available expressions, and they will here be used in accordance with universal practice. What is, it is conceived, even more misleading, as regards

erately and intentionally refused," and that "sufficient opportunity must have been afforded to ascertain the amount due".

29. *Manning v. Burges*, 1 Ch. Cas. 29; *Gyles v. Hall*, 2 P. Wms. 378; *Kinnaird v. Trollope*, 42 Ch. D. 610; *Greenwood v. Sutcliffe* (1892), 1 Ch. 1.

30. *Harris v. Jex*, 66 Barb. (N. Y.) 32; *Brunswick Realty Co. v.*

*University Inv. Co.*, 43 Utah, 75, 134 Pac. 608.

31. *Ante*, § 640(b), note 76.

32. *Shields v. Lozear*, 34 N. J. Law, 496, 3 Am. Rep. 256; *Rowell v. Mitchell*, 68 Me. 21; *Maynard v. Hunt*, 5 Pick. (Mass.) 240; *Currier v. Gale*, 9 Allen (Mass.) 522; *Parker v. Beasley*, 116 N. C. 1, 33 L. R. A. 231, 21 S. E. 955.

33. *Ante*, §§ 34, 59(e).

the fundamental principles involved, than the use of the expressions "merge" and merger, is the statement usually found, that the *mortgage* is merged, *vel non*. As we have before seen, the debt is the principal thing, and the mortgage is merely an incident, and the question is, not whether the *mortgage* is merged, but whether the acquisition by one person of both the mortgaged land and the debt secured by the mortgage has the effect of extinguishing or merging *the debt*. If the debt is extinguished under such circumstances, the mortgage lien is necessarily also extinguished, while if the debt remains the mortgage lien also remains. Even in states which adhere to the title theory of a mortgage, the mere acquisition, by the owner of the land, of the legal title of the mortgagee, without the debt, could not extinguish the debt, nor affect the creditor's right to proceed against the land in equity, while, on the other hand, if the owner of the land acquires the debt, with its incidental lien, the fact that he does not acquire the legal title, this being still outstanding in the mortgagee, could not, it is conceived, prevent the debt and the lien being extinguished, if the owner of the debt and of the land so intended and desired. And so, when the legal title is vested in one person as security for a debt due another person, as in the case of a deed of trust to secure, a conveyance of the land by the debtor to the creditor, while it cannot of itself affect the legal title of the trustee,<sup>34</sup> will, it seems, operate to merge the debt, if such result appears to accord with the interest or intention of the creditor.<sup>35</sup> The mere fact that the legal title to the land is outstanding can not exclude the right of the creditor to regard the debt as discharged.

In order that the debt may be regarded as merged, it is necessary that it be held in the same right as the

34. *Brown v. Bartee*, 10 Sm. & M. (Miss.) 263.

35. See *Hatz's Appeal*, 40 Pa. St. 209.

land. For instance, if the debt or land is held by one in his own right while the land or debt is held by him as trustee or executor, no merger will occur.<sup>36</sup>

In the present state of the law as to married women, no merger can result from the fact that the land and the mortgage debt are held, the one by the husband and the other by the wife.<sup>37</sup>

Merger can evidently not occur when the land is conveyed to the mortgagee after he has assigned the debt with its lien to another,<sup>38</sup> nor can it occur when the mortgage debt is transferred to the mortgagor after he has transferred the land to another,<sup>39</sup> though in the latter case, if the transfer of the land by the mortgagor contains covenants of title covering the mortgage lien, the mortgagor is estopped, on acquiring the debt, to assert the mortgage against the land.<sup>40</sup>

In case the owner of the mortgaged land, whether the original mortgagor or his transferee, conveys the land to the mortgage creditor under an agreement that this shall operate to extinguish the mortgage debt, such conveyance ordinarily extinguishes the lien of the mortgage. In that case the extinguishment of the

36. *Hough v. De Forest*, 13 Conn. 472; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Swayze v. Schuyler*, 59 N. J. Eq. 75, 45 Atl. 347; *Angel v. Boner*, 38 Barb. (N. Y.) 425; *Clowney v. Cathcart*, 2 S. Car. 395.

37. *Skinner v. Hale*, 76 Conn. 223, 56 Atl. 524; *Bean v. Boothby*, 57 Me. 295; *Bemis v. Call*, 10 Allen (Mass.) 512; *Cormerais v. Wesselhoft*, 114 Mass. 550; *Bray v. Conrad*, 101 Mo. 331, 13 S. W. 957; *Power v. Lester*, 23 N. Y. 527. But this may affect the right to foreclose. *Tucker v. Fenno*, 110 Mass. 311; see *Butler v. Ives*, 139 Mass. 202, 29 N. E. 654.

38. *International Bank of Chicago v. Wilshire*, 108 Ill. 143; *Cole v. Beale*, 89 Ill. App. 424; *Campbell v. Vedder*, 1 Abb. Dec. 295; *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168; *Lime Rock Nat. Bank v. Mowry*, 66 N. H. 598, 13 L. R. A. 294; *Case v. Fant*, 53 Fed. 41, 3 C. C. A. 420; *Oregon, etc., Inv. Co. v. Shaw*, 6 Sawy. (N. S.) 52.

39. *Pratt v. Buckley*, 175 Mass. 115, 55 N. E. 889; *Mickles v. Townsend*, 18 N. Y. 575.

40. *Mickles v. Townsend*, 18 N. Y. 575; *Byles v. Kellogg*, 67 Mich. 318, 34 N. W. 671; *Jones v. Lamar*, 34 Fed. 454.

debt and its attendant security is properly by way of payment or accord and satisfaction,<sup>41</sup> but the courts usually refer to it as a case of merger. Occasionally even in the absence of any evidence of an intention to extinguish the debt by such a conveyance, the debt has been regarded as extinguished by such a conveyance to the mortgage creditor provided the amount paid by him for the transfer and the amount of the debt did not together exceed the value of the land, the theory being said to be that there is in such case the equivalent of a strict foreclosure, which extinguishes the debt to the extent of the value of the land.<sup>42</sup>

— **Intention ordinarily controlling.** The theory on which, upon the acquisition by one person of the mortgaged land and of the mortgage debt with the incidental lien on the land, the debt, and with it the lien, may ordinarily be regarded as extinguished, would seem to be that, under such circumstances, the person owning and controlling the debt can usually have no object in keeping it alive, it being in substance a claim against his own property, and he may consequently be presumed to intend that the debt shall be extinguished, a presumption to which, as tending to the simplification of titles, the courts are ready to give full effect. In accordance with this view are the numerous decisions that the intention of the holder of the two interests is the decisive consideration, and that no merger will take place if there is proof of an intention on his part to the contrary.<sup>43</sup>

41. *Ante*, § 640(b), notes 50, 51.

42. *Bassett v. Mason*, 18 Conn. 131; *Lilly v. Palmer*, 51 Ill. 331; *Spencer v. Hartford*, 4 Wend. (N. Y.) 381; See *Webb v. Meloy*, 32 Wis. 319.

43. *Hartford Fire Ins. Co. v. Buckwalter Lumber Co.*, 116 Miss.

822, 77 So. 798; *Salvage v. Haydock*, 68 N. H. 484, 44 Atl. 696; *Betts v. Betts*, 159 N. Y. 547, 54 N. E. 1089, 9 N. Y. App. Div. 210, 41 N. Y. Supp. 285; *South Carolina Ins. Co. v. Cook*, 106 S. C. 461, 91 S. E. 728.

It has occasionally been asserted that the intention which controls in this regard is that which exists at the time the two interests came together in one person, and that an intention afterwards formed by him is immaterial.<sup>44</sup> There are, however, statements to the contrary.<sup>45</sup> In so far as the intention existing at the time of the acquisition of the two interests was to keep them separate, it is not perceived why, if the person owning and controlling them subsequently changes his intention and desire in this regard, and considers the debt as merged, such change of intention should not be given effect. If, however, an intention to merge exists at the time of the acquisition of the two interests, and merger results, a subsequent change of intention in this regard could not well undo the merger, and recreate the debt, with its incidental lien, as a separate entity.

An intention to merge induced by false representations that there is no other incumbrance on the property has been held not to be effective to produce a merger.<sup>46</sup> Such a case is analogous to a release or discharge of the mortgage induced by fraud, which has been decided not to be effective as against the person who executed it.<sup>47</sup> And an intention to extinguish the debt has occasionally been regarded as not conclusive in this regard owing to ignorance of an intervening incumbrance.<sup>48</sup>

Upon an assignment of the debt, with the mortgage lien, to the owner of a portion of the mortgaged land, merger will, as in the case of an assignment to the

44. *McClain v. Wise*, 22 Ill. App. 272; *James v. Johnson*, 5 Johns. Ch. (N. Y.) 417; *Given v. Marr*, 27 Me. 212

45. See *Goodwin v. Keney*, 47 Conn. 486; *James v. Morey*, 2 Cow. (N. Y.) 248; *Ft. Scott Building & Loan Ass'n v. Palatine Ins. Co.*, 74 Kan. 272, 86 Pac. 142; *Na-*

*gle v. Conard*, 79 N. J. Eq. 124, 81 Atl. 841, 80 N. J. Eq. 252, 86 Atl. 1103.

46. *Howard v. Clark*, 71 Vt. 424, 76 Am. St. Rep. 782, 45 Atl. 1042; *Young v. Hill*, 31 N. J. Eq. 429.

47. *Post*, § 642(e).

48. *Post*, this subsection, notes 58-60.

owner of all the land, ordinarily not take place except in accord with his intention or his apparent interest.<sup>49</sup> The fact that he owns but a part of the land appears to furnish no reason for regarding the debt as merged in part only, if his intention or interest is that the debt be entirely merged.<sup>50</sup>

— **Evidence as to intention.** The intention as to whether merger shall occur may be stated or indicated in the conveyance of the land or the assignment of the mortgage debt which brings the two interests together, and such an expression of intention will ordinarily be given controlling effect.<sup>51</sup> The fact that a release or satisfaction of the mortgage is or is not executed has occasionally been regarded as showing an intention to merge,<sup>52</sup> or not to merge.<sup>53</sup> The fact that the mortgage debt with its lien is subsequently assigned by the person who has acquired the two interests has been held to show an intention against merger,<sup>54</sup> as has his subsequent transfer of the land in terms "subject to" the mortgage,<sup>55</sup> while the fact that he subsequently

49. *Duncan v. Drury*, 9 Pa. 332, 49 Am. Dec. 365; *Collamer v. Langdon*, 29 Vt. 32.

50. But see *Casey v. Buttolph*, 12 Barb. (N. Y.) 367.

51. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080; *Lagrange v. Greer-Wilkinson Lumber Co.*, 59 Ind. App. 488, 108 N. E. 373; *Abbott v. Curran*, 98 N. Y. 665; *Agnew v. Charlotte, C. & A. R. Co.*, 24 S. C. 18, 58 Am. Rep. 237; *Bleckley v. Branyan*, 26 S. C. 424, 2 S. E. 319; *Case v. Fant*, 53 Fed. 41, 3 C. C. A. 420.

52. *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400. Compare *post*, this subsection, notes 61, 93.

53. *Davis v. Randall*, 117 Cal. 3 R. P.—22

12, 48 Pac. 906; *Linscott v. Lamart*, 46 Iowa, 312; *Hoppock v. Ramsey*, 28 N. J. Eq. 413; *Salvage v. Haydock*, 68 N. H. 484, 44 Atl. 696; *Dubbels v. Thompson*, 49 Mont. 550, 143 Pac. 986.

54. *Goodwin v. Keney*, 47 Conn. 486; *Security Title Co. v. Schlander*, 190 Ill. 609, 60 N. E. 854; *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255; *Dubbels v. Thompson*, 49 Mont. 550, 143 Pac. 986; *James v. Morey*, 2 Cow. (N. Y.) 248; *Chase v. Van Meter* 140 Ind. 321, 39 N. E. 455.

55. *Saint v. Cornwall*, 207 Pa. 270, 56 Atl. 440; *Cliff v. White*, 12 N. Y. 525. That the person who acquires the two interests there

transfers the land with covenants of title sufficient to protect against the mortgage shows an intention in favor of merger.<sup>56</sup>

If frequently happens that there is no evidence as to the intention in this regard, and in such a case equity will usually presume that the owner of the two interests intended that they should merge, or the contrary, according as merger *vel non* would be most for his benefit.<sup>57</sup> So a presumption against the existence of an intention to merge on the part of the owner of the two interests has been recognized when there was a junior incumbrance on the property, since the effect of a merger in such case would be to accord priority to the junior incumbrance over the claim of such owner.<sup>58</sup>

after undertakes to foreclose the mortgage has been held to show an intention not to merge. *Salvage v. Haydock*, 68 N. H. 484, 44 Atl. 696.

56. *Thomas v. Simmons*, 101 Ind. 538; *Pearson v. Bailey*, 180 Mass. 229, 62 N. E. 265; *Senter v. Senter*, 87 Ohio St. 377, 101 N. E. 272. See *post*, this subsection, note 92.

57. *Factors & Traders' Ins. Co. v. Murphy*, 111 U. S. 738, 28 L. Ed. 582; *Davis v. Randall*, 117 Cal. 12, 48 Pac. 906; *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51; *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290; *Aetna Life Ins. Co. v. Corn*, 89 Ill. 170; *Clark v. Glos*, 180 Ill. 556, 72 Am. St. Rep. 223, 54 N. E. 631; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; *Patterson v. Mills*, 69 Iowa, 755, 28 N. E. 53; *Bean v. Boothby*, 57 Me. 295; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *Stantons v. Thompson*, 49 N. H. 272, 279;

*Den d. Van Wagenen v. Brown*, 26 N. J. L. 196; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Watson v. Dundee Mortgage & Trust Inv. Co.*, 12 Ore. 474, 8 Pac. 548; *Duncan v. Drury*, 9 Pa. St. 332, 49 Am. Dec. 565; *Knowles v. Carpenter*, 8 R. I. 548; *Silliman v. Gammage*, 55 Tex. 365; *Bullard v. Leach*, 27 Vt. 491; *Rorer v. Ferguson*, 96 Vt. 411, 31 S. E. 817; *Adams v. Angell*, 5 Ch. Div. 634.

58. *Cohn v. Hoffman*, 45 Ark. Anglo Californian Bank v. Field, 175, 169 S. W. 783; *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743; 576; *Cowling v. Britt*, 114 Ark. 146 Cal. 644, 80 Pac. 1080; *Westhelmer v. Thompson*, 3 Idaho, 560, 32 Pac. 205; *Lowman v. Lowman*, 118 Ill. 582, 9 N. E. 245; *Hanton v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Kilmer v. Hannifan*, 113 Iowa, 281, 85 N. W. 16; *Simonton v. Gray*, 45 Me. 50; *Savage v. Hall*, 12 Gray. (Mass.) 363; *Ryer v. Glass*, 130 Mass. 227; *Dutton*



And there are cases which recognize this presumption of an intention in accordance with his interest, on the part of the person who acquired both the mortgaged property and the mortgage debt, although, in the particular case, he was ignorant of the junior incumbrance, and consequently, as a matter of fact, had no such intention.<sup>59</sup> In so far as one is, even though he pays the mortgage debt, protected as against a junior lienor on the principle of subrogation,<sup>60</sup> he might properly, it seems, be so protected, when he does not undertake to pay the debt, although he holds both the land and the debt.

The fact that a certificate of satisfaction or a release is executed upon the acquisition of the two interests by one person does not necessarily show that the mortgage is extinguished in favor of a junior lien,<sup>61</sup> since such a release or certificate is not conclusive of

**v. Ives**, 5 Mich. 515; **Sieberling v. Tipton**, 113 Mo. 373, 21 S. W. 4; **Green v. Currier**, 63 N. H. 563, 3 Atl. 428; **Hoppock v. Ramsay**, 28 N. J. Eq. 413; **Denzler v. O'Keefe**, 34 N. J. Eq. 361; **Mills-paugh v. McBride**, 7 Paige (N. Y.) 509, 34 Am. Dec. 360; **Bell v. Tenny**, 29 Ohio St. 240; **Yoder v. Robinson**, 45 Okla. 165, 145 Pac. 775; **Katz v. Obenchain**, 48 Ore. 352, 120 Am. St. Rep. 821, 85 Pac. 617; **Moore v. Harrisburg Bank**, 8 Watts (Pa.) 138; **Duffy v. McGuinness**, 13 R. I. 595; **Lipscomb v. Goode**, 57 S. C. 182, 35 S. E. 493; **Gleason v. Carpenter**, 74 Vt. 399, 52 Atl. 966; **Hitchcock v. Nixon**, 16 Wash. 281, 47 Pac. 412; **McClaskey v. O'Brien**, 16 W. Va. 791. In South Carolina there are decisions that merger will take place in spite of the resulting injury to the owner of the two interests, unless there is an ex-

press declaration of a contrary intention. **Bleckley v. Branyan**, 26 S. C. 424, 2 S. E. 319; **Agnew v. Renwick**, 27 S. C. 562, 4 S. E. 223. But this is questioned in **Glenn v. Rudd**, 68 S. C. 102, 102 Am. St. Rep. 659, 46 S. E. 555. And see **Lipscomb v. Goode**, 57 S. C. 182, 35 S. E. 493.

. 59. **Lowman v. Lowman**, 118 Ill. 582, 9 N. E. 245; **Hanlon v. Doherty**, 109 Ind. 37, 9 N. E. 782; **Stantons v. Thompson**, 49 N. H. 272; **Katz v. Obenchain**, 48 Ore. 352, 120 Am. St. Rep. 821, 85 Pac. 617; **Shapard v. Mixon**, 122 Ark. 530, 184 S. W. 399. *Contra*, **Lewis v. Hinman**, 56 Conn. 55, 13 Atl. 143.

60. *Post*, § 646.

61. **Lowman v. Lowman**, 118 Ill. 582, 9 N. E. 245; **Hanlon v. Doherty**, 109 Ind. 37, 9 N. E. 782; **Bell v. Woodward**, 34 N. H. 90; **Stantons v. Thompson**, 49

the discharge of the debt secured, and may be shown to have been executed by inadvertence, or in ignorance of the existence of a junior lien.<sup>62</sup> And even the fact that the notes are cancelled has been held not to give priority to the junior incumbrance.<sup>63</sup>

—**In person primarily liable.** While, as above stated, the question of merger *vel non* is ordinarily to be determined with reference either to the intention or the interest of the party in whom the two interests are vested, there may be circumstances under which neither of these considerations can be given effect. Such is the case when one who is primarily liable for the mortgage debt acquires the debt with the lien incidental thereto, “takes an assignment of the mortgage,” as it is usually expressed. One who is primarily liable for a debt cannot acquire the debt, that is, a claim against himself, and assert that the debt is still outstanding. The same person cannot be debtor and creditor, and the effect of his acquisition of the debt is to render it no longer existent. So when the person whose debt is secured by a mortgage, ordinarily the mortgagor himself, acquires the debt with its incidental lien, the debt being discharged, the mortgage lien is extinguished.<sup>64</sup> And the case is the same when a grantee of the land assumes payment of the mortgage and thereafter acquires the mortgage debt. He being primarily liable for the debt, the debt is discharged.<sup>65</sup> It would

N. H. 272. But see *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400, *contra*.

62. *Post*, § 642(c).

63. *Stantons v. Thompson*, 49 N. H. 272; *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443, 65 Pac. 643 (*dictum*).

64. *Hussey v. Hill*, 120 N. C. 312, 58 Am. St. Rep. 789, 26 S. E. 919.

65. *Barnett & Jackson v. Mc*

*Millan*, 176 Ala. 430, 58 So. 400; *Belk v. Fossler*, 49 Ind. App. 248, 96 N. E. 15; *Fouche v. Delk*, 83 Iowa, 297, 48 N. W. 1078; *Lynch v. Pfeiffer*, 110 N. Y. 33, 17 N. E. 402; *Fretwell v. Branyon*, 67 S. C. 95, 45 S. E. 157; *Converse v. Cook*, 8 Vt. 164; *Willson v. Burton*, 52 Vt. 394; *Bier v. Beaty*, 25 W. Va. 830; *Latton v. McCarty*, 142 Wis. 190, 125 N. W. 430. See *Moore v. Harrisburg Bank*, 8

seem, however, that if the person so primarily liable for the mortgage debt undertakes to acquire it by purchase, that is, by paying the amount of the debt to the holder thereof, this involves an extinguishment of the lien by payment rather than by merger, and consequently the rule that merger necessarily results if the person primarily liable acquires the debt and incidental mortgage security would seem properly to be restricted in its actual operation to cases in which such person acquires the debt and mortgage by gift or by the payment of less than the debt. The cases usually fail to distinguish in this regard between payment and merger, but it seems sufficiently evident that if the person primarily liable pays the debt, though nominally purchasing it and taking an assignment, the debt, with its incidental mortgage lien, is extinguished not by reason of its merger but by reason of its payment. That such person cannot claim to be subrogated, on payment of the debt, to the rights of the creditor, even though he undertakes to obtain an assignment of the debt, has been frequently decided,<sup>66</sup> and these decisions would seem to involve the view that the delivery to the creditor, by the person primarily liable, of the amount of the debt, constitutes a payment and extinguishment of the debt.

That one to whom the land has been transferred subject to a mortgage thereon,<sup>67</sup> without assuming the mortgage debt, subsequently acquires the debt and mortgage, does not necessarily involve a discharge of the debt on the theory of merger. He is not personally liable for the debt, and consequently he is not in the impossible position of one asserting a claim against himself. Nevertheless he is, to the extent of the value of the land, under an obligation to his grantor to

Watts (Pa.) 138; Chase Nat. Bank of New York v. Hastings, 20 Wash. 433, 55 Pac. 574. But Rorer v. Ferguson, 96 Va. 411, 31 S. E. 817, appears to be *contra*. And see

Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147.

66. *Post*, § 646.

67. *Ante*, § 622.

pay the debt, and the latter would consequently have a right to insist that, if such grantee pays the amount of the debt to the mortgagee, such payment be regarded as a payment of the debt, effecting its extinguishment in favor of such grantor, rather than a purchase of the debt, even though an intention to the latter effect is indicated by the making to him of an assignment.<sup>68</sup> He can no more claim a right to take an assignment of the debt under such circumstances, as against his grantor, than he can claim a right of subrogation to the mortgagee's rights without an express assignment.<sup>69</sup> He might, however, it seems, without reference to the express assignment, be entitled to be subrogated to the rights of the mortgagee, on thus paying the debt, as against a junior lienor.<sup>70</sup>

It thus appearing that when the transferee of land subject to a mortgage obtains an assignment of the mortgage debt by paying therefor the amount of the debt, the question of the continued existence of the debt is one of payment, it follows that it is only when the assignment of the mortgage debt to such a grantee of the land is made by way of gift, or for a consideration less than the amount of the debt, that the question of whether such an assignment effects a merger of the debt can well arise. The answer to this question appears to be, in the ordinary case, that since the transferee of land subject to a mortgage is under an obligation to the mortgagor to have the debt, so far as possible, paid from the land transferred, he cannot, on taking an assignment of the debt, keep it alive as against the mortgagor, or the land retained by the mortgagor, except perhaps to the extent of its excess over the value of the land transferred. As against junior incumbrancers, however,

68. See *Lydon v. Campbell*, 204 Mass. 580, 91 N. E. 151.

69. *Post*, § 646, note 98.

70. *Post*, this subsection, note

77.

he might well be allowed to keep the debt with the incidental mortgage security in full force and effect.

If one who is primarily liable at law for the whole debt, is but one of two or more co-obligors, it would seem that, as he is entitled to contribution in equity as against the others in case he pays the whole debt,<sup>71</sup> so an assignment to him of the debt and mortgage would not be regarded in equity as effecting a merger of the debt except as regards his share thereof.<sup>72</sup>

— **Conveyance to mortgage creditor.** Upon the conveyance of the mortgaged land to the mortgagee, or to an assignee of the mortgagee, merger will not ordinarily occur in disregard of his intention or interest, since he is under no personal obligation as regards the payment of the debt.<sup>73</sup> The only case, it would seem, in which it would necessarily occur, in spite of his intention or interest to the contrary, would be when, in acquiring the land, he in terms assumes the mortgage debt. In such a case he would be in the position of a creditor who, by contract with his debtor, assumes payment of the debt to himself, and this would necessarily, it seems, extinguish the debt, and with it any lien by which it is secured.<sup>74</sup>

If the conveyance of the land to the mortgage creditor is "subject to" the debt, in the sense of making the land the primary fund for its payment, he

71. *Post*, § 646, note 95.

72. In *Saint v. Cornwall*, 207 Pa. 270, 56 Atl. 440, it seems to be decided that an assignment to him does not necessarily cause a merger even in part.

73. See, *e. g.*, *Cowling v. Britt*, 114 Ark. 175, 169 S. W. 783; *Erooks v. Rice*, 56 Cal. 428; *La grange v. Greer-Wilkinson Lumber Co.*, 59 Ind. App. 488, 108 N. E. 373; *Hartford Fire Ins. Co. v.*

*Buckwalter Lumber Co.*, 116 Miss. 822, 77 So. 798; *Dubbels v. Thompson*, 49 Mont. 550, 143 Pac. 986.

74. See *Kneeland v. Moore*, 138 Mass. 198; *Forthman v. Deters*, 206 Ill. 159, 99 Am. St. Rep. 145, 69 N. E. 97. But *Mathews v. Jones*, 47 Neb. 616, 66 N. W. 622, is apparently to the effect that merger does not necessarily occur in such case.

cannot, it would seem clear, enforce a personal liability against the mortgagor or another upon the debt secured,<sup>75</sup> except perhaps for the excess over the value of the land.<sup>76</sup> But it does not seem that even under such circumstances the debt should be regarded as merged in favor of a person other than one who is personally liable for the debt, a subsequent lienor for instance.<sup>77</sup> No personal liability for the debt being assumed by the mortgage creditor in accepting such a conveyance, he is not in the position of one holding a personal claim against himself, and the debt, with its incidental lien, may properly be regarded as still existent in his favor for the purpose of assertion against persons to whom he owes no obligation to see that the debt is paid.

Though a conveyance of the land to the holder of the mortgage debt would not, in the ordinary case, necessarily involve a merger of the debt, it will do so if such appears to be his intention, or if neither his intention or his interest is shown to be otherwise.<sup>78</sup> And even though his intention or interest is to keep alive the debt and its incidental lien, he cannot do so, it is evident, if the conveyance of the mortgaged premises to such holder of the mortgage debt was made and accepted as a payment of the debt. In such case the debt is discharged, not as having been merged but as having been paid.<sup>79</sup> The conveyance of the property,

75. *National Investment Co. v. Nordin*, 50 Minn. 336, 52 N. W. 899; *Cock v. Bailey*, 146 Pa. 328, 22 Atl. 370.

76. *Post*, § 646, note 99.

77. See *Senter v. Senter*, 87 Ohio St. 377, 101 N. E. 272.

78. *Simpson v. Hall*, 47 Conn. 417; *Coleman & Burden Co. v. Rice*, 115 Ga. 510, 42 S. E. 5; *Swatts v. Bowen*, 141 Ind. 322, 40 N. E. 1057; *Kilmer v. Hannifan*, 113 Iowa, 281, 85 N. W. 16;

*Scott Building & Loan Ass'n v. Palatine Ins. Co.*, 74 Kan. 272, 86 Pac. 142; *Hayden v. Lauffenburger*, 157 Mo. 88, 57 S. W. 721; *Gibbs v. Johnson*, 104 Mich. 120, 62 N. W. 145; *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168; *Burnet v. Denlstown*, 5 Johns. Ch. (N. Y.) 35; *Gleason v. Carpenter*, 74 Vt. 399, 52 Atl. 966.

79. *Ante*, § 640(b).

if intended as payment, is as effective as would be the payment of money, to discharge the debt and the incidental mortgage lien.<sup>80</sup>

In case a portion of the mortgaged land, or an undivided interest therein, is conveyed to the mortgage creditor, the debt will not ordinarily be merged, since it is to the latter's interest that it be kept alive in order that it may be enforced against the other portion of, or undivided interest in, the land.<sup>81</sup> And in case there is no intention that the conveyance operate as a payment in part or in whole of the mortgage debt, and the conveyance cannot be regarded as "subject" to the mortgage, the mortgage may be enforced for the full amount of the debt against the other portion of the land, still remaining in the hands of the grantor or

In *Dickason v. Williams*, 129 Mass. 182, a grantee of the land assumed the mortgage debt and thereafter conveyed to the mortgage creditor, "subject to" the mortgage, "which mortgage forms part of the" consideration named, and it was held that this "operated as a payment of the mortgage debt, by a party legally bound to pay it to a party entitled to receive it." And see *National Investment Co. v. Nordin*, 50 Minn. 336, 52 N. W. 899. In *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147, it appears to be assumed by the court that the conveyance of the land to the mortgage creditor was in payment of the mortgage debt, and yet it was held that the mortgage was not extinguished in favor of a junior lienor.

80. But there may be a conveyance in consideration of the release of the debtor from personal liability without the payment of the debt. *Coburn v. Stephens*, 137

Ind. 683, 45 Am. St. Rep. 218, 36 N. E. 132; *Young v. Hill*, 31 N. J. Eq. 429; *James v. Williams*, 102 Kan. 231, 169 Pac. 1163.

81. *Cole v. Beale*, 89 Ill. App. 426; *Haggerty v. Byrne*, 75 Ind. 499; *Sahler v. Signer*, 44 Barb. (N. Y.) 606; *Thebaud v. Hollister*, 37 N. J. Eq. 402; *Souther v. Pearson*, — (N. J. Eq.) —, 28 Atl. 450. There are occasional suggestions that there cannot possibly be any merger in such case. *Chase v. Van Meter*, 140 Ind. 321, 39 N. E. 455; *Klock v. Cronkhite*, 1 Hill (N. Y.) 107. This seems questionable. In South Carolina it has been decided that the acquisition by the mortgagee of a part of the mortgaged land does not of itself discharge the debt to a greater extent than the value of such part. *Trimmier v. Vise*, 17 S. Car. 499, 43 Am. Rep. 624; *Ex Parte Powell*, 68 S. C. 324, 47 S. E. 440.

subsequently conveyed by him to another.<sup>82</sup> But a conveyance of a part of the mortgaged land to the mortgage creditor ordinarily extinguishes a proportionate part of the debt in favor of a grantee of another part, since otherwise the whole burden of the debt might fall upon such other part.<sup>83</sup>

A conveyance of the mortgaged land to one who has but a share in the debt secured can evidently not effect a merger so far as concerns the other share in the debt.<sup>84</sup> Whether his share in the debt is merged appears to be, as in other cases, a question to be determined by reference to his intention and interest,<sup>85</sup> except when he actually assumes the payment of the debt.<sup>86</sup>

— **Subsequent purchasers.** Since the question whether the mortgage debt has been merged, so as to extinguish it, with its incidental lien, is ordinarily to be determined with reference to the intention or interest of the person in whom the debt and the land have come together, it would seem that a subsequent purchaser of land has no right to assume that a mortgage, which appears on the records as unsatisfied or unreleased, is no longer an existing incumbrance, merely because the mortgage debt and the land have belonged, at one time, to the same person. And there are

82. *Smith v. Roberts*, 91 N. Y. 470. In this case there was a purchase by the mortgagee of part of the land, and this was paid for irrespective of the mortgage, *i. e.*, he did not take it "subject to" the mortgage. See *Sanford v. Van Arsdall*, 53 Hun (N. Y.) 70, 6 N. Y. Supp. 494.

83. *Martin v. Turnabaugh*, 153 Mo. 172, 54 S. W. 515; *Brooks v. Benham*, 70 Conn. 92, 66 Am. St. Rep. 87, 38 Atl. 908, 39 Atl. 1112; *Meacham v. Steele*, 93 Ill. 135.

84. *Ehrman v. Alabama Mineral Land Co.*, 109 Ala. 478, 20 So. 112; *Strever v. Earl*, 60 Hun (N. Y.) 528, 15 N. Y. Supp. 350; *Clark v. Clark*, 56 N. H. 105.

85. See *Wallace v. Blair*, 1 Grant (Pa.) 75; *Carpenter v. Gleason*, 58 Vt. 244, 4 Atl. 706; *Stewart v. Eaton*, 20 Wash. 378, 55 Pac. 314.

86. *Ehrman v. Alabama Mineral Land Co.*, 109 Ala. 478, 20 So. 112.



decisions to that effect.<sup>87</sup> Conceding this to be so, it is necessarily immaterial that, by reason of the failure to record an assignment of the debt and mortgage, the subsequent purchaser of the land is misled into thinking that the assignor still owned the debt and mortgage at the time of his subsequent acquisition of the land.<sup>88</sup> There are, however, decisions to a contrary effect, that a purchaser of the land has a right to presume a merger of the mortgage debt by reason of its acquisition by the owner of the land, or of the acquisition of the land by the owner of the debt, in the absence of any notice on his part of matters indicating that no merger did actually take place.<sup>89</sup> And some of these decisions are to the effect that a purchaser of the land has a right to assume that the debt, with its lien, has been merged. if by reason of the failure to record an assignment of the debt and mortgage by one who subsequently acquired the land, he appears on the records to have owned both interests simultaneously,<sup>90</sup> provided at least such purchaser makes reasonable inquiry to ascertain that the mortgage is no longer outstanding.<sup>91</sup> But even in jurisdictions where otherwise a subsequent purchaser

87. *Edgerton v. Young*, 43 Ill. 464; *Peterborough Sav. Bank v. Pierce*, 54 Neb. 712, 75 N. W. 20; *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685, 41 Atl. 862; *Aiken v. Milwaukee & St. P. R. Co.*, 37 Wis. 69.

88. *Newman v. Fidelity Savings & Loan Ass'n*, 14 Ariz. 354, 128 Pac. 53; *Jordan v. Cheney*, 74 Me. 587; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168; *Pratt v. Bank of Bennington*, 10 Vt. 293, 33 Am. Dec. 201; *Oregon v. Washington*, 5 Sawy. 336, Fed. Cas. No. 10556. See *International Bank of*

*Chicago v. Wilshire*, 108 Ill. 143.

89. *Gregory v. Savage*, 32 Conn. 250; *Dubbels v. Thompson*, 49 Mont. 550, 143 Pac. 986, and cases in next following notes.

90. *Bowling v. Cook*, 39 Iowa, 200; *James v. Newman* 147 Iowa, 574, 126 N. W. 781; *Pritchard v. Kalamazoo College*, 82 Mich. 587, 47 N. W. 31; *Leonard v. Leonia Heights Land Co.*, 81 N. J. Eq. 43, 85 Atl. 602.

91. *Ames v. Miller*, 65 Neb. 204, 91 N. W. 250; *Artz v. Yeager*, 36 Ind. App. 677, 66 N. E. 917; *Pritchard v. Kalamazoo College*, 82 Mich. 587, 47 N. W. 31.

would have no right to presume a merger from the apparent ownership of the two interests by one person at the same time, a presumption to this effect would be justified if such person, in subsequently conveying the land, entered into a covenant for title which would cover the mortgage,<sup>92</sup> and also if such person, while apparently owner of the debt and land, placed on record a release or satisfaction of the mortgage.<sup>93</sup>

— (f) **Bar of obligation by limitations.** By the weight of authority, the fact that the recovery of a personal judgment for the amount of the debt secured is barred by the running of the statute of limitations does not affect the right to enforce the mortgage lien against the land, that is, does not in effect extinguish the mortgage.<sup>94</sup> There are, however, in quite a num-

92. *Pearson v. Bailey*, 180 Mass. 229, 62 N. E. 265; *Thomas v. Simmons*, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381; *Summy v. Ramsey*, 53 Wash. 93, 101 Pac. 506.

93. *Ogle v. Turpin*, 102 Ill. 148. See *ante*, this subsection, notes 52, 53.

94. *Austin v. Edwards*, — Ala. —, 78 So. 886; *Belknap v. Gleason*, 11 Conn. 160, 27 Am. Dec. 721; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96; *Elkins v. Edwards*, 8 Ga. 325 (see *Allen v. Glenn*, 87 Ga. 414, 13 S. E. 565); *Joy v. Adams*, 26 Me. 330; *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322; *Thayer v. Mann*, 19 Pick. (Mass.) 532; *Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783; *Michigan Insur. Co. v. Brown*, 11 Mich. 265; *Campbell v. Upton*, 56 Neb. 385, 76 N. W. 910; *Cookes v. Culbertson*, 9 Nev. 159; *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46

Atl. 728; *Hurlbert v. Clark*, 128 N. Y. 295, 14 L. R. A. 59, 28 N. E. 638; *Pratt v. Huggins*, 29 Barb. (N. Y.) 277; *Menzel v. Hinton*, 132 N. C. 660, 95 Am. St. Rep. 647, 44 S. E. 385; *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166; *McCarty v. Goodsman*, — N. D. —, 167 N. W. 503; *Fisher's Executor v. Mossman*, 11 Ohio St. 42; *Myer v. Beal*, 5 Ore. 30; *Hartmanft's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 Atl. 104; *Pallou v. Taylor*, 14 R. I. 277; *Nichols v. Briggs*, 18 S. C. 473; *Alexander v. Ransom*, 16 S. D. 302, 92 N. W. 418; *Irvine v. Shrum*, 97 Tenn. 259, 36 S. W. 1089; *Gleason v. Kinney's Adm'r*, 65 Vt. 560, 27 Atl. 208; *Smith v. Washington City, etc., R. Co.*, 33 Gratt. (Va.) 617; *Camden v. Alkire*, 24 W. Va. 674; *Potter v. Stransky*, 48 Wis. 235, 4 N. W. 95; *Ogden v. Bradshaw*, 161 Wis. 49, 150 N. W. 399, 152 N. W. 654; *Hardin v. Boyd*, 113 U. S. 756,

ber of states, decisions to the opposite effect, that the bar of the personal action precludes the subsequent enforcement of the lien,<sup>95</sup> and in several states it is expressly so provided by statute.<sup>96</sup>

The decisions to the effect that, apart from a statute expressly so providing, the bar of the personal claim extinguishes the lien, are ordinarily based on the theory that since the debt is the principal thing and the mortgage merely an accessory, the latter cannot exist after the right of action on the first has come to an end. But this involves an assumption that the statutes of limitations operate by way of destruction of the cause of action, while the view more usually accepted is that they operate upon the remedy only. Logically, it would seem, the question whether the bar of the debt extinguishes the lien depends upon whether, in that particular state, the bar of the debt extinguishes the debt. That the mortgagee has or has not the legal title, though occasionally referred to as a controlling consideration in this regard,<sup>97</sup> is, it is conceived, im-

28 L. Ed. 1141; *Higgins v. Scott*, 2 B. & Ad. 413.

95. *Ford v. Nesbitt*, 72 Ark. 267, 79 S. W. 793; *Kern Valley Bank v. Koehn*, 157 Cal. 237, 107 Pac. 111; *McGovney v. Gwillim*, 16 Colo. App. 284, 65 Pac. 346; *Law v. Spence*, 5 Idaho, 244, 48 Pac. 282; *Harris v. Mills*, 28 Ill. 44, 81 Am. Dec. 259; *Pollock v. Maison*, 41 Ill. 516; *Lilly v. Dunn*, 96 Ind. 220; *Jenks v. Shaw*, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900 (mortgage not barred till debt barred); *Fitzgerald v. Flanagan*, 155 Iowa, 217, Ann. Cas. 1914C, 1104, 135 N. W. 738; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765 (mortgage not barred till debt barred); *Kulp v. Kulp*, 51 Kan. 341, 21 L. R. A. 550, 32 Pac. 1118; *Allen v. Shep-*

*herd*, 162 Ky. 756, 173 S. W. 135; *Gay v. Hebert*, 44 La. Ann. 301, 10 So. 775; *Fievel v. Zuber*, 67 Tex. 275, 3 S. W. 273 (after debt barred no judicial foreclosure but still power of sale); *George v. Butler*, 26 Wash. 456, 57 L. R. A. 396, 90 Am. St. Rep. 756, 67 Pac. 263; *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434 (foreclosure not barred till debt barred).

96. See *Austin v. Steele*, 68 Ark. 348, 58 S. W. 352; *London & S. F. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583; *Bumgardner v. Wealand*, 197 Mo. 433, 95 S. W. 211; *Haggart v. Wilczinski*, 143 Fed. 22, 74 C. C. A. 176 (Mississippi).

97. See *e. g.*, 16 Harv. Law Rev. at p. 445.

material. Even though he has the legal title, he cannot utilize it for the purpose of foreclosure, or otherwise, after the debt has been extinguished, and conversely, although he has not the legal title, he may enforce the lien even after his personal remedy against the mortgagor is barred, provided only the debt secured can be regarded as still existent.

— (g) **Recovery of personal judgment.** The recovery of a judgment in a court of record has the effect of merging the original cause of action in the judgment, but it does not extinguish any remedy except the particular cause of action in respect to which the judgment was recovered, and the creditor may still enforce any collateral security which he may have taken.<sup>98-99</sup> Consequently, the recovery of a personal judgment on a debt secured by mortgage, though it precludes any subsequent action on the debt against the debtor personally, does not affect the right to enforce the mortgage security, that is, it does not cause an extinguishment of the mortgage.<sup>1</sup>

— (h) **Change in note or bond.** Conceding, as has been stated,<sup>2</sup> that the mortgage operates as security for the debt as it existed or was created at the time of the execution of the mortgage instrument, and that the promissory note or bond usually given for the amount of the debt is merely evidence of the debt, or at most collateral security for the payment of the debt, it would follow that a change in such evidence or collateral security would not affect the debt itself or the mortgage

98-99. *Drake v. Mitchell*, 3 East 251; *Wegg Prosser v. Evans* (1895), 1 Q. B. 108.

1. *Priest v. Wheelock*, 58 Ill. 114; *Darst v. Bates*, 95 Ill. 493; *Applegate v. Wilson*, 13 Ind. 75; *Jordan v. Smith*, 30 Iowa, 500; *Freeburg v. Eksell*, 123 Iowa, 464, 99 N. W. 118; *Rossiter v. Merri-*

*man*, 80 Kan. 739, 104 Pac. 858; *Jewett v. Hamlin*, 68 Me. 172; *Perkins v. Pitts*, 11 Mass. 125; *Fisher v. Fisher*, 98 Mass. 303; *Torrey v. Cook*, 116 Mass. 163; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271.

2. *Ante*, § 607(c), notes 95-98a.

securing the debt. In accordance with this view are numerous decisions that the substitution of another note for that originally given, whether for the purpose of renewal or otherwise, does not affect the existence of the debt for which the mortgage stands as security, nor of the mortgage itself, in the absence of evidence of an intention that it should have that effect.<sup>3</sup> That is, as sometimes expressed, a mere change in the evidence of the debt secured by the mortgage does not affect the debt or the security.<sup>4</sup> And this is the case even in states in which the presumption ordinarily obtains that a negotiable note given for a preexisting debt was intended to extinguish the debt, such presumption not being recognized when the effect thereof would be to deprive the creditor of the benefit of a mortgage or other security.<sup>5</sup>

3. *Cullum v. Branch Bank at Mobile*, 23 Ala. 797; *Lent v. Morrill*, 25 Cal. 492; *Newhall v. Hatch*, 134 Cal. 269, 55 L. R. A. 673, 66 Pac. 266; *Bolles v. Chauncy*, 3 Conn. 389; *Flower v. Elwood*, 66 Ill. 446; *Stein v. Kann*, 244 Ill. 32, 91 N. E. 77; *Dumell v. Tersetteg*, 23 Ind. 397, 85 Am. Dec. 466; *Sloan v. Rice*, 41 Iowa, 465; *Bourne v. Littlefield*, 29 Me. 302; *Buck v. Wood*, 85 Me. 204, 27 Atl. 103; *Pomroy v. Rice*, 16 Pick. (Mass.) 22; *Jenkins v. Andover Theological Seminary*, 205 Mass. 376, 91 N. E. 552; *Boxheimer v. Gunn*, 24 Mich. 372; *Heard v. Evans*, 1 Freem. Ch. (Miss.) 79; *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821; *Byers v. Chase*, — Neb. —, 167 N. W. 405; *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; *Dunham v. Dey*, 15 Johns. (N. Y.) 554, 8 Am. Dec. 282; *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 393, 49 Am. Dec. 175; *Alston v. Alston*,

2 Rich. (S. C.) 427, note, *Seymour v. Darrow*, 31 Vt. 122. For cases in which the circumstances were held to show an intention to extinguish the note and mortgage, see *Wilhelmi v. Leonard*, 13 Iowa, 330; *Tucker v. Alger*, 30 Mich. 67; *Jarnagan v. Gaines*, 84 Ill. 103.

4. *Cullum v. Branch Bank at Mobile*, 23 Ala. 800; *London & S. F. Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492; *Simmons Hardware Co. v. Thomas*, 147 Ind. 313, 46 N. E. 645; *Lewis v. Starke*, 10 Sm. & M. (Miss.) 120; *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821; *New Hampshire Bank v. Willard*, 10 N. H. 210; *Choteau v. Thompson*, 3 Ohio St. 424; *Nichols v. Briggs*, 18 S. C. 473; *Artrip v. Rosnake*, 96 Va. 277, 31 S. E. 4; *Williams v. Starr*, 5 Wis. 534.

5. *Reeder v. Nay*, 95 Ind. 164; *Jouchert v. Johnson*, 108 Ind. 436,

In applying the doctrine above referred to, the courts have shown a tendency, wherever possible, to recognize the indebtedness secured by the mortgage as continuing, in spite of discrepancies in the terms of the successive notes or other instruments evidencing an indebtedness. Thus the presumption in favor of the continued existence of the debt secured by the mortgage has been held to apply in spite of the fact that the substituted note or other instrument has indorsers or sureties, while the former note had none, or vice versa, or that the indorsers or sureties are different,<sup>6</sup> that the new note is payable on demand, while the former note was payable at a certain date,<sup>7</sup> or that they were made payable at different places.<sup>8</sup> Even an instrument of an entirely different character may be substituted, as when a note was given originally, and subsequently a recognizance was given for the debt,<sup>9</sup> when a note was substituted for a bond originally given,<sup>10</sup> or when a judgment note was substituted for a single bill.<sup>11</sup>

Provided the indebtedness can be regarded as the same, the fact that the new note is given by a different person, as for instance, by a purchaser of the property from the maker of the original note, has been regarded as immaterial,<sup>11a</sup> as has the fact that the new note is in favor, not of the original creditor, but

9 N. E. 413; *Bunker v. Barron*, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253; *Lovell v. Williams*, 125 Mass. 442; *Pinney v. Kimpton*, 46 Vt. 80.

6. *Ford v. Burks*, 37 Ark. 91; *Flower v. Elwood*, 66 Ill. 438; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Moore v. Thompson*, 100 Ky. 231, 37 S. W. 1042; *Wright v. Wooters*, 46 Tex. 380.

7. *Buck v. Wood*, 85 Me. 204, 27 Atl. 103.

8. *Whittaker v. Dick*, 5 How. (Miss.) 296, 35 Am. Dec. 436.

9. *Davis v. Maynard*, 9 Mass. 242.

10. *Maryland etc., N. Y. Coal & Iron Co. v. Wingert*, 8 Gill (Md.) 170.

11. *Cover v. Black*, 1 Pa. 493.

11a. *McGuire v. Van Pelt*, 55 Ala. 344; *Bond v. Liverpool & L. & G. Ins. Co.*, 106 Ill. 654; *Foster v. Paine*, 63 Iowa, 85, 18 N. W. 699; *Commercial Bank v.*

of one to whom the mortgage debt has been assigned.<sup>12</sup>

The same principle applies in case a part of the debt is paid and a new note is taken for the balance remaining due, the mortgage being as effective to secure payment of such balance as of the whole original debt.<sup>13</sup> And the debt continues to be secured by the mortgage although the note originally given therefor is cancelled, and a new note is executed for a greater amount, covering the debt secured and also another debt.<sup>14</sup> And provided the amount which the mortgage was made to secure is not exceeded, it is effective to secure what is due although the debt, after being reduced, is again increased.<sup>15</sup>

Suggestions are occasionally to be found that the surrender or cancellation of the original note or bond tends to show an intention that the giving of the subsequent note or bond shall operate as a payment of the debt secured so as to extinguish the mortgage lien.<sup>16</sup>

Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; New Hampshire Bank v. Willard, 10 N. H. 210. But see Sharp v. Collins, 74 Mo. 266; Hadlock v. Bulfinch, 31 Me. 246, as to the presumption in such case.

12. Moody v. Stubbs, 94 Kan. 250, 146 Pac. 346; Burdett v. Clay, 8 B. Mon. (Ky.) 287; Watkins v. Hill, 8 Pick. (Mass.) 522; Cullum v. Branch Bank, 23 Ala. 797; McGuire v. Van Pelt, 55 Ala. 344; Flower v. Elwood, 66 Ill. 438. Compare Tucker v. Alger, 30 Mich. 67. So in the case of a renewal note given to the husband of the person to whom the original note and mortgage securing it were given. Pomroy v. Rice, 16 Pick. (Mass.) 22.

13. Franklin v. Cannon, 1 Root (Conn.) 500; Bray v. First Avenue Coal Min. Co., 148 Ind.

599, 47 N. E. 1073; Chase v. Abbott, 20 Iowa, 154; Maryland, etc., Coal, etc., Co. v. Wingert, 8 Gill (Md.) 170; Gleason v. Wright, 53 Miss. 247; Lippold v. Held, 58 Mo. 213; Davis v. Thomas, 66 Neb. 26, 92 N. W. 187; Kaphan v. Ryan, 16 S. C. 352; Seymour v. Darrow, 31 Vt. 122.

14. Port v. Robbins, 35 Iowa, 268; Boxheimer v. Gunn, 24 Mich. 372; Bourne v. Littlefield, 29 Me. 302; Joyner v. Stancill, 108 N. C. 153, 12 S. E. 912; Seymour v. Darrow, 31 Vt. 122, 130.

15. Brinckerhoff v. Lansing, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; De Cottes v. Jeffers, 7 Fla. 284.

16. Wilkes v. Miller, 156 N. C. 428, 72 S. E. 482 (surrender necessary for discharge); Davis v. Thomas, 66 Neb. 26, 92 N. W.

The propriety of such an inference of intention would appear, however, to be open to question.<sup>17</sup> And opposed to such a view are occasional decisions that the fact that the original note is surrendered to the maker at the time of the delivery of the substituted note, and is afterwards shown by him to an intending purchaser of the mortgaged property, does not justify the latter in assuming that the mortgage has been extinguished by the discharge of the debt secured.<sup>18</sup>

That the new note is itself secured by a new mortgage upon the same,<sup>19</sup> or upon different,<sup>20</sup> property does not necessarily show an intention that it should operate as a discharge of the original debt or of the mortgage securing it.

As the mere taking of a new note does not affect the mortgage when the debt was originally evidenced by another note, so the taking of a note as evidence of a debt, already secured by mortgage, but not previously evidenced by a note, will not affect the mortgage security.<sup>21</sup>

187 (surrender strong evidence); *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. W. 492 (cancellation without surrender immaterial); *Bonestell v. Bowie*, 128 Cal. 511, 61 Pac. 78 (surrender and cancellation not conclusive).

17. See *Cook v. Gilchrist*, 82 Iowa, 277, 48 N. W. 84, to the effect apparently, that the cancellation and surrender of the former bond is no evidence of intention.

18. *Bolles v. Chauncy*, 8 Conn. 389; *Boxheimer v. Gunn*, 24 Mich. 372. See *Heively v. Matteson*, 54 Iowa, 505, 6 N. W. 732.

19. *Higman v. Humes*, 127 Ala. 404, 30 So. 733; *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828, (but see *Williamson v.*

*Strong*, 136 Cal. XX, 68 Pac. 486); *Walters v. Walters*, 73 Ind. 425; *Pouder v. Ritzinger*, 102 Ind. 571, 1 N. E. 44; *Watson v. Bowman*, 142 Iowa, 528, 119 N. W. 623; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Hinton v. Ferree*, 107 N. C. 154, 12 S. E. 235; *New England Loan & Trust Co. v. Stephens*, 16 Utah 385, 52 Pac. 624 (partial mortgages substituted). And see *post*, 641. But see *Dryden v. Stephens*, 19 W. Va. 1, where it is held that the giving of a note and mortgage by a purchaser of the property discharges the prior mortgage.

20. *Jenkins v. Daniel*, 125 N. C. 161, 74 Am. St. Rep. 632, 34 S. E. 239.

21. *Gravlee v. Lamkin*, 120 Ala.



That subsequently to the execution and delivery of the mortgage instrument, it is agreed that the mortgage debt shall be paid in a medium other than was originally specified, as, for instance, in gold or cotton, has been held not to affect the existence of the mortgage lien as security for the debt.<sup>22</sup>

In the case of a mortgage given to secure indorsers or sureties on a note or draft against loss by reason of the contract of indorsement or suretyship, the conditional indebtedness secured by the mortgage is ordinarily regarded as still existent in spite of the substitution of another or other notes or drafts, on which the persons secured by the mortgage again appear as endorsers or sureties.<sup>23</sup> And the fact that the other endorsers are different,<sup>24</sup> or even that the signer or signers of the notes are different,<sup>25</sup> has been regarded as not affecting the mortgage security, provided only the indebtedness still existing can be regarded as the same as that in connection with which the original contract of indorsement or suretyship was entered into. And the mortgage has been regarded as continuing although the new notes or drafts are for amounts and periods different from the amounts and periods specified in the notes originally given, provided they do not

210, 24 So. 756; *Shipman v. Lord*, 60 N. J. Eq. 484, 46 Atl. 1101. So the fact that a note is given for accrued interest does not take such interest out of the operation of the mortgage. *Frink v. Branch*, 16 Conn. 260; *Dean v. Ridgeway*, 82 Iowa, 757, 48 N. W. 923.

22. *Lehman v. Marshall*, 47 Ala. 362; *Belloc v. Davis*, 38 Cal. 242.

23. *Greist v. Gowdy*, 81 Conn. 351, 71 Atl. 555; *De Cottes v. Jeffers*, 7 Fla. 284; *Simmons Hardware Co. v. Thomas*, 147 Ind. 313,

46 N. E. 645; *Markell v. Eichelberger*, 12 Md. 78; *Boxheimer v. Gunn*, 24 Mich. 372; *Stavers v. Philbrick*, 68 N. H. 379, 36 A. 1. 16; *Newburgh Nat. Bank v. Bigler*, 83 N. Y. 51; *Patterson v. Johnson*, 7 Ohio, 225; *Choteau v. Thompson*, 3 Ohio St. 424; *Alston v. Alston*, 2 Rich. Law (S. C.) 428. But *Bell v. Murphy*, 2 L. 3. Ann. 765, is apparently *contra*.

24. *Pond v. Clarke*, 14 Conn. 334.

25. *Moore v. Thompson*, 100 Ky. 231, 37 S. W. 1042.

exceed the sum for which the security was originally given.<sup>26</sup>

In the case of a mortgage on the land of one person securing the debt of another, the former is, as regards the land, in the position of a surety, and consequently an extension of the debt in favor of the principal debtor, by taking a renewal note or otherwise, will operate to relieve the land from the burden of the mortgage.<sup>27</sup>

§ 641. **Effect of new mortgage.** A mortgage is not necessarily discharged by reason of the fact that another mortgage upon the same property is subsequently executed to secure the same debt,<sup>28</sup> and consequently the first mortgage may still retain its effectiveness, for the purpose of protecting the mortgage creditor against an intervening incumbrance,<sup>29</sup> of excluding the claim of the mortgagor's wife under a statute passed after the making of the first mortgage and before the making of the second,<sup>30</sup> or for other purposes.<sup>31</sup>

In the absence of any evidence of an intention to extinguish or supersede the prior mortgage, it remains in full force and effect,<sup>32</sup> since the mere taking of

26. *Gault v. McGrath*, 32 Pa. St. 392; *De Cottes v. Jeffers*, 7 Fla. 284 (notes reduced and then increased); *Brinckerhoff v. Lansing*, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175.

27. *Metz v. Todd*, 36 Mich. 473; *Campion v. Whitney*, 30 Minn. 177, 14 N. W. 806; *Smith v. Townsend*, 25 N. Y. 479; *Peoples Insurance Co. v. McDonnell*, 41 Ohio St. 650; *Ayres v. Wattson*, 57 Pa. St. 360; and see *Benneson v. Savage*, 130 Ill. 352, 22 N. E. 838; *Jenkins v. Daniel*, 125 N. C. 161, 74 Am. St. Rep. 632, 34 S. E. 239.

28. *Gerrish v. Gerrish*, 62 N. H. 397; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Burdett*

*v. Clay*, 8 B. Mon. (Ky.) 827; *Springer v. Bradley*, — (Mo.) —, 188 S. W. 175; *Wilkes v. Miller*, 156 N. C. 428, 72 S. E. 482; and cases cited *ante*, § 638(h), note 19. -

29. *Higman v. Humes*, 127 Ala. 404, 30 So. 733; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Young v. Shaner*, 73 Iowa, 555, 5 Am. St. Rep. 701, 35 N. W. 629; *Walters v. Walters*, 73 Ind. 425.

30. *Pouder v. Ritzinger*, 119 Ind. 597, 20 N. E. 654; *Burns v. Thayer*, 101 Mass. 426.

31. *Swift v. Kraemer*, 13 Cal. 526.

32. *Higman v. Humes*, 127 Ala. 404, 30 So. 733; *White v. Steven-*

other security has never been regarded as affecting that previously given.<sup>33</sup> And even though the first mortgage is satisfied or released, if this done at the time of the making of the second mortgage and as a part of the same transaction, the courts have tended to regard it as done for the purpose of such second mortgage only, and as consequently not letting in an intervening claim.<sup>34</sup> In accordance with the decisions referred to it has been held that a mortgage for purchase money does not lose its priority by the subsequent taking of another mortgage in lieu thereof.<sup>35</sup> And there is a decision to the effect that when there is a sale under a senior mortgage, the mortgage given by the purchaser to secure the purchase money enjoys the same priority as against the junior mortgage as did the mortgage under which the sale was made.<sup>36</sup> On the other hand, it has been said that the execution of a receipt for the debt secured will raise a presumption of extinguishment of the first mortgage,<sup>37</sup> and an agreement that it shall be extinguished has been accorded full effect.<sup>38-39</sup>

son, 144 Cal. 104, 77 Pac. 828; *Christian v. Newbury*, 61 Mo. 446.

33. *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551.

34. *Shurn v. Wilkinson*, 131 Ark. 167, 198 S. W. 279; *Swift v. Kraemer*, 13 Cal. 526; *Packard v. Kingman*, 11 Iowa, 219; *Burns v. Thayer*, 101 Mass. 426; *American Sav. Bank & Trust Co. v. Helgen*, 67 Wash. 572, 122 Pac. 26. But see *Gray v. Gilliam*, 166 Ky. 194, 179 S. W. 22; *Stanley v. True*, 114 Me. 503, 96 Atl. 1057. In *Bruse v. Nelson*, 35 Iowa, 157, and *Young v. Shaner*, 73 Iowa, 555, 5 Am. St. Rep. 701, 35 N. W. 629, it was held that the cancellation of the first

mortgage at the time of taking the second, was to be regarded as voidable by reason of mistake of fact, if the mortgagee was ignorant of an intervening incumbrance.

35. *Austin v. Underwood*, 37 Ill. 438, 87 Am. Dec. 254; *Hassell v. Hassell*, 129 Ala. 326, 29 So. 695. So in the case of the acceptance of a mortgage in place of the vendor's lien. *Jones v. Davis*, 121 Ala. 348, 25 So. 789.

36. *Threefoot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 So. 513.

37. *Higman v. Humes*, 127 Ala. 404, 30 So. 733.

38-39. *Lewis v. Starke*, 10 Sm. & M. (Miss.) 120; *Benton Land*

§ 642. **Express release or certificate of satisfaction** — (a) **General considerations.** Although, as above stated, the discharge of the obligation secured, whether by payment or otherwise, extinguishes the mortgage lien, and such discharge can be shown, in defense to a proceeding to enforce the mortgage, by evidence of the same character as in an action to enforce personal liability under the obligation secured, still it is most important, for the protection not only of the present owner of the property, but also of future owners, that evidence of the discharge of the obligation be given the same permanence and accessibility as was given to the creation of the lien, by its entry upon the public records. Recognizing the necessity of such appearance upon the records of the discharge of the obligation secured, the legislatures of the various states have provided that the mortgagee or his assignee shall, upon request of the mortgagor or other person interested in the land, execute a release or other instrument evidencing satisfaction of the mortgage obligation, available for record, or shall enter or have entered on the records an acknowledgment of satisfaction of the obligation. In most of the states provision is made for the entry of satisfaction upon the margin of the record of the mortgage itself, this entry being made in same states by the holder of the mortgage and in some by the clerk or register of deeds after acknowledgment of satisfaction by such holder.

In case the mortgagee or his assignee fails to execute a release or the statutory certificate of satisfaction, the owner of the land may, by a proceeding in equity, or an equivalent statutory proceeding, compel this to be done.<sup>40</sup> And the statutes of many states impose a

Co. v. Zeitler, 182 Mo. 251, 70 L. R. A. 94, 81 S. W. 193; Chattanooga First Nat. Bank v. Radford Trust Co., 80 Fed. 569, 26 C.

C. A. 1; Macomber v. French, 198 Mass. 20, 84 N. E. 328.

40. Remington Paper Co. v. O'Dougherty, 81 N. Y. 474; King-

pecuniary penalty upon one who, upon the discharge of the debt secured, fails to execute the release or certificate, or to have it entered, as the case may be.<sup>41</sup>

It may occur that the parties interested agree to extinguish the lien as regards either the whole or a part of the land, leaving the debt still existent in whole or in part, and such an agreement is carried into effect by the execution, by the mortgagee, or his successor in interest, of a release of the land, in whole or in part, from the lien. In such a case the release operates directly to free the land, or a part thereof, from the lien of the mortgage, and is in that regard analogous to a release by way of extinguishment at common law. So a release of part of the land from the mortgage may be executed in compliance with a provision of the mortgage instrument for such a release upon part payment of the debt secured.<sup>42</sup> The ordinary release of a mortgage, so called, on the other hand, appears to constitute merely a discharge of the obligation secured by the mortgage, or evidence of such discharge, except as occasionally it also involves a reconveyance of the legal title. The designation frequently employed in this connection, that of certificate of "satisfaction," is for this reason more appropriate than the expression "release."

man v. Sinclair, 80 Mich. 427, 20 Am. St. Rep. 522, 45 N. W. 187; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225.

41. Jones, Mortgages, §§ 992-1037.

42. It has occasionally been decided that an agreement for the release of a portion of the land upon the payment of a sum named "apportioned the mortgage debt," so that it could be enforced against that portion of the land only to the extent of that sum. Chicago Lumber & Coal Co. v.

Swalley, 85 Kan. 4, 116 Pac. 475; Scott v. Smith, 58 Ore. 591, 115 Pac. 969. Such a view would seem to bear somewhat severely on the mortgagee and not, in the ordinary case, to accord with his probable intention.

A covenant by the mortgagee to execute partial releases upon the payment of specified portions of the debt secured has been decided, at least when not in terms in favor of the assigns, to be personal to the mortgagor, so that a subsequent transferee of the land

As before stated,<sup>43</sup> in some jurisdictions in which the legal title is vested in the mortgagee, the discharge of the obligation secured, if after maturity, does not of itself revest the legal title in the mortgagor or in his successor in interest, and it does not seem that a mere acknowledgment of satisfaction of the mortgage obligation, or even a mere release of the land from the lien, could, apart from statute, be construed as showing an intention to reconvey the legal title to the mortgagor.<sup>44</sup> But the statutes of most of the states in which the matter is of practical importance provide that a release or satisfaction in the prescribed form shall revest all title in the mortgagor or his successor in interest, or shall have the effect of a conveyance by way of release.

— (b) **Conveyance by mortgage creditor as release.** The question has occasionally arisen whether a conveyance, by the mortgage creditor to the owner of the land, in terms of the land, is effective to extinguish the rights of the creditor as such, and whether it does have such an effect depends on the language used, construed with reference to the circumstances of the case, particularly the possible existence of another object in making the conveyance, as when the creditor has some other interest in the land.<sup>45</sup> So it has been decided that the fact that the creditor, as husband of the

could not avail thereof. *Clark v. Cowan*, 206 Mass. 252, 92 N. E. 474; *Pierce v. Kneeland*, 16 Wis. 672. 84 Am. Dec. 726.

43. *Ante*, § 640(a), note 24.

44. In *Lowe v. Convention of Protestant Episcopal Church*, 83 Md. 409, 35 Atl. 87, it was held that the statutory "short form" of release of mortgage was insufficient to reconvey the legal title, at least as to a portion of the property only. In *Wolfe v. Doe*, 13

Sm. & M. (Miss.) 103, 51 Am. Dec. 147, it was intimated that a "satisfaction" on the margin of the record did revest title in the mortgagor.

45. *Barr v. Foster*, 25 Colo. 28, 52 Pac. 1101; *Woodbury v. Aikin*, 13 Ill. 639; *Mable v. Hattinger*, 48 Mich. 341, 12 N. W. 198; *Merritt v. Harris*, 102 Mass. 326; *Barnstable Sav. Bank v. Barrett*, 122 Mass. 172; *Collins v. Stocking*, 98 Mo. 290, 11 S. W. 750 (con-

owner of the land, joins in a conveyance thereof by her, does not extinguish his rights under the mortgage, his joinder being intended for a different purpose.<sup>46</sup>

In a number of cases a conveyance by the mortgage creditor to the owner of the land, either by way of quitclaim deed,<sup>47</sup> or otherwise,<sup>48</sup> has been regarded as effecting a discharge or release of the former's interest, but in several of these cases there is a lack of explicitness as to whether the instrument operates as a discharge of the obligation secured, and for this reason extinguishes the mortgage security, or whether it operates merely upon the security, leaving the personal obligation for the debt unimpaired. Whether it operates in the one way or the other would seem to depend upon the construction of the language of the instrument. In some jurisdictions it might be given effect, not as a discharge of either the obligation or of the mortgage security, but as an assignment of the mortgage debt, in which case the question whether the mortgage debt with its attendant security is discharged would be determined by the considerations applicable in connection with the question of merger of the debt, before considered.<sup>49</sup>

— (c) **Power or authority to execute.** Since the satisfaction or release is merely an acknowledgment of the discharge of the debt or, if the debt is not discharged, a relinquishment of the right to proceed against the land to obtain payment thereof, the proper

veyance by maker of trust deed to beneficiary); *Bunger v. Pruitt*, 73 Wash. 569, 132 Pac. 237.

46. *Center v. Elgin City Banking Co.*, 185 Ill. 534, 57 N. E. 439; *Gillig v. Maass*, 28 N. Y. 191.

47. *Waters v. Waters*, 20 Iowa, 363, 89 Am. Dec. 540; *Willhite v. Berry*, 232 Ill. 331, 83 N. E. 852; *Washington County R. Co. v. Canadian Mills Co.*, 104 Me. 527,

72 Atl. 491; *Gille v. Hunt*, 35 Minn. 357, 29 N. W. 2; *Nickell v. Tracy*, 100 N. Y. App. Div. 80, 91 N. Y. Supp. 287; *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884.

48. *Wade v. Howard*, 6 Pick. (Mass.) 492; *Allen v. Leominster Sav. Bank*, 134 Mass. 580; *Mutual Building & Loan Ass'n v. Wyeth*, 105 Ala. 639, 17 So. 45.

49. *Ante*, § 640(e).

person to execute it, generally speaking, is the person entitled to demand the payment of the debt. Accordingly, the survivor of two joint creditors, being the person entitled to demand payment, has power to execute a release.<sup>50</sup>

A release or satisfaction of the mortgage may be executed or effected by the agent of the holder of the mortgage debt, and the statutes quite frequently contain provisions as to the mode of authorization of such attorney. Apart from statute, and so far as the release or satisfaction can be regarded as merely a discharge of the debt, it would seem that a verbal authority would be sufficient. But a release or satisfaction executed by one acting under merely verbal authority would afford but little, if any, protection to subsequent purchasers of the property, and the same may be said as to a written authority, if this is not recorded. It has accordingly been decided that a purchaser of property is not bound to accept the title if the satisfaction of a mortgage is by an attorney in fact whose authority does not appear of record.<sup>51</sup> And it has been decided that in the case of any satisfaction or discharge by a person other than the apparent owner of the debt, a subsequent purchaser is under an obligation to inquire as to the authority by which such person is acting.<sup>52</sup> The fact, however, that the authority to

50. *Wall v. Bissell*, 125 U. S. 382, 31 L. Ed. 772; *Heilig v. Heilig*, 215 Pa. 256, 64 Atl. 442.

51. *O'Neill v. Douthitt*, 40 Kan. 689, 20 Pac. 493.

52. *Swartout v. Curtis*, 5 N. Y. 301, 55 Am. Dec. 345. That one purchased land on the strength of a satisfaction of record by a third person, attested by the recorder, such third person having intended to satisfy another mortgage, was held not to protect him.

*Brown v. Henry*, 106 Pa. St. 262.

As to the effect of cancellation by the clerk, without authority, under the New Jersey law, as protecting a subsequent purchaser, see *Harris v. Cook*, 28 N. J. Eq. 345; *Harrison v. N. J. R. R. & T. Co.*, 19 N. J. Eq. 488; *Baldwin v. Howell*, 45 N. J. Eq. 519, 15 Atl. 236; *Baldwin v. Howell*, 45 N. J. Eq. 519, 15 Atl. 236; *Collignon v. Collignon*, 52 N. J. Eq. 516, 28 Atl. 794.



execute the satisfaction or other discharge does not appear of record obviously does not show a lack of such authority, and that the satisfaction or discharge purports to be executed by an agent has been held to put a subsequent purchaser of the mortgage debt on notice as to whether he did not have authority, though his authority does not appear of record.<sup>53</sup> One having authority to release on payment is ordinarily presumed, in executing the release, to have acted only in accord with his authority.<sup>54</sup>

In the case of a deed of trust to secure a debt, which authorizes the trustee to execute a release upon payment, a subsequent purchaser of the land is, by the fact that a release by the trustee was executed before the maturity of the debt, ordinarily regarded as put on inquiry as to whether the debt was paid, so as to justify the release.<sup>55-56</sup> But this has been held not to be the case when there was an option to pay the debt before the date of maturity,<sup>57</sup> or when the beneficial title to the land appeared on the records to be vested in the holder of the debt secured.<sup>58</sup> And ordinarily, it seems, a release executed by the trustee after the maturity of the debt secured will protect a subsequent *bona fide* purchaser of the land.<sup>59</sup> A purchaser of the

53. See *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

54. *Williams v. Jackson*, 107 U. S. 478, 27 L. Ed. 529; *Porter v. Stuart*, 227 Fed. 840, 142 C. C. A. 364. Compare *Hutchings v. Clark*, 64 Cal. 228, 30 Pac. 805.

55-56. *Jackson v. Blackwood*, 1 MacAr. & M. (Dist. Col.) 188; *Lang v. Metzger*, 86 Ill. App. 117. See *Weldon v. Tallman*, 67 Fed. 986, 15 C. C. A. 138; *Murto v. Lemon*, 19 Colo. App. 314, 75 Pac. 160; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826, 14 N. E. 411. So where the beneficial

interest in the land had become vested, as appeared of record, in the trustee at the time of the release made before maturity of the debt. *Swift v. Smith*, 102 U. S. 442, 26 L. Ed. 193; *Appelman v. Gara*, 22 Colo. 397, 45 Pac. 366. The expressions in *Vogel v. Troy*, 232 Ill. 481, 83 N. E. 960, appear to be to a different effect.

57. *Lennartz v. Quilty*, 191 Ill. 174, 85 Am. St. Rep. 260, 60 N. E. 913.

58. *Havighorst v. Bowen*, 214 Ill. 90, 73 N. E. 402.

59. *Day v. Brenton*, 102 Iowa,

land with notice that the debt has not been paid is obviously not protected by a release made by the trustee.<sup>60</sup> Nor is a purchaser, whether with or without notice that the debt is still unpaid, protected by a release made by the trustee, if the statute provides that the trustee shall have no authority to execute a release or satisfaction.<sup>61</sup> A release by one named as mortgagee in a mortgage securing a note in favor of another, but payment of which to the mortgagee was authorized, has been regarded as sufficient in favor of a *bona fide* purchaser of the land.<sup>62</sup>

— (d) **Execution by assignor.** After the assignment of the mortgage debt, as the assignor has no right to receive payment on account of the obligation,<sup>63</sup> so he has no right to give a release or satisfaction of the mortgage.<sup>64</sup> If he undertakes so to do, the assignee, suffering loss by such action, may recover damages.<sup>65</sup> And, in case the rights of innocent third persons have not intervened, the assignee is entitled

482, 63 Am. St. Rep. 460, 71 N. W. 538; Mann v. Jummel, 183 Ill. 523, 56 N. E. 161.

60. Stiger v. Bent, 111 Ill. App. 328; Connecticut General Life Ins. Co. v. Eldredge, 102 U. S. 545, 26 L. Ed. 245.

61. As in Missouri. See How-er v. Erwin, 221 Mo. 93, 119 S. W. 951.

62. Citizens Nat. Bank v. Williams, 100 Kan. 140, 163 Pac. 647.

63. *Ante*, § 640(c).

64. Fassett v. Mulock, 5 Col. 466; Vandercook v. Baker, 48 Iowa, 199; Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266; Cutler v. Haven, 8 Pick. (Mass.) 490; Ripley Nat. Bank v. Connecticut Mut. Life Ins. Co., 145 Mo. 142, 47 S. W.

1; Roberts v. Halstead, 9 Pa. St. 22, 49 Am. Dec. 541; Parker v. Randolph, 5 S. D. 549, 29 L. R. A. 33, 59 N. W. 722; Nash v. Kelley, 50 Vt. 425; Fischer v. Woodruff, 25 Wash. 67, 87 Am. St. Rep. 742, 64 Pac. 923; Gordon v. Mulhare, 13 Wis. 22. If the assignment was made as security for a debt, the payment of the debt obviously reverts in the assignor the power to release. Seymour v. Laycock, 47 Wis. 272, 2 N. W. 297.

65. Fox v. Wray, 56 Ind. 423; Anglo-American Land, Mortgage & Agency Co. v. Bush, 84 Iowa, 272, 50 N. W. 1063; Snyder v. Parmalee, 80 Vt. 496, 68 Atl. 649; Evans v. Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323.

to have the release or satisfaction cancelled by the decree of a court of equity.<sup>66</sup>

It quite frequently happens that, after the assignor of the mortgage debt has undertaken, wrongfully, to give a satisfaction or release, in spite of having made the assignment, the property is conveyed or mortgaged by the mortgagor or his transferee to another person, who, without notice of the assignment, pays value under the supposition that the mortgage has been properly discharged by one having power to discharge it.<sup>67</sup> The rights of such purchaser are ordinarily determined with reference to the recording laws, it being held in effect that, in the absence of actual notice, he has a right to assume that the person in whom the records show the title to the debt and mortgage to be is the person entitled to discharge them. That is, if an assignment is of record; the subsequent purchaser is charged with notice of the fact that the assignor had no power, after the assignment, to discharge the mortgage,<sup>68</sup> while if no assignment appears of record, he may properly assume that the power to discharge the mortgage had not passed to another,<sup>69</sup> unless he actually

66. *Fassett v. Mulock*, 5 Colo. 466; *Willcox v. Foster*, 132 Mass. 320; *Gordon v. Mulhare*, 13 Wis. 22.

67. No equity exists in favor of a *bona-fide* purchaser who does not pay value. *Spicer v. First Nat. Bank*, 170 N. Y. 562, 62 N. E. 1100.

68. *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Center v. Elgin City Banking Co.*, 185 Ill. 534, 57 N. E. 439; *Indiana Bank v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390; *Lewis v. Kirk*, 28 Kan. 497, 42 Am. Rep. 173; *Hewell v. Coulbourn*, 54 Md. 59; *Higgins v.*

*Jamesburg Mut. Building & Loan Ass'n*, 67 N. J. Eq. 525, 58 Atl. 1078; *Viele v. Judson*, 82 N. Y. 32; *Larned v. Donovan*, 155 N. Y. 341, 49 N. E. 942.

69. *Vann v. Marbury*, 100 Ala. 428, 23 L. R. A. 325, 46 Am. St. Rep. 70, 14 So. 273; *Summers v. Kilgus*, 14 Bush (Ky.) 449; *Ogle v. Turpin*, 102 Ill. 148; *Connecticut Mut. Life Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586; *Quincy v. Ginsbach*, 92 Iowa, 144, 60 N. W. 511 (release by sole beneficiary of mortgage); *Fisher v. Cowles*, 41 Kan. 418, 21 Pac. 228 (record of unacknowledged assignment);

knows of an assignment.<sup>70</sup> By some decisions, however, a different view has been adopted, that a subsequent purchaser could not claim to take free from the mortgage by reason of a release by the assignor, even though there was nothing on the records to show the assignment, and he had no notice otherwise thereof,<sup>71</sup> this view being apparently based on the consideration, either that the formal assignment of a mortgage is not within the recording laws, or that the assignment in the particular case, being by a mere transfer of the debt, was incapable of record. Adopting such a view, an intending purchaser or mortgagee of premises which

Peaks v. Dexter, 82 Me. 85, 19 Atl. 100; Swasey v. Emerson, 168 Mass. 118, 60 Am. St. Rep. 368, 46 N. E. 426; Foss v. Dullam, 111 Minn. 220, 126 N. W. 820; Cram v. Cotrell, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; Bacon v. Van Schoonhoven, 87 N. Y. 589; Henniges v. Paschke, 9 N. D. 489, 81 Am. St. Rep. 588, 84 N. W. 350; Swartz's Ex'rs v. Leist, 13 Ohio St. 419; Pickford v. Peebles, 7 S. D. 166, 63 N. W. 779; Henderson v. Pilgrim, 22 Tex. 464; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779; Torrey v. Deavitt, 53 Vt. 331; Seattle Nat. Bank v. Ally, 66 Wash. 610, 120 Pac. 94; Fallass v. Pierce, 30 Wis. 443; Friend v. Yahr, 126 Wis. 291, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 924, 104 N. W. 997; Marling v. Jones, 138 Wis. 82, 119 N. W. 931; Frank v. Snow, 6 Wyo. 42, 42 Pac. 484, 43 Pac. 78; see Wiscomb v. Cubberly, 51 Kan. 580, 33 Pac. 320. So in the case of release by trustee under deed of trust to secure notes, in which the payee joins, as against the assignee of

the notes. Williams v. Jackson, 107 U. S. 478, 27 L. Ed. 529; Livermore v. Maxwell, 87 Iowa. 705, 55 N. W. 37; Evans v. Roanoke Sav. Bank, 95 Va. 294, 28 S. E. 323.

The joinder by the mortgagee, under such circumstances, in a subsequent conveyance by the mortgagor, has the same effect for this purpose as has an express release by him. Jenks v. Shaw, 99 Iowa, 604, 61 Am. St. Rep. 256, 68 N. W. 900.

70. Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193; Passumpsic Sav. Bank v. Buck, 71 Vt. 190, 44 Atl. 93.

So it has been decided that if the assignment is not recorded, the assignee is bound by an agreement on the part of the assignor, with one who took a second mortgage, that such second mortgage should have priority, the second mortgagee being ignorant of the assignment. Parmenter v. Oakley, 69 Iowa, 388, 28 N. W. 653.

71. Northrup v. Reese, 68 Fla. 451, L. R. A. 1915F, 554, 67 So.

have previously been subjected to a mortgage might have difficulty, it seems, in satisfying himself as to the person entitled to release the mortgage, so as to secure absolute protection in this regard. Even that he requires the production of the notes evidencing the obligation secured by the mortgage might not render him entirely safe, since other notes may have been substituted for these, without affecting the existence of the obligation.<sup>71a</sup>

A discharge by one who has previously assigned the mortgage debt cannot enure to the benefit of one who purchased the property previous to such discharge, even though he has not notice of the assignment by record or otherwise. He did not make his purchase on the strength of such discharge.<sup>72</sup>

Though, as above stated, the assignor has no power to release the mortgage as against his assignee, it has been decided in one state that, if the assignment is not recorded and the assignor consequently appears on the records as the owner of the debt secured, he is bound to give the statutory release or satisfaction upon payment of the debt secured and is liable to the statutory penalty if he fails so to do on demand.<sup>73</sup> And it has been decided, in that and another state, that in such case the assignee, not appearing on the records to have any interest in the mortgage debt, is not the

136; *Reeves v. Hayes*, 95 Ind. 521; *Mut. Benefit Life Ins. Co. v. Huntington*, 57 Kan. 744, 48 Pac. 19; *Demuth v. Old Town Bank*, 85 Md. 315, 60 Am. St. Rep. 322 37 Atl. 266; *Lee v. Clark*, 89 Mo. 533, 1 S. W. 142; *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Bamberger v. Geiser*, 24 Ore. 203, 33 Pac. 609; *W. C. Early Co. v. Williams*, 135 Tenn. 249, L. R. A. 1916F, 418.

186 S. W. 102; *Fischer v. Woodruff*, 25 Wash. 67, 87 Am. St. Rep. 743, 64 Pac. 938. See *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168; *Lynch v. Hancock*, 14 S. C. 66; *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746.

71a. *Ante*, § 641(h).

72. *Roberts v. Halstead*, 9 Pa. 32, 49 Am. Dec. 541; *Girardin v. Lampe*, 58 Wis. 267, 16 N. W. 614; *Lynch v. Hancock*, 14 S. C. 66.

73. *Perkins v. Matteson*, 40 Kan. 165, 19 Pac. 633.

person to give a satisfaction and is so not liable to the penalty for failing to give one.<sup>74</sup> In other states, however, such an assignee has been regarded as under an obligation to execute a release or satisfaction on demand.<sup>75</sup>

— (e) **Conclusiveness of release or satisfaction.**

A satisfaction or release in terms of the mortgage, being in legal effect, in the ordinary case, merely a statement or acknowledgment that the debt has been discharged, is not conclusive in that respect, and it may be shown, as against the owner of the land at the time, as well as against subsequent purchasers with notice,<sup>76</sup> that the debt has not been actually discharged, and that the satisfaction or release was procured by fraud,<sup>77</sup> or was executed for some limited purpose,<sup>78</sup> or without the consent of the person beneficially interested in the mortgage debt.<sup>79</sup> And so it may be shown that, the debt being still unpaid, the release or satisfaction was executed by mistake or inadvertence,<sup>80</sup> or in ignorance of the existence of a subsequent in-

74. *Low v. Fox*, 56 Iowa, 221, 9 N. W. 131; *Thomas v. Reynolds*, 29 Kan. 304. *Contra*, *Daniels v. Densmore*, 32 Neb. 40, 48 N. W. 906.

75. *Ewing v. Shelton*, 34 Mo. 518; *Daniels v. Densmore*, 32 Neb. 40, 48 N. W. 906.

76. *Eldridge v. Conn. Gen. Life Ins. Co.*, 3 MacArth. (Dist. Col.) 301; *Farmers' Bank v. Butterfield*, 100 Ind. 229; *Ferguson v. Glassford*, 68 Mich. 36, 35 N. W. 820; *Whipple v. Fowler*, 41 Neb. 675, 60 N. W. 15.

77. *Eldridge v. Conn. Gen. Life Ins. Co.*, 3 MacArth. (Dist. Col.) 301; *Headley v. Goundry*, 41 Barb. (N. Y.) 279; *Downing v. Hill*, 165 Mich. 559, 130 N. W. 1115; *Voris v. Ferrell*, 57 Ind.

App. 1, 103 N. E. 122.

78. *Wood v. Wood*, 61 Iowa, 256, 16 N. W. 132; *Martin v. Righter*, 10 N. J. Eq. 510. See *Hughes v. Torrence*, 111 Pa. St. 611, 4 Atl. 825.

79. *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. 92.

80. *Stoeckle v. Rosenheim*, 10 Del. Ch. 195, 87 Atl. 1006; *Ettler v. Evans*, 61 Ind. 56; *Bruse v. Nelson*, 35 Iowa, 157; *Kent v. Bailey*, 181 Iowa, 489, 164 N. W. 852; *Willcox v. Foster*, 132 Mass. 320; *Short v. Currier*, 153 Mass. 182, 26 N. E. 444; *Institute Bldg. & Loan Ass'n v. Edwards*, 81 N. J. Eq. 359, 86 Atl. 962; *Moore v. Bond*, 75 N. C. 243; *Long v. Dufur*, 58 Ore. 162, 113 Pac. 59; *Taylor v. Godfrey*, 62 W. Va. 677, 59 S. E. 631.

incumbrance which would be thereby given priority.<sup>81</sup> But it has been held that, as against a subsequent *bona fide* purchaser of the land, who takes on the strength of a release or satisfaction apparently valid and effective, it cannot be shown that it was obtained by fraud or executed by mistake or for some limited purpose.<sup>82</sup> And so if a discharge of the mortgage upon the records is effected as a result of the negligence of the mortgagee in allowing the owner of the property to have the custody of the mortgage instrument or evidence of the debt,<sup>83</sup> or if the conduct of the mortgagee otherwise conduces to mislead in this regard,<sup>84</sup> a *bona fide* purchaser is ordinarily protected. If a transaction by way of compromise, by which the debt is sought to be discharged, is afterwards set aside for any reason, the debt is revived, and with it the mortgage lien.<sup>84a</sup>

But that mistake of law does not affect the conclusiveness of the release, see *Ernett v. Wheeler*, 109 Minn. 157, 123 N. W. 414.

81. *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Robinson v. Sampson*, 23 Me. 388; *Young v. Hill*, 31 N. J. Eq. 429; *Bell v. Woodward*, 34 N. H. 90; *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625; *Strehlow v. Fee*, 36 N. D. 59, 161 N. W. 719; *Kern v. A. P. Hotaling Co.*, 27 Ore. 205, 50 Am. St. Rep. 710, 40 Pac. 168; *Borman v. Hatfield*, 96 Wash. 270, 164 Pac. 270. But see *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260, to the effect that the mortgage will not be restored if the mortgagee was negligent in not knowing of the subsequent incumbrance.

82. *Wittenbrock v. Parker*, 102 Cal. 93, 24 L. R. A. 197, 41 Am. St. Rep. 172, 36 Pac. 374; *Lewis*

*v. Hinman*, 56 Conn. 55, 13 Atl. 143; *Barco v. Doyle*, 50 Fla. 488, 39 So. 103; *McConnell v. American Nat. Bank* (Ind. App.) 103 N. E. 809; *Sheldon v. Holmes*, 58 Mich. 138, 24 N. W. 795; *Bristow v. Thackston*, 187 Mo. 332, 106 Am. St. Rep. 472, 86 S. W. 94; *Rehn v. Alber*, 272 Mo. 452, 199 S. W. 170; *Heyder v. Excelsior Building & Loan Ass'n*, 42 N. J. Eq. 403, 59 Am. Rep. 49, 8 Atl. 310; *Charleston v. Ryan*, 22 S. C. 339.

83. *Heyder v. Excelsior Building & Loan Ass'n*, 42 N. J. Eq. 403, 59 Am. Rep. 49, 8 Atl. 310; see *Harrison v. N. J. R. R. & T. Co.*, 19 N. J. Eq. 488.

84. *Turner v. Flinn*, 72 Ala. 532; *Morris v. Beecher*, 1 N. D. 130, 45 N. W. 696.

84a. *Doe v. Pendleton*, 15 Ohio St. 735; *Heimstreet v. Burdick*, 90 Ill. 444.

§ 643. **Subsequent reissue of mortgage.** Since the discharge of the obligation secured, by payment or otherwise, extinguishes the mortgage lien, it would seem necessarily to follow that that lien cannot be subsequently utilized to secure another debt. Occasionally, however, in spite of the fact that the debt has been paid, the mortgagor, or his transferee, thereafter in effect agrees that the same mortgage shall operate to secure another debt, to the same or a different creditor, or undertakes to deliver the same instrument to secure another debt. This is in legal effect an attempt to utilize the instrument which created the first lien, for the purpose of creating another lien, the first lien having ceased to exist on the discharge of the debt. It has been decided that a mortgage cannot be thus "reissued," as it is ordinarily expressed, as against an intervening incumbrancer,<sup>85</sup> as against creditors,<sup>86</sup> or as against a subsequent purchaser or mortgagee of the property.<sup>87</sup> In a number of cases such a transaction appears to be regarded as an absolute nullity.<sup>88</sup> It would seem, however, that the original instrument, being no longer operative to secure the former debt, this having been paid, might be delivered as an entirely new instrument, creating a new lien to secure a dif-

85. *Peiffer v. Bates*, 45 N. J. Eq. 311, 19 Atl. 612; *Marvin v. Vedder*, 5 Cow. (N. Y.) 671; *Angel v. Boner*, 38 Barb. (N. Y.) 425; *McCown v. Westbury*, 52 S. C. 421, 29 S. E. 663, 30 S. E. 142; see *Flye v. Berry*, 181 Mass. 442, 63 N. E. 1071.

86. *Mead v. York*, 6 N. Y. 449, 57 Am. Dec. 467; *Bowman v. Mauter*, 33 N. H. 530, 66 Am. Dec. 743; *Mitchell v. Combs*, 96 Pa. St. 430; *Gardner v. James*, 7 R. I. 396.

87. *Bogert v. Bliss*, 148 N. Y.

194, 51 Am. St. Rep. 684, 42 N. E. 582.

88. *Crampton v. Massie*, 236 Fed. 900, 150 C. C. A. 162; *Bailey v. Rockafellow*, 57 Ark. 216, 21 S. W. 227; *Ross v. Hodges*, 108 Ark. 270, 157 S. W. 391; *Thompson's Adm'r v. George*, 86 Ky. 311, 5 S. W. 760; *Roberts' Trustee v. Terry*, 161 Ky. 397, 170 S. W. 965; *Hayhurst v. Morin*, 104 Me. 169, 71 Atl. 707; *Merrill v. Chase*, 3 Allen (Mass.) 239; *Mead v. York*, 6 N. Y. 449, 57 Am. Dec. 467; *Anderson v. Neff*, 11 Serg. &



ferent debt;<sup>89</sup> and occasionally, as against an innocent purchaser, the owner of the land might be estopped to deny that the mortgage thus reissued was a valid security.<sup>90</sup>

It may happen that an assignment of the mortgage debt to a third person is effected by arrangement with the mortgagor, who, in behalf of the assignee, pays over to the assignor the amount of the debt. This, it has been decided, does not involve a payment of the mortgage debt, and the debt and mortgage security remain unaffected thereby in the hands of the assignee.<sup>91</sup>

A written, as distinct from an oral, agreement that the mortgage, though the debt originally secured has been paid, shall secure another debt, would, at least if based on a valid consideration, be effective as creating an equitable lien,<sup>92</sup> the reference to the previously existing mortgage serving to incorporate in such agreement by reference the description of the mortgaged premises and, if such agreement were executed as a mortgage instrument is required to be executed, it would presumably operate as a new mortgage, the description of the premises being incorporated therein by reference.<sup>93</sup>

**§ 644. Release of principal debtor.** In case a mortgage is given on the land of one person to secure the debt of another, the former is in effect a surety to the extent of his land, and if the creditor releases the

R (Pa.) 223; Thomas' Appeal, 30 Pa. St. 378.

89. See Robinson v. Urquhart, 12 N. J. Eq. 515; Houseman v. Bodine, 122 N. Y. 158, 25 N. E. 255; Pechin v. Brown, 3 Phila. (Pa.) 62.

90. Kellogg v. Ames, 41 N. Y. 259.

91. Hoy v. Bramhall, 19 N. J.

Eq. 563, 97 Am. Dec. 687; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Shedd v. Geran, 113 Mass. 378; White v. Knapp, 8 Paige (N. Y.) 173; Graves v. Mumford, 26 Barb. (N. Y.) 95; Hubbell v. Blakeslee, 71 N. Y. 63.

92. Post, § 661.

93. See Houseman v. Bodine, 122 N. Y. 158, 25 N. E. 255.

principal debtor or other security furnished by the latter, he to that extent extinguishes the mortgage.<sup>94</sup> It is upon a similar principle that if different parts of the mortgaged land, by reason of their ownership by different persons, are liable, not equally for the mortgage debt, but in some particular order, a release of a part primarily liable may to that extent operate to release a part secondarily liable.<sup>95</sup> And so if the mortgaged land is transferred subject to the mortgage the mortgagor's personal liability is secondary only,<sup>96</sup> and consequently a release, by the mortgage creditor, of the land<sup>97</sup> or of the transferee's assumption of personal liability,<sup>98</sup> may have the effect of releasing, to that extent, the mortgagor's personal liability. A somewhat similar rule is applied in connection with the equitable doctrine of marshalling.<sup>99</sup> By force of this doctrine, one who has a superior lien upon two funds owes to one who has an inferior lien on one only of such funds a duty to enforce his lien, so far as possible, against the other fund, so as not to affect the inferior lien. And if the one having the superior lien, with knowledge of the inferior lien, releases his lien on the fund which is subject to his lien alone, he thereby loses to that extent his lien on the fund which is subject to both liens, provided this latter is insufficient to pay both debts. This rule has been applied in the case of a release by a senior mortgagee, for the purpose of protecting a junior lienor.<sup>1</sup> The application of these rules, how-

94. *Finnegan v. Janeway*, 85 Minn. 384, 89 N. W. 4; *Hardwicke v. Barnes*, 179 Mo. App. 386, 166 S. W. 826; *Grow v. Garlock*, 97 N. Y. 81; *Atwater v. Underhill*, 22 N. J. Eq. 599.

95. *Ante*, § 625.

96. *Ante*, § 622.

97. *Bowman v. Clyde*, 101 Kan. 165, 165 Pac. 820; *Meigs v. Tunnecliffe*, 214 Pa. 495, 112 Am. St.

Rep. 769, 6 Ann. Cas. 549, 63 Atl. 1019; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542.

98. *Heidahl v. Geiser Mfg. Co.*, 112 Minn. 319, 140 Am. St. Rep. 493, 127 N. W. 1050.

99. *Post*, § 647.

1. *Clark v. Cowan*, 206 Mass. 252, 92 N. E. 474; *Anderson v. McCloud Love Live Stock Com-*

ever, in order to preserve the equities of the various parties as regards the order of liability,<sup>2</sup> or as regards the marshalling of assets,<sup>3</sup> is dependent upon whether the mortgage creditor or other incumbrancer has actual notice of such equities, and he is not charged with notice thereof by the fact that they would appear upon an examination of the records.

**§ 645. Right to extinguish by payment (Right to redeem)——(a) Persons entitled.** The mortgagor, or any other person having an interest in the land, and who is in privity with and claims under the mortgagor, may redeem from the mortgage, provided he would be prejudiced by the enforcement thereof.<sup>4</sup> Accordingly the right may be exercised by a grantee of the mortgaged premises, or of a part thereof,<sup>5</sup> and even

mission Co., 58 Neb. 670, 79 N. W. 613; Ingalls v. Morgan, 10 N. Y. 178; Rogis v. Barnatowich, 36 R. I. 227, 89 Atl. 838; First Nat. Bank of Huntington v. Simms, 49 W. Va. 442, 38 S. E. 525; Deuster v. McCannis, 14 Wis. 307; Schaad v. Robinson, 50 Wash. 283, 97 Pac. 104.

2. Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; Ellis v. Fairbanks, 38 Fed. 257, 21 So. 107; Boone v. Clarke, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850; Annan v. Hays, 85 Md. 505, 37 Atl. 20; George v. Wood, 9 Allen (Mass.) 80, 85 Am. Dec. 741; Norton v. Metropolitan Life Ins. Co., 74 Minn. 484, 77 N. W. 298, 539; Balen v. Lewis, 130 Mich. 567, 97 Am. St. Rep. 499, 90 N. W. 416; Howard Ins. Co. v. Halsey, 8 N. Y. 271, 59 Am. Dec. 478; Patty v. Pease, 8 Paige (N. Y.) 277, 35 Am. Dec. 683; Hart v. Anderson, 198 Pa. St. 558, 48

Atl. 636; Lynchburg Perpet. Bld'g Assn. v. Fellers, 96 Va. 337, 70 Am. St. Rep. 851, 31 S. E. 505.

3. Louis v. Hinman, 56 Conn. 55, 13 Atl. 143; Annan v. Hays, 85 Md. 505, 37 Atl. 20; Johnson v. Bell, 58 N. H. 395; Ward v. Hague, 25 N. J. Eq. 397; Chesebrough v. Millard, 1 Johns. Ch. (N. Y.) 414, 7 Am. Dec. 494; Sherman v. Foster, 158 N. Y. 587, 52 N. E. 504; Searles v. McGee, 1 N. D. 365, 26 Am. St. Rep. 633, 48 N. W. 231.

4. Rapier v. Gulf City Paper Co., 64 Ala. 330; Frisbee v. Frisbee, 86 Me. 444, 29 Atl. 1115; Platt v. Squire, 12 Metc. (Mass.) 494; Powers v. Golden Lumber Co., 43 Mich. 468, 5 N. W. 656; Grant v. Duane, 9 Johns. (N. Y.) 611; Sellwood v. Gray, 11 Ore. 534, 5 Pac. 196.

5. Howser v. Cruikshank, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206; Purcell v. Gann, 113

one who has merely a contract for the sale to him of the land has the right, provided the contract is susceptible of specific enforcement.<sup>6</sup> One who acquires the mortgagor's interest in the land by purchase at execution or judicial sale stands in the same position in this regard as one to whom the land is voluntarily conveyed by the owner.<sup>7</sup> The right also exists in favor of an heir or devisee of an owner of the land.<sup>8</sup>

The owner of an estate of limited duration, such as an estate for life<sup>9</sup> or for years,<sup>10</sup> has the same right to redeem as has a tenant in fee simple. And the right exists to its full extent in favor of the owner of an undivided interest in the mortgaged property<sup>11</sup> or of

Ark. 332, 168 S. W. 1102; Loomis v. Knox, 60 Conn. 343, 22 Atl. 771; Dunlap v. Wilson, 32 Ill. 517; Douglas v. Bishop, 27 Iowa, 214; Skinner v. Miller, 5 Litt. (Ky.) 84; Wood v. Goodwin, 49 Me. 260, 77 Am. Dec. 259; Houston v. National Mut. Building & Loan Ass'n, 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540; Childs v. Childs, 10 Ohio St. 339, 75 Am. Dec. 512.

6. Lowry v. Tew, 3 Barb. Ch. (N. Y.) 407; Emerson v. Atkinson, 159 Mass. 356, 34 N. E. 516; see Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909. *Aliter* when the court did not have full equity powers. McDougald v. Capron, 7 Gray (Mass.) 278; Porter v. Read, 19 Me. 363.

7. Allen v. Swoope, 64 Ark. 576, 44 S. W. 78; Dalton v. Brown, 130 Ark. 200, 197 S. W. 32; Jackson v. Weaver, 138 Ind. 539, 38 N. E. 166; Tukey v. Reinholdt. — (Iowa) —, 130 N. W. 727; Millett v. Blake, 81 Me. 531, 10 Am. St.

Rep. 275, 18 Atl. 293; Hayward v. Cain, 110 Mass. 273; Willis v. Smith, 66 Tex. 31, 17 S. W. 247.

8. Chew v. Hyman, 10 Biss. 240, 7 Fed. 7; Zaegel v. Kuster, 51 Wis. 31, 7 N. W. 781; Hunter v. Dennis, 112 Ill. 568; Lewis v. Nangle, 2 Ves. Sr. 431.

9. Lamson v. Drake, 105 Mass. 564; Wicks v. Scrivens, 1 Johns. & H. 215; Donovan v. Smith, — (N. J. Ch.) —, 88 Atl. 167. And see cases cited *post*, this section, note 13.

10. Loud v. Lane, 8 Metc. (Mass.) 517; Hamilton v. Dobbs, 19 N. J. Eq. 227; Averill v. Taylor, 8 N. Y. 44; Wunderle v. Ellis, 212 Pa. St. 618, 4 Ann. Cas. 806, 62 Atl. 106; Campbell v. McElevay, 2 Disney (Ohio) 574.

11. McQueen v. Whetstone, 127 Ala. 417, 30 So. 548; Titsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Emerson v. Atkinson, 159 Mass. 356, 34 N. E. 516; Geisbaker v. Pancoast, 57 N. J. Eq. 60, 40 Atl. 200; Hubbard v. Ascutney Mill

an ascertained part thereof.<sup>12</sup>

The right may be exercised by one who has an estate of dower in the mortgaged land, provided her estate is subject to the mortgage, by reason of the fact, either that she joined therein,<sup>13</sup> or that it was created before the marital rights accrued.<sup>14</sup> If her estate is not subject to the mortgage, she has no right to redeem therefrom since she cannot be affected by its enforcement.<sup>15</sup> Even though the right of dower is inchoate merely, by reason of the fact that the husband is still living, the wife has, it has been generally decided, a right to redeem to the same extent as if it were consummate.<sup>16</sup>

Dam Co., 20 Vt. 402, 50 Am. Dec. 41.

12. *Howser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206; *Douglas v. Bishop*, 27 Iowa, 214; *Averill v. Taylor*, 8 N. Y. 44; *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259; *Ferry v. Miller*, 164 Mich. 429, 129 N. W. 721. The owner of timber on the land has the right. *Cilley v. Herrick*, 117 Me. 264, 103 Atl. 777.

13. *McGough v. Sweetser*, 97 Ala. 361, 19 L. R. A. 470, 12 So. 162; *Hays v. Cretin*, 102 Md. 695, 4 L. R. A. (N. S.) 1039, 62 Atl. 1028; *Smith v. Hall*, 67 N. H. 200, 30 Atl. 409; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *McArthur v. Franklin*, 16 Ohio St. 193; *Atwood v. Arnold*, 23 R. I. 609, 51 Atl. 216.

14. *Mackenna v. Fidelity Trust Co. of Buffalo*, 184 N. Y. 411, 3 L. R. A. (N. S.) 1068, 112 Am. St. Rep. 620, 6 Ann. Cas. 471, 77 N. E. 721; *Atwood v. Arnold*, 23 R. I. 609, 51 Atl. 216; *Opdyke*

*v. Bartles*, 11 N. J. Eq. 133. So the widow is entitled to redeem from a mortgage made by the husband to secure purchase money, though she did not join therein, this being superior to her dower right. *May v. Fletcher*, 40 Ind. 575; *Barr v. Vanalstine*, 120 Ind. 590, 22 N. E. 965; *Mills v. Van Voorhies*, 20 N. Y. 412. But see *Burson v. Dow*, 65 Ill. 146.

15. *Huston v. Seeley*, 27 Iowa, 183 (nonjoinder in mortgage); *Opdyke v. Bartles*, 11 N. J. Eq. 133 (nonjoinder in mortgage). See *Barker v. Burton*, 67 Barb. (N. Y.) 458.

16. *Daniels v. Henderson*, 5 Fla. 452; *Camp v. Small*, 44 Ill. 37; *Bigoness v. Hibbard*, 267 Ill. 301, 108 N. E. 294; *Hays v. Cretin*, 102 Md. 695, 4 L. R. A. (N. S.) 1039, 62 Atl. 1028; *Tuttle v. Davis*, 114 Me. 109, 95 Atl. 513; *Davis v. Wetherell*, 13 Allen (Mass.) 60, 90 Am. Dec. 177; *Fitcher v. Griffiths*, 216 Mass. 174, 103 N. E. 471; *Smith v. Hall*, 67 N. H. 200, 30 Atl. 409; *Mackenna*

The owner of an easement in the mortgaged land has the right to redeem,<sup>17</sup> but not one having a license merely.<sup>17a</sup> It is generally agreed that a judgment creditor has, by reason of his lien on the mortgaged property, a right to redeem from a prior mortgage,<sup>18</sup> and the same right has been regarded as existing in favor of a junior mortgagee.<sup>19</sup> It appears to be questionable, however, whether a junior mortgagee, or other junior lienor, has a right to redeem from the prior mortgage, if the prior mortgagee himself does not seek or desire to secure payment of the mortgage debt, preferring to retain it as an investment.<sup>19a</sup> The junior lienor can, in such case, foreclose his own lien, taking the property, or having it sold, subject to the prior mortgage.

If the debt is evidenced by two or more notes, and the notes are in the hands of different persons, the owner of one note may redeem by payment to the owner of another note, first maturing, in order to protect his

v. Fidelity Trust Co., 184 N. Y. 411, 3 L. R. A. N. S. 1068, 112 Am. St. Rep. 620, 6 Ann. Cas. 471, 77 N. E. 721; Gatewood v. Gatewood, 75 Va. 467.

17. Bacon v. Bowdoin, 22 Pick. (Mass.) 405; Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, Ann. Cas. 1915A, 387, 61 So. 108 (holder of turpentine lease).

17a. Harbottle v. Central Coal & Coke Co., 134 Ark. 251, 203 S. W. 1044.

18. Raisin Fertilizer Co. v. Bell, 197 Ala. 261, 18 So. 168; Cowling v. Britt, 114 Ark. 175, 169 S. W. 783; Loomis v. Knox, 60 Conn. 343, 22 Atl. 771; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Lambert v. Miller, 38 N. J. Eq. 117; Groff v. Morehouse, 51 N. Y. 503; Stonehewer

v. Thompson, 2 Atk. 440.

19. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785; Frink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149; Steinke-meyer v. Gillespie, 82 Ill. 253; Wheeler v. Menold, 84 Iowa, 647, 47 N. W. 871; Long v. Richards, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083; Sager v. Tupper, 35 Mich. 131; Roff v. Miller, 189 Mich. 558, 155 N. W. 517; Cram v. Cottrill, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; American Loan & Trust Co. v. Atlanta Elec. R. Co., 99 Fed. 313.

19a. Bigelow v. Cassidy, 26 N. J. Eq. 557; Atwood v. Carmer, 75 N. J. Eq. 319, 73 Atl. 114; Frost v. Vonkers Sav. Bank, 70 N. Y. 553.

own interest in the security. He is regarded, in this respect, as in the position of a junior lienor.<sup>20</sup>

One who has no interest in the land, as lienor or otherwise, has no right of redemption,<sup>21</sup> and consequently the right is denied to a mortgagor who has disposed of or been deprived of his estate in the land,<sup>22</sup> to a judgment creditor who has lost his lien,<sup>23</sup> and to a junior mortgagee who has lost his lien by payment, foreclosure, or otherwise.<sup>24</sup> Moreover, as before indicated, the interest of the person seeking to redeem must be subject to the mortgage, and not superior thereto.<sup>25</sup> If his interest is superior to the mortgage, he could not be prejudiced by the enforcement of the mortgage against the land, and consequently cannot assert a right to remove the incumbrance. Consequently a senior mortgagor cannot assert a right to redeem from a junior mortgage, since his lien cannot be prejudiced by the enforcement of the junior lien.<sup>26</sup>

As between several persons entitled to redeem, the one whose lien or interest is superior, is first entitled

20. *Grattan v. Wiggins*, 23 Cal. 16; *Preston v. Hodgen*, 50 Ill. 56; *Murdock v. Ford*, 17 Ind. 52.

21. *Lomax v. Bird*, 1 Vern. 182; *Rapier v. Gulf City Paper Co.*, 64 Ala. 330; *Byington v. Buckwalter*, 7 Iowa. 512, 74 Am. Dec. 279; *Skinner v. Young*, 80 Iowa, 234, 45 N. W. 889; *McNiece v. Eliason*, 78 Md. 168, 27 Atl. 940; *Harwood v. Underwood*, 28 Mich. 427; *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672; *Grant v. Duane*, 9 Johns. (N. Y.) 591.

22. *Ingersoll v. Sawyer*, 2 Pick. (Mass.) 276; *True v. Haley*, 24 Me. 297; *Phillips v. Leavitt*, 54 Me. 105. So a mortgagor loses his equity to redeem a first mortgage, if a second mortgage on

the property is foreclosed, this depriving him of all interest in the property. *Colwell v. Warner*, 36 Conn. 224.

23. *Thomas v. Stewart*, 117 Ind. 50, 1 L. R. A. 715, 18 N. E. 595; *Long v. Mellet*, 94 Iowa, 548, 63 N. W. 490.

24. *Bigelow v. Stringfellow*, 25 Fla. 366; *McHenry v. Cooper*, 27 Iowa, 137.

25. *Huston v. Seeley*, 27 Iowa, 183; *Ayres v. Adair Co.*, 61 Iowa, 728, 17 N. W. 161; *Smith v. Austin*, 9 Mich. 165; *Opdyke v. Bartles*, 11 N. J. Eq. 133.

26. *Goodman v. White*, 26 Conn. 317; *Dawson v. Overmyer*, 141 Ind. 438, 40 N. E. 1065; *Hutchinson v. Wells*, 67 Iowa, 430, 25 N. W. 690.

to do so. For instance, a second mortgagee is entitled, before a third mortgagee, to redeem from the first mortgage.<sup>27</sup> Upon redemption by the second mortgagee the third mortgagee may then redeem from him.

— (b) **Amount to be paid.** In order to redeem from a mortgage, it is necessary to pay the entire mortgage debt, if due, or so much thereof as may be due at the time of payment,<sup>28</sup> together with interest to the time of redemption.<sup>29</sup>

The mortgagor, or other person redeeming, must also repay to the mortgage creditor any sums expended by the latter in extinguishing prior incumbrances upon the property, in order to protect the mortgage security,<sup>30</sup> and this includes payments made by the mortgage creditor on account of taxes and assessments on the property.<sup>31</sup> He must also repay

27. See *Moore v. Beasom*, 44 N. H. 215; *Wimpfheimer v. Prudential Ins. Co.*, 56 N. J. Eq. 585, 39 Atl. 916; *Loomis v. Knox*, 60 Conn. 343, 22 Atl. 771; *Wiley v. Ewing*, 47 Ala. 418.

28. *Smith v. Simpson*, 129 Ark. 275, 195 S. W. 1067; *Hocker v. Reas*, 18 Cal. 650; *Williams v. Dickerson*, 66 Iowa, 105, 37 N. W. 286; *Mann v. Richardson*, 21 Pick. (Mass.) 355; *Adams v. Brown*, 7 Cush. (Mass.) 220; *Bennett v. Healey*, 6 Minn. 240; *Deming v. Comings*, 11 N. H. 474.

29. *American Freehold Land Mortgage Co. of London v. Pollard*, 132 Ala. 155, 32 So. 630; *Shumate v. McLendon*, 120 Ga. 396, 48 N. E. 10; *Meacham v. Steele*, 93 Ill. 135; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Merritt v. Hosmer*, 11 Gray

(Mass.) 276, 71 Am. Dec. 713; *Martin v. Martin*, 146 Mass. 517, 16 N. E. 413; *Kidder v. McIlhenny*, 81 N. C. 123; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512.

30. *Mosier v. Norton*, 83 Ill. 519; *Stone v. Bartlett*, 46 Me. 438; *Davis v. Winn*, 2 Allen (Mass.) 111; *Baker v. Pierson*, 5 Mich. 522; *Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Page v. Foster*, 7 N. H. 392; *Parker v. Child*, 25 N. J. Eq. 41; *Robinson v. Ryan*, 25 N. Y. 320; *McCormick v. Knox*, 105 U. S. 122, 26 L. Ed. 940.

31. *Dozier v. Mitchell*, 65 Ala. 511; *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322; *Sanders v. Peck*, 131 Ill. 407, 25 N. E. 508; *Strong v. Burdick*, 52 Iowa, 630, 3 N. W. 707; *Williams v. Hilton*, 35 Me. 547; *Dooley v. Potter*, 146 Mass. 148, 15 N. E. 499; *Sanborn Co. v.*



any sums paid by the latter for insurance premiums which the mortgagor was by contract bound to pay,<sup>32</sup> and in case the mortgage creditor was in possession of the property, the latter is entitled to be reimbursed any necessary expenditures made by him for the purpose of protecting and preserving the property.<sup>33</sup> One who has a right to redeem even after foreclosure sale, because not made a party to the foreclosure proceeding, must ordinarily pay the amount of the mortgage debt, although this exceeds the amount paid by the purchaser at the sale.<sup>34</sup> He redeems from the mortgage and not from the sale.

Though a person has an undivided interest only in the mortgaged premises, or owns a part only in severalty, he must, as a general rule, offer to pay the entire mortgage debt, since the mortgagee is entitled to retain his lien on every part of the land until his debt is entirely paid.<sup>35</sup> And, accordingly, a widow, entitled

Alston, 153 Mich. 456, 117 N. W. 625; Gooch v. Botts, 110 Mo. 469, 20 S. W. 192; Dale v. M'Evers, 2 Cow. (N. Y.) 118; Sidenberg v. Ely, 90 N. Y. 257; Shepard v. Vincent, 38 Wash. 493; Carstens & Earles v. Seattle, 88 Wash. 632, 153 Pac. 1080.

32. Harper v. Ely, 70 Ill. 581; Johnson v. Hosford, 110 Ind. 572, 10 N. E. 407, 12 N. E. 522; American Button Hole, etc., Co. v. Burlington Mut. Loan Ass'n, 68 Iowa, 326, 27 N. W. 271; Carr v. Hodge, 130 Mass. 55; Neale v. Albertson, 39 N. J. Eq. 382; Walton v. Hollywood, 47 Mich. 385, 11 N. W. 209; Northwestern Mut. Life Ins. Co. v. Drown, 51 Wis. 419, 8 N. W. 237.

33. Miller v. Peter, 158 Mich. 336, 122 N. W. 780, and cases cited, *ante*, § 615.

34. Wood v. Holland, 53 Ark. 69, 13 S. W. 739 (*semble*); Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564; Iowa Co. v. Beeson, 55 Iowa, 262, 7 N. W. 597; Evans v. Kahr, 60 Kan. 719, 57 Pac. 950, 58 Pac. 467; Martin v. Friedly, 23 Minn. 13; Large v. Van Doren, 14 N. J. Eq. 208; Benedict v. Gilman, 4 Paige (N. Y.) 58; Childs v. Childs, 10 Ohio St. 339, 75 Am. Dec. 512; Collins v. Riggs, 14 Wall. (U. S.) 491, 20 L. Ed. 723.

35. Tilley v. Davis, 2 Eq. Cas. Abr. 604; Palk v. Clinton, 12 Ves. 59; Casinella v. Allen, 168 Cal. 677, 144 Pac. 746; Franklin v. Gorham, 2 Day (Conn.) 142, 2 Am. Dec. 86; Andreas v. Hubbard, 50 Conn. 351; Meacham v. Steele, 93 Ill. 135; Street v. Beal, 16 Iowa, 68, 85 Am. Dec. 504; Smith v. Kelley, 27 Me. 237, 46 Am. Dec.

to dower, who desires to redeem, must pay the whole amount of the debt, and not merely one-third thereof.<sup>36</sup> One may, however, redeem part of the land by payment of part of the debt, if the holder of the mortgage assents.<sup>37</sup> It may at times be to the advantage of one having an interest in the land to redeem the whole by paying the full amount of the mortgage debt rather than to redeem a part by paying a proportionate amount, but it has been decided that the right to elect in this regard belongs not to him but to the mortgage creditor.<sup>38</sup> Occasionally the mortgage creditor has been allowed to choose whether there shall be a redemption of the whole, or whether he shall relinquish all claim as regards the part belonging to the person seeking to redeem.<sup>39</sup>

The rule requiring one having an interest in part or an undivided share of the land, to redeem the whole by paying the full amount of the mortgage debt, has been held not to apply when the other part or share belongs to the holder of the mortgage, and such part is primarily or proportionately liable under the incumbrance.<sup>40</sup>

— **Tacking unsecured claims.** Applying the maxim that he who seeks equity must do equity, it has been held in some states that the mortgagor cannot ob-

595; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Merritt v. Hosmer*, 11 Gray (Mass.) 276, 71 Am. Dec. 713; *Bell v. City of New York*, 10 Paige (N. Y.) 49; *Coffin v. Parker*, 127 N. Y. 117, 27 N. E. 814; *Merrimon v. Parkey*, 136 Tenn. 645, 191 S. W. 327.

36. *McCabe v. Bellows*, 7 Gray (Mass.) 148, 66 Am. Dec. 467; *Merselis v. Van Riper*, 55 N. J. Eq. 618, 38 Atl. 196.

37. *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368, 27 N. E. 91;

*Kerse v. Miller*, 169 Mass. 44, 47 N. E. 504.

38. *Robinson v. Fife*, 3 Ohio St. 551. See *Kirkham v. Dupont*, 14 Cal. 559.

39. *Boquet v. Coburn*, 27 Barb. (N. Y.) 230; *Wilson v. Tarter*, 22 Ore. 504, 30 Pac. 499.

40. *Bradley v. George*, 2 Allen (Mas.) 392; *Tillinghast v. Fry*, 1 R. I. 53. A like holding was made when the mortgagee had purchased at the foreclosure sale and thereafter sold portions of the

tain a decree for redemption unless he pays not only the mortgage debt and interest, but also all other debts due by him to the mortgage creditor.<sup>41</sup> In other states, however, as in England, it is held that the mortgagee cannot thus charge collateral debts against the mortgaged property.<sup>42</sup> And even in the former class of states, one other than the mortgagor, who seeks to redeem, is under no obligation to pay other debts due by the mortgagor, and not by himself.<sup>43</sup> The right thus to tack collateral debts for the purpose of fore-

property to others. *Dukes v. Turner*, 44 Iowa, 575. See *Robinson v. Fife*, 3 Ohio St. 551,

41. *Anthony v. Anthony*, 23 Ark. 479; *Scripture v. Johnson*, 3 Conn. 211; *Brown v. Gaffney*, 32 Ill. 251; *Downing v. Palmateer*, 1 T. B. Mon. (Ky.) 64, 70; *Chase v. McDonald*, 7 H. & J. (Md.) 161, 196; *Lee v. Stone*, 5 G. & J. (Md.) 1; *Leeds v. Gifford*, 41 N. J. Eq. 46; *Walling v. Aiken*, 1 McM. Eq. (S. C.) 2, 10; *Lake v. Shumate*, 20 S. C. 23; *Siter v. McClanachan*, 2 Gratt. (Va.) 280, 299; *Webb v. Crouch*, 70 W. Va. 580, Ann. Cas. 1914A, 728, 74 S. E. 730. See *Rodda v. Needham*, 78 Wash. 636, 139 Pac. 628.

42. *Challis v. Casborn*, Finch, Prec. Ch. 407; *Coleman v. Winch*, 1 P. Wms. 755; *Jones v. Smith*, 2 Ves. Jr. 372, 376; *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; *Brooks v. Brooks*, 169 Mass. 38, 47 N. E. 448; *Weller v. Summers*, 82 Minn. 307; *Corporation for Relief v. Wallace*, 3 Rawle (Pa.) 109, 155. In Maine and Massachusetts the mortgagee is given this right if it was orally agreed that the mortgage should

be security for such debts. *Hayhurst v. Morin*, 104 Me. 169, 71 Atl. 707; *Joslyn v. Wyman*, 5 Allen (Mass.) 62; *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586.

Even in England it is held that an heir or devisee seeking to redeem must pay, in addition to the mortgage debt, a debt of the deceased which is payable out of the land as being assets in the hands of such heir or devisee, this being stated to be for the purpose of avoiding circuity of action. *Coleman v. Winch*, 1 P. Wms. 777; *Rolfe v. Chester*, 20 Beav. 610; *Elvy v. Norwood*, 21 Law J. Ch. 716. But this rule is not there applied to the detriment of other creditors of equal degree, or incumbrancers whose rights have accrued between the time of the mortgage and the creation of the debt. *Powis v. Corbet*, 3 Atk. 556; 1 Story, Eq. Jur. §§ 418, 419; *Hamerton v. Rogers*, 1 Ves. Jr. 513, Sumner's note.

43. *Cohn v. Hoffman*, 56 Ark. 119, 19 S. W. 233; *Gelston v. Thompson*, 29 Md. 595; *Hays v. Cretin*, 102 Md. 695, 4 L. R. A. (N. S.) 1039, 62 Atl. 1028.

closure, as distinct from redemption, has never been recognized.<sup>44</sup>

— (c) **Loss of right— By foreclosure.** One having a right to redeem is ordinarily entitled to exercise the right until it is cut off by foreclosure and not thereafter. There are in some jurisdictions statutes allowing redemption at any time before rendition of the decree in the foreclosure proceedings, and some statutes allow redemption at any time before actual sale. In the absence of any statute, or any established practice in that regard,<sup>45</sup> it would seem that the law would be as declared by the former class of statutes, that is, that the right of redemption would exist until the rendition of the decree. But a foreclosure proceeding does not affect the right of redemption of a person who was not made a party thereto.<sup>46</sup> And even one who was a party thereto may redeem if the proceeding was for any reason invalid as regards him, as for instance in case of fraud, mistake or lack of notice.<sup>47</sup>

Even though there has been a valid foreclosure, by which the title is vested in the mortgage creditor, the right of redemption may be revived by his action

44. *Lee v. Stone*, 5 Gill & J. (Md.) 1; *Anthony v. Anthony*, 23 Ark. 479; *Tunno v. Robert*, 16 Fla. 738.

45. See *Wimpfheimer v. Prudential Ins. Co.*, 56 N. J. Eq. 585, 39 Atl. 916; *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247.

46. *Ilrod v. Smith*, 130 Ala. 212, 30 So. 420; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Bridgeport Sav. Bank v. Eldridge*, 28 Conn. 556, 73 Am. Dec. 688; *Dandee Naval Stores Co. v. McDowell*, 65 Fla. 15, Ann. Cas. 1915A, 187, 61 So. 108; *Strang v. Allen*, 4 Ill. 428; *McDonald v. Secor*, Nat. Bank, 106 Iowa, 517,

76 N. W. 1011; *Shackleford v. Stockton*, 6 B. Mon. (Ky.) 390; *Worthington v. Wilmot*, 59 Miss. 608; *Minor v. Beekman*, 50 N. Y. 237; *Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *DeLashmutt v. Sellwood*, 10 Oreg. 219; *Froelich v. Swafford*, 33 S. D. 142, 144 N. W. 925; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762.

47. *Weiss v. Alling*, 34 Conn. 60; *Bostwick v. Stiles*, 35 Conn. 195; *Webber v. Curtiss*, 104 Ill. 309; *Penny v. Cook*, 19 Iowa, 538; *Wilson v. Eggleston*, 27 Mich. 257; *McKeighan v. Hopkins*, 14 Neb.

in thereafter accepting payments on account of the mortgage debt, with the intention of opening the foreclosure.<sup>48</sup> And the recovery of a personal judgment for the entire mortgage debt has been held to involve, presumptively at least, a waiver or disclaimer of a prior strict foreclosure.<sup>49</sup>

In some states the statute expressly provides, in the case of foreclosure by entry upon the land, that a right of redemption shall continue for a certain number of years after such entry, while in many states there is, by statute, a right, to endure for a time named, to redeem from a sale under the mortgage. A mortgage creditor who forecloses by entry under the statute may, by agreement with the debtor, extend the statutory period for redemption.<sup>50</sup> And a foreclosure purchaser may extend the statutory period for redemption from the sale.<sup>51</sup> Such an agreement for extension does not, however, involve a waiver or relinquishment of the foreclosure, and upon the expiration of the period named without redemption, the title of the mortgagee or purchaser is absolute.<sup>52</sup> In the absence

361, 15 N. W. 711; *Bennett v. Austin*, 81 N. Y. 308; *Stinson v. Pepper*, 47 Fed. 676.

48. *Lounsberry v. Norton*, 59 Conn. 170, 22 Atl. 153; *Scott v. Childs*, 64 N. H. 566, 15 Atl. 206; *Osborne v. Tunis*, 25 N. J. L. 633, *Findlay v. Longe*, 81 Vt. 523 71 Atl. 829. That the mere making of payments on the mortgage debt, without other evidence of an intention to open the foreclosure, is insufficient, see *Lawrence v. Fletcher*, 8 Metc. (Mass.) 153.

49. *Clarke v. Robinson*, 15 R. I. 231, 10 Atl. 642; *Hazard v. Robinson*, 15 R. I. 226, 2 Atl. 433.

50. *Quint v. Little*, 4 Me. 495; *Danforth v. Roberts*, 20 Me. 307; *Chase v. McLellan*, 49 Me. 375;

*Brown v. Lawton*, 87 Me. 83, 32 Atl. 733; *Daggett v. Town of Mendon*, 64 Vt. 323, 24 Atl. 242. See *Clark v. Crosby*, 101 Mass. 184; *Daniels v. Mowry*, 1 R. I. 151.

51. *Pensoneau v. Pulliam*, 47 Ill. 58; *Taggart v. Blair*, 215 Ill. 339, 74 N. E. 372; *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *Moote v. Scriven*, 33 Mich. 500; *Pearson v. Douglass*, 1 Baxt. (Tenn.) 151; *Mann v. Provident Life & Trust Co.*, 42 Wash. 581, 85 Pac. 56; *Schroeder v. Young*, 161 U. S. 334, 344, 40 L. Ed. 721.

52. *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *Southard v. Pope*, 9 B. Mon. (Ky.) 261.

of any statutory right of redemption after foreclosure, if a purchaser at foreclosure sale agrees to allow the debtor to reacquire the land by the payment of a sum named, such agreement is in effect, it would seem, a new mortgage in favor of such purchaser, which would necessitate a new foreclosure,<sup>53</sup> or it is an agreement giving the former debtor an option of purchase.<sup>54</sup>

— **By lapse of time.** A mortgagor may be barred of his right to redeem by the lapse of time, equity usually adopting for this purpose the legal period of limitation applicable to suits for the recovery of land, after which time the right of redemption is presumed to be extinguished,<sup>55</sup> though sometimes the period fixed by statute for the bringing of a proceeding to foreclose is adopted, as being more closely analogous.<sup>56</sup>

In order that the right of the mortgagor be thus barred by the expiration of the limitation period it is necessary that the mortgage creditor shall have been in possession of the land during that period, and his possession must, in most of the states, have been adverse to the mortgagor, that is, without any admission of the latter's interest in the land.<sup>57</sup> Oc-

53. See *ante*, § 605(d).

54. *Woods v. McGraw*, 127 Fed. 914, 63 C. C. A. 556.

55. *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; *Slicer v. Bank of Pittsburg*, 16 How. (U. S.) 571, 14 L. Ed. 1063; *Dexter v. Arnold*, 1 Sumn. 109 Fed. Cas. No. 3,857; *Jarvis v. Woodruff*, 22 Conn. 548; *Morgan v. Morgan*, 10 Ga. 297; *Tibbs v. Reed*, 105 Ky. 331, 49 S. W. 6; *Roberts v. Littlefield*, 48 Me. 61; *McNair v. Lot*, 34 Me. 285, 84 Am. Dec. 78; *Hoffman v. Harrington*, 33 Mich. 92; *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78; *Little*

*v. Teague*, 60 Miss. 115; *Clark v. Clough*, 65 N. H. 43, 23 Atl. 526; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 135, 8 Am. Dec. 467; *Robinson v. Fife*, 3 Ohio St. 551.

56. See *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357; *Gower v. Winchester*, 23 Iowa, 303; *Mahaffy v. Faris*, 144 Iowa, 220, 24 L. R. A. (N. S.) 840, 122 N. W. 534.

57. *Dexter v. Arnold*, 3 Sumn. 112; *Jarvis v. Woodruff*, 22 Conn. 248; *Morgan v. Morgan*, 10 Ga. 297; *Locke v. Caldwell*, 91 Ill. 417; *Salinger v. McAllister*, 165 Iowa, 508, 146 N. W. 8; *Munro*

asionally the courts have regarded adverse possession by the mortgage creditor for the statutory period not as an absolute bar to the right of redemption, but as merely raising a presumption of the relinquishment of the right.<sup>58</sup> But ordinarily the mortgagor's right of redemption, that is, his right to discharge the mortgage lien, and thus to reacquire the possession of the land and the ownership thereof free from any claim by the mortgage creditor, is regarded as absolutely barred by the lapse of the statutory period of limitation. Until, however, the arrival of the time named for the performance of the obligation secured, there is no right in the mortgagor to assert a right of redemption, and consequently, until then, the statutory period does not commence to run.<sup>59</sup> If the mortgagee holds possession under an agreement or understanding that he is to apply the rents and profits on the debt, his possession cannot become adverse until the debt is satisfied.<sup>60</sup> And it does not do so even then, it would seem, unless he disclaims holding as mortgagee and asserts an absolute title.<sup>61</sup>

In some states there is a statute specifically limit-

v. Barton, 98 Me. 250, 56 Atl. 844; Ayres v. Waite, 10 Cush. (Mass.) 72; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658; Hall v. Hooper, 47 Neb. 111 66 N. W. 33; Minnuck v. Reichenbach, 97 Neb. 629, 150 N. W. 1001; Clark v. Clough, 65 N. H. 43 23 Atl. 526; Becker v. McCrea, 193 N. Y. 423, 86 N. E. 463; Simmons v. Ballard, 102 N. C. 105, 9 S. E. 495; Blessett v. Turcotte, 23 N. D. 417, 136 N. W. 945; West v. Middlesex Banking Co., 33 S. D. 465, 146 N. W. 598. *Contra*, Crawford v. Taylor, 42 Iowa, 260.

58. Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; Ayres v. Waite, 10 Cush. (Mass.) 72.

59. McGuire v. Shelby, 20 Ala. 456; Munro v. Barton, 98 Me. 250; Froelich v. Swafford, 33 S. D. 142, 144 N. W. 925; Hammonds v. Hopkins, 3 Yerg. (Tenn.) 527; Waldo v. Rice, 14 Wis. 286.

60. Anding v. Davis, 38 Miss. 574, 77 Am. Dec. 658; McPherson v. Hayward, 81 Me. 329, 17 Atl. 164.

61. Green v. Turner, 38 Iowa, 112.

ing the time within which a suit for redemption may be brought.<sup>62</sup>

It has been asserted by several courts that the right to foreclose and the right to redeem are reciprocal rights, and that if the one right, that to foreclose, is barred, the other right, that to redeem, is also barred.<sup>63</sup> This statement, it has been said, can properly mean no more than that so long as an instrument is to be regarded as a mortgage for the purposes of one party it must be so regarded for the purposes of the other.<sup>64</sup> If it be given a more extended effect, as has been well remarked, a person might one day be a mortgagee, having, in most jurisdictions, a lien merely on the premises, and the next day be their absolute owner,<sup>65</sup> and this, it might be added, without any action on his part to enforce his security, but merely by reason of his failure to enforce it. Another objection to such a doctrine which might be suggested, is that it would give to one claimant the benefit of disabilities to which his opponent is subject. There is a sense however in which the right of redemption does exist only so long as the right of foreclosure exists, and that is in the case of a junior mortgagee. His right of redemption from the senior mortgage, at least in states where he has a lien only, grows out of his right to foreclose his lien, and so soon as he loses this latter right, he loses the former.<sup>66</sup> In some states,<sup>67</sup> the statement

62. *Drum v. Bryan*, — (Ala.) —, 40 So. 131; *Warder v. Enslen*, 73 Cal. 291, 14 Pac. 874; *Garrett v. Ellis*, 98 Miss. 1, 52 So. 451; *Chapin v. Wright*, 41 N. J. Eq. 438, 5 Atl. 574; *Pecker v. McCrea*, 193 N. Y. 423, 86 N. E. 463; *Houck v. Adams*, 98 N. C. 519, 4 S. E. 502.

63. See *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; *Morrow v. Jones*, 41 Neb. 867, 60 N. W. 369; *Carpenter v. Plagge*,

192 Ill. 82, 61 N. E. 530; *Mahaffy v. Faris*, 144 Iowa, 220, 24 L. R. A. (N. S.) 840, 122 N. W. 934.

64. *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85, 53 N. E. 594.

65. *Bradley v. Norris*, 63 Minn. 156, 65 N. W. 357.

66. *Gower v. Winchester*, 33 Iowa, 303; *Krutz v. Gardner*, 25 Wash. 396, 65 Pac. 771.

67. *Ante*, this section, note 56.



referred to might perhaps mean that the period within which a right to redeem may be exercised must be the same as that within which a right of foreclosure must be exercised, that is, that the analogy of foreclosure proceedings must be applied in this regard.

Apart from the question of limitations, the person seeking redemption may be guilty of such laches as to be incapacitated to assert the right of redemption.<sup>68</sup> Occasionally it has been asserted that to bar the right of redemption the laches must involve a delay to assert the right for a period equal to the statutory limitation,<sup>69</sup> but this view does not usually prevail.

— **By estoppel.** The right to redeem may be extinguished, on the principle of estoppel, in case the mortgagor or his transferee induces some third person to purchase the premises, or to make expenditures thereon, by expressions or conduct inducing the belief on the part of such person that no right of redemption will be asserted.<sup>70</sup>

68. *Askew v. Sanders*, 84 Ala. 356, 4 So. 167; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85, 58 N. E. 594; *Bigoness v. Hibbard*, 267 Ill. 301, 108 N. E. 294; *Adams v. Holden*, 111 Iowa, 54, 82 N. W. 468; *United States Bank v. Carroll*, 4 B. Mon. (Ky.) 40; *Broaddus' Heirs v. Potts*, 140 Ky. 583, 131 S. W. 510; *Tetrault v. Fournier*, 187 Mass. 58, 72 N. E. 351; *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512, 19 S. W. 727; *Elling v. Fine*, 53 Mont. 481, 164 Pac. 891; *Piatt v. Smith*, 12 Ohio St. 561; *Simmons v. Burlington, C. R. & N. R. Co.*, 159 U. S. 278, 40 L. Ed. 150.

69. *Moore v. Dick*, 187 Mass. 207, 72 N. E. 967; *Chapin v. Wright*, 41 N. J. Eq. 438, 5 Atl. 574 (*semble*); *Houston v. Nat.*

*Mut. Building & Loan Ass'n*, 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540; *Ross v. Leavitt*, 70 N. H. 602, 50 Atl. 110. In *Mellish v. Robertson*, 25 Vt. 503, it was decided that such was the rule in the case of a mortgage which is such in form, though not in the case of an absolute deed intended as security.

70. *Schlawig v. Fleckenstein*, 80 Iowa, 668, 45 N. W. 770; *Southard v. Sutton*, 68 Me. 575; *Fay v. Valentine*, 12 Pick. (Mass.) 40, 22 Am. Dec. 397; *Hardy v. City of Keene*, 67 N. H. 166, 32 Atl. 759; *Lusenhop v. Einsfeld*, 93 N. Y. App. Div. 68, 87 N. Y. Supp. 268; *Woods v. McGarock*, 10 Yerg. (Tenn.) 133; *Wright v. Whitehead*, 14 Vt. 268.

— (d) **Enforcement of right.** The mortgage creditor occasionally refuses to allow the mortgagor, or other person entitled to redeem, to exercise such right, thereby subjecting the land to a continuance of the mortgage lien, and perhaps impairing the validity or vendibility of the title. In such a case, and likewise when the creditor claims that the conveyance was absolute, and not by way of mortgage, or when there is a dispute as to the amount due, or there was a failure to make one a party to the foreclosure proceeding so as to cut off his right of redemption, the mortgagor or other person entitled to redeem may proceed in equity to enforce the right of redemption, and may obtain a decree compelling the mortgage creditor, upon payment of the debt, to release or discharge the mortgage.

By the weight of authority, it is not necessary, in order to establish a right to redeem, that the person asserting the right shall previously have made an actual tender of the amount due upon the mortgage debt.<sup>71</sup> But it has occasionally been asserted, either expressly or by implication, that tender before suit is necessary in the absence of exceptional circumstances.<sup>72</sup>

71. *Hammett v. White*, 128 Ala. 280, 29 So. 517; *Rees v. Rhodes*, 3 Ariz. 235, 73 Pac. 446; *Longino v. Ball-Warren Co.*, 84 Ark. 521, 106 S. W. 682; *Deven v. Blake*, 44 Ill. 135; *Barr v. Vanalstine*, 120 Ind. 590, 22 N. E. 965; *Tucker v. Witherbee*, 130 Ky. 269, 113 S. W. 123; *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39; *Kline v. Vogel*, 90 Mo. 239, 1 S. W. 733, 2 S. W. 408; *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. 1000; *Reich v. Cochran*, 213 N. Y. 416, 107 N. E. 1029; *Sweele v. Beale*, 20 Ore.

323, 25 Pac. 633; *Eschbach v. Zimmerman*, 2 Pa. St. 313; *Loving v. Milliken*, 59 Tex. 423.

72. *Dawson v. Overmyer*, 141 Ind. 438, 40 N. E. 1063; (but see *Doyle v. Ringo*, 180 Ind. 348, 102 N. E. 18); *Porter v. Farmers' & Merchants' Sav. Bank of Lone Tree*, 143 Iowa, 629, 120 N. W. 633; *Aust v. Rosenbaum*, 74 Miss. 893, 21 So. 555; *Nestor v. Davis*, 100 Miss. 199, 56 So. 347; *Lambert v. Miller*, 38 N. J. Eq. 117; *Rodda v. Needham*, 78 Wash. 636, 139 Pac. 628.

The petition or complaint must, in most jurisdictions, allege a readiness on the part of the plaintiff to pay such sum as may be found to be due,<sup>73</sup> provided at least it is framed on the theory that the debt secured or a portion thereof is still due and unpaid.<sup>74</sup>

— **Accounting.** In case there is any question as to the amount which may be due, the court will ordinarily refer the case to a master or commissioner to state an account between the parties.<sup>75</sup> And the stating of an account is usually necessary if the mortgage creditor has been in possession of the land, he being in such case liable for the rents and profits of the property, and entitled to credit for expenditures necessarily incurred by him.<sup>76</sup>

The mortgagee in possession is required to account for rents and profits when the person seeking to redeem is a junior mortgagee as well as when he is the mortgagor himself, the junior mortgagee representing the mortgagor for this purpose.<sup>77</sup> And this has been held to be the case even though the mortgagee,

73. *Hodges v. Verner*, 100 Ala. 612, 13 So. 679; *Ray v. Pitman*, 119 Ga. 678, 46 S. E. 849; *Way v. Mullett*, 143 Mass. 49, 8 N. E. 881; *Hoopes v. Bailey*, 28 Miss. 328; *Jopling v. Walton*, 138 Mo. 485, 40 S. W. 99; *Eastman v. Thayer*, 60 N. H. 408; *Berkman v. Frost*, 18 Johns. (N. Y.) 544, 9 Am. Dec. 246; *Marshall v. Stewart*, 17 Ohio, 356; *Jones v. Porter*, 29 Tex. 456; *American Loan & Trust Co. v. Atlanta Elec. R. Co.*, 99 Fed. 213. But see *contra*, *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39; *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260; *Casserly v. Witherbee*, 119 N. Y. 522, 23 N. E. 1000.

74. *Horn v. Indianapolis Nat. Bank*, 125 Ind. 281, 9 L. R. A. 676,

21 Am. St. Rep. 231, 25 N. E. 558; *De Leonis v. Walsh*, 140 Cal. 175, 73 Pac. 813; *Smith v. Conner*, 65 Ala. 371.

75. See *Williams v. Norton* 139 Ala. 402, 36 So. 11; *Bartlett v. Fellows*, 47 Me. 53; *Doody v. Pierce*, 9 Allen (Mass.) 111; *Merriam v. Goss*, 139 Mass. 77, 28 N. E. 449; *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 187; *Bellows v. Stone*, 18 N. H. 465; *Ross v. Boardman*, 22 Hun. (N. Y.) 527; *McDonald v. McLeod*, 36 N. C. 221; *Reeder v. Trullinger*, 151 Pa. St. 287, 24 Atl. 1104; *Feamster v. Withrow*, 9 W. Va. 296.

76. *Ante*, § 613(c).

77. *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 18 N. E. 1083; *Clark v. Paquette*, 67 Vt.

after entering into possession as such, acquired the mortgagor's interest in the land.<sup>78</sup> But if he enters into possession by reason of another title, he does not become liable to account upon his subsequent acquisition of the mortgage debt.<sup>79</sup> And if he enters into possession after having acquired such other title, he will be presumed, it seems, to have done so under such title and not as mortgagee.<sup>80</sup> But if such other title terminates or in some way becomes divested, then his subsequent possession may be referred to the mortgage.<sup>81</sup>

One in possession under an absolute deed intended as a mortgage is regarded as a mortgagee in possession and as such required to account for rents and profits.<sup>82</sup>

A purchaser at foreclosure sale is, if the mortgagor or the mortgagor's transferee was not a party to the proceeding, in the position of a mortgagee in possession, and as such is bound to account for rents and profits.<sup>83</sup> But if the mortgagor or his successor in interest was made a party, the purchaser at the sale acquires the mortgagor's interest and will be regarded as taking possession on the strength of such title, and consequently will not ordinarily be required to account as a mortgagee in possession upon a proceeding to redeem by a junior lienor, who was not a

681, 32 Atl. 812; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791.

78. *Harrison v. Wyse*, 24 Conn. 1 63 Am. Dec. 151; *Clark v. Paquette*, 67 Vt. 681, 32 Atl. 812.

79. *Hart v. Chase*, 46 Conn. 207.

80. *Adler-Goldman Commission Co. v. Herren*, 65 Ark. 229, 45 S. W. 543; *Rogers v. Herren*, 92 Ill. 583; *Gray v. Nelson*, 77 Iowa, 63, 41 N. W. 566.

81. *Anderson v. Lauterman*, 27

Ohio St. 104; *Moore v. Degraw*, 5 N. J. Eq. 346.

82. *Harrill v. Stapleton*, 55 Ark. 1, 16 S. W. 474; *Clark v. Finlon*, 90 Ill. 245; *Miller v. Peter*, 158 Mich. 336, 122 N. W. 780; *Cookes v. Culbertson*, 9 Nev. 159.

83. *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949.

party to the foreclosure proceeding,<sup>84</sup> unless the foreclosure was for some other reason invalid.<sup>85</sup>

The decree in a proceeding to redeem is framed in such a manner as finally to fix and adjust the rights of the parties with reference to the mortgaged land and the debt secured by the mortgage, ordinarily providing in effect for the satisfaction or release of the mortgage on the records, or the reconveyance of the legal title, upon the payment of the amount found to be due,<sup>86</sup> a time being named in the decree within which the payment must be made.<sup>87</sup> The time thus to be allowed is usually a matter within the sound discretion of the court,<sup>88</sup> a reasonable time being allowed, having regard to the circumstances and justice of the case.<sup>89</sup> A failure to pay the amount found due within the time named in the decree, resulting in a dismissal

84. *Longino v. Ball-Warren Commission Co.*, 84 Ark. 521, 106 S. W. 682; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Gault v. Equitable Trust Co.*, 100 Ky. 578, 38 S. W. 1065; *Penard v. Brown*, 7 Neb. 449. *Contra*, *Ten Eyck v. Casad*, 15 Iowa, 524.

85. *Hannon v. Hilliard*, 83 Ind. 363; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083.

86. *Bremer v. Calumet & C. Canal & Dock Co.*, 127 Ill. 464, 18 N. E. 321; *Dennett v. Codman*, 158 Mass. 371, 33 N. E. 574; *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898; *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *Martin v. Ratcliff*, 101 Mo. 254, 20 Am. St. Rep. 605, 13 S. W. 1051.

87. *Cline v. Robbins*, 112 Cal. 581, 44 Pac. 1023; *Collins v. Gregg*, 109 Iowa, 506, 80 N. W. 562; *Pitman v. Thornton*, 66 Me. 469;

*Dennett v. Codman*, 158 Mass. 371, 33 N. E. 574; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949.

88. *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *Clark v. Reyburn*, 8 Wall. (U. S.) 318, 19 L. Ed. 354.

89. In *Taylor v. Dillenburg*, 168 Ill. 235, 48 N. E. 41, the period of thirty days, allowed by the lower court, was regarded as insufficient, the sum to be paid being over six thousand dollars. In *Murphy v. New Hampshire Sav. Bank*, 63 N. H. 362, a year was decided to be the proper period, in analogy to certain periods fixed by statute as to the redemption and discharge of mortgages. And in *Lindsey v. Delano*, 78 Iowa, 350, 43 N. W. 218, it was held that if a junior mortgagee was, though a nominal party to a foreclosure proceeding, not served until after the sale, he should be allowed only nine months to redeem, by analogy to

of the proceeding to redeem, involves in effect a foreclosure.<sup>90</sup>

§ 646. **Subrogation on payment.** While the payment of the debt secured by a mortgage extinguishes the mortgage so far as the mortgage creditor is concerned, it does not necessarily have that effect as regards the person making the payment. In his favor the courts will frequently apply the equitable doctrine of subrogation, by which one who, in order to protect his interests, pays a debt for which he is not primarily liable, is entitled to stand in the place of the original creditor, with all the rights belonging to the latter, including particularly the right to enforce any security which the latter may have held for the payment of the debt. This right is sometimes given the name of "equitable assignment," as being in effect an assignment, implied by equity, to the person making the payment. As a general rule, any person who, as being liable for the mortgage debt, or as having an interest in the land, is entitled to pay the debt, that is, to "redeem from the mortgage," as it is ordinarily expressed,<sup>91</sup> is entitled to be subrogated on making such payment, provided he is not primarily and solely liable for the debt. If he is so liable, he is not entitled to be subrogated, since this would involve his substitution, by operation of law, as claimant under an obligation as against himself and his performance of the obligation consequently extinguishes the obligation and the incidental security.

The doctrine of subrogation is frequently applied for the benefit of a surety who, upon paying his principal's debt, thereby becomes entitled to stand in the place of the creditor, in order to obtain indemnity; and, accordingly, when the debt is secured by mortgage,

the statutory period for redemption from a foreclosure sale.

90. *Winchester v. Paine*, 11 Ves. 121, 199; *Cassery v. Witherbee*,

119 N. Y. 522; *Flanders v. Hall*, 159 Mass. 95; *Pitman v. Thornton*, 66 Me. 469.

91. *Ante*, § 645(a).

the surety is, on paying it, entitled to the benefit of such mortgage, being in equity regarded as the assignee thereof.<sup>92</sup> And payment is, for this purpose, to be regarded as made by the person from whose funds it is made, although another is the actual agent in the transaction.<sup>93</sup>

The mortgagor himself may or may not be entitled to subrogation. So long as he is primarily liable for the whole debt, he cannot pay it and assert a right of subrogation.<sup>94</sup> If, however, he shares with others the primary liability for the debt, as when he is one of two or more co-owners of property who mortgaged it to secure their joint debt, he is but a surety for the others as regards their shares of the debt, and if he pays the whole debt, or a part thereof greater than his proportionate part, he is subrogated to the extent of such overpayment, for the purpose of enforcing contribution by the others.<sup>95</sup>

In case the mortgage debt is paid by one of the

92. *Matthews v. Fidelity Title & Trust Co.* (C. C.), 52 Fed. 687; *Telford v. Garrels*, 132 Ill. 550, 24 N. E. 573; *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 92; *Lynn v. Richardson*, 78 Me. 367, 5 Atl. 377; *Conner v. Hows*, 35 Minn. 518, 29 N. W. 314; *Taylor v. Tarr*, 84 Mo. 420; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Smith v. Folsom*, 80 Ohio St. 218, 88 N. E. 546; *Bowen v. Barksdale*, 33 S. C. 142, 11 S. E. 640; *Wilder v. Wilder*, 82 Vt. 123, 72 Atl. 203.

93. *Kingsley v. Purdom*, 53 Kan. 56, 35 Pac. 811; *Nichols v. Lee*, 10 Mich. 526, 82 Am. Dec. 57; *Wright v. Patterson*, 45 Mich. 261, 7 N. W. 820; *Shepherd v. McClain*, 18 N. J. Eq. 128; *Hammond v. Barker*, 61 N. H. 53; *Kinley v. Hill*, 4 Watts. & S. (Pa.) 426; *Shepherd v. McClain*, 18 N.

J. Eq. 128; *Fears v. Albee*, 69 Tex. 437, 5 Am. St. Rep. 78, 68. S. W. 286.

94. *Clay v. Banks*, 71 Ga. 363; *Butler v. Seward*, 10 Allen (Mass.) 466.

95. *Pratt v. Law*, 9 Cranch. (U. S.) 456, 3 L. Ed. 791; *Young v. Williams*, 17 Conn. 393; *Randolph v. Stark*, 51 La. Ann. 1121, 26 So. 59; *Dunean v. Drury*, 9 Pa. 332; *Holland v. Citizens' Sav. Bank*, 16 R. I. 734, 8 L. R. A. 553, 19 Atl. 654; *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654; *Baugh & Sons Co. v. Black*, 120 Va. 12, 90 S. E. 607; *Lamberson v. Bailey*, 158 Wis. 105, 147 N. W. 1066. Part of the co-promisors cannot purchase the note and enforce it for the full amount against the others. *Peaks v. Dexter*, 82 Me. 85, 19 Atl. 100.

parties to a transfer of the mortgaged land or of a part thereof, the question whether the party paying has a right of subrogation will depend upon the character or circumstances of the transfer. If the property was transferred subject to the mortgage, though without any assumption of the debt by the transferee, the mortgaged property is subject to a primary liability for the debt,<sup>96</sup> and consequently, if the transferor pays the debt, he is subrogated to the rights of the mortgagee against the property;<sup>97</sup> and conversely, if the transferee pays the debt, he is not subrogated to the rights of the mortgagee against the transferor personally or against a part of the land not transferred,<sup>98</sup> except, it seems, to the extent to which the debt paid by him exceeds the value of the land transferred to him,<sup>99</sup> the relation of suretyship extending to such value only.<sup>1</sup> The transferee of mortgaged land, who assumes payment of the debt, becomes primarily liable therefor,<sup>2</sup> and cannot, on paying the debt, assert a right of subrogation as

96. *Ante*, § 622.

97. *Funk v. McReynolds*, 33 Ill. 481; *Gregory v. Arms*, 48 Ind. App. 562, 96 N. E. 196; *Kinnear v. Lowell*, 34 Me. 299; *Hermanns v. Fanning*, 151 Mass. 1, 23 N. E. 493; *Pratt v. Buckley*, 175 Mass. 115, 55 N. E. 889; *Baker v. Terrell*, 8 Minn. 195; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Greenwell v. Heritage*, 71 Mo. 459; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Marsh v. Pike*, 10 Paige (N. Y.) 395; *Johnson v. Pike*, 51 N. Y. 333; *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Howard v. Robbins*, 170 N. Y. 498, 63 N. E. 580; *Fogarty v. Hunter*, 83 Ore. 183, 162 Pac. 964; *Hansell v. Lutz*, 20 Pa. 284.

98. *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514; *Shirk*

*v. Whitten*, 131 Ind. 455, 31 N. E. 87; *Northwestern Nat. Bank v. Stone*, 97 Iowa, 183, 66 N. W. 91; *Moore v. Olive*, 114 Iowa, 650, 87 N. W. 720; *Wedge v. Moore*, 6 Cush. (Mass.) 8; *In re Wisner's Estate*, 20 Mich. 442; *Landau v. Cottrill*, 159 Mo. 308, 60 S. W. 64; *Robinson v. Lowery*, 52 S. C. 464, 30 S. E. 487; *Guernsey v. Kendall*, 55 Vt. 201; *Gayle v. Wilson*, 30 Gratt. (Va.) 166; *Bennett v. Keehn*, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112. So when the payment was by a purchaser at execution sale. *Dollar Sav. Bank v. Burns*, 87 Pa. 491; *Steele v. Walter*, 204 Pa. 257, 53 Atl. 1097.

99. *Southworth v. Scofield*, 51 N. Y. 513.

1. *Ante*, § 624, note 28.

2. *Ante*, § 623.



against the land, so as to take priority of others having junior incumbrances thereon or for other purposes.<sup>3</sup> Nor can he assert a right of subrogation as against another part of the mortgaged land retained by his grantor, or subsequently conveyed by the latter to another.<sup>4</sup> And one claiming under a grantee who has assumed stands, it has been decided, in the same position in this regard as his grantor.<sup>5</sup> Conversely, the transferee having assumed the debt, the transferor is secondarily liable only, and is entitled to subrogation in case he pays the debt.<sup>6</sup>

3. *Dodds v. Spring*, 174 Cal. 412, 163 Pac. 351; *Clay v. Banks*, 71 Ga. 363; *Ellis v. Bashor*, 17 Idaho, 259, 105 Pac. 214; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Theisen v. Dayton*, 82 Iowa, 74, 47 N. W. 891; *Burnham v. Dorr*, 72 Me. 198; *McCabe v. Swap*, 14 Allen (Mass.) 188; *Lydon v. Campbell*, 204 Mass. 580, 91 N. E. 151; *Probstfield v. Czizek*, 37 Minn. 420, 34 N. W. 896; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960; *Gulling v. Washoe County Bank*, 24 Nev. 477, 56 Pac. 580; *Kahn v. McConnell*, 37 Okla. 219, 47 L. R. A. (N. S.) 1189, 131 Pac. 682; *Lackawanna Trust & Safe Deposit Co. v. Gomerlinger*, 236 Pa. 179, 84 Atl. 757; *Dargan v. McSween*, 33 S. C. 324, 11 S. E. 1077; *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795; *Martin v. C. Aultman & Co.*, 80 Wis. 150, 49 N. W. 749. But see *Capitol Nat. Bank v. Holmes*, 43 Colo. 154, 16 L. R. A. (N. S.) 470, 127 Am. St. Rep. 108, 95 Pac. 314; *Johnson v. Tootle*, 14 Utah, 482, 47 Pac. 1033, *contra*.

4. *Wright v. Briggs*, 99 Ind.

563; *Johnson v. Walter*, 60 Iowa, 315, 14 N. W. 325; *Cushing v. Ayer*, 25 Me. 383; *Putnam v. Colamore*, 120 Mass. 454; *Pike v. Goodnow*, 12 Allen (Mass.) 472; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Champlin v. Williams*, 9 Pa. 341.

5. *Goodyear v. Goodyear*, 72 Iowa, 329, 33 N. W. 142; *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795. See *Hamilton v. Robinson*, 190 Ala. 549, 67 So. 434.

6. *Hamilton v. Robinson*, 190 Ala. 549, 67 So. 434; *Flagg v. Geltmacher*, 98 Ill. 293; *Howard v. Burns*, 279 Ill. 256, 116 N. E. 703; *Begein v. Brehm*, 123 Ind. 160, 23 N. E. 496; *Kinnear v. Lowell*, 34 Me. 299; *North End Sav. Bank v. Snow*, 197 Mass. 339, 83 N. E. 1099; *Minnesota Loan & Trust Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255; *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642; *Assumptive Sav. Bank v. Weeks*, 59 N. H. 239; *Stillman's Ex'rs v. Stillman*, 21 N. J. Eq. 126; *Ayers v. Dixon*, 78 N. Y. 318; *Winans v. Hare*, 46 Okla. 741, 148 Pac.

If the transfer of the land by the mortgagor was not subject to the mortgage, and was unaccompanied by an assumption of the debt by the transferee, the mortgagor is primarily liable, the debt secured being his own debt, and he has consequently no right of subrogation on paying the debt.<sup>7</sup> The transferee, on the other hand, under such circumstances, is entitled to pay the debt and then assert a claim by way of subrogation.<sup>8</sup> And so if the conveyance was of a part of the mortgaged land, the grantee is, on paying the debt, entitled to subrogation for the purpose of enforcing any rights which may exist in his favor as against other parts of the land.<sup>9</sup>

If the mortgage debt is paid by one having a junior

1052; *Hampe v. Manke*, 28 S. D. 501, 134 N. W. 60; *Stevens v. Goodenough*, 26 Vt. 676.

7. *Young v. Morgan*, 89 Ill. 199 (*semble*); *Abbott v. Kasson*, 72 Pa. St. 183; *Walker v. King*, 45 Vt. 525; *Barnes v. Mott*, 64 N. Y. 397. See *Loverin v. Humboldt Safe Deposit & Trust Co.*, 113 Pa. St. 6, 4 Atl. 191. So when there is a covenant of title by the transferor sufficient to protect the transferee against the mortgage. *Jones v. Lamar (C. C.)* 34 Fed. 454; *Maitlen v. Maitlen*, 44 Ind. App. 559, 89 N. E. 966; *Kelly v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Butler v. Seward*, 10 Allen (Mass.) 466; *Wadsworth v. Williams*, 100 Mass. 126; *Byles v. Kellogg*, 67 Mich. 318, 34 N. W. 671; *Hooper v. Henry*, 31 Minn. 264, 17 N. W. 476; *Nixon v. Jullian*, 72 Miss. 570, 18 So. 366. The effect of the covenant in this regard has been held to be removed by a subsequent conveyance "subject" to the mortgage. *Merritt v. Byers*,

46 Minn. 74, 48 N. W. 417. But as to this see *ante* § 622, note 32.

8. *Simpson v. Ennis*, 114 Ga. 202, 39 S. E. 853; *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671; *Braden v. Graves*, 85 Ind. 92; *Holden v. Pike*, 24 Me. 427; *Lovejoy v. Vose*, 73 Me. 46; *Gleason v. Dyke*, 22 Pick. (Mass.) 390; *Brown v. Lapham*, 3 Cush. (Mass.) 551; *Ryer v. Gass*, 130 Mass. 227; *McIntyre v. Agricultural Bank, Freeman (Miss.)* 105; *Bell v. Woodward*, 34 N. H. 90; *Newcomb v. Lubrasky*, 65 N. J. Eq. 125, 55 Atl. 89 (*semble*); *Wadsworth v. Lyon*, 93 N. Y. 201; *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900; *Duffy v. McGuinness*, 13 R. I. 595; *Fears v. Albea*, 69 Tex. 437, 5 Am. St. Rep. 78, 6 S. W. 286; *Hudson v. Dismukes*, 77 Va. 242; *McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335; *Lamberson v. Bailey*, 158 Wis. 105, 147 N. W. 1066 (payment by remote grantee).

9. *Matteson v. Thomas*, 41 Ill. 110; *Barker v. Flood*, 103 Mass.

lien, a mortgage or judgment for instance, he is entitled to be subrogated to the position of the mortgage creditor.<sup>10</sup> Likewise, if the debt is paid by one who has an interest in the land of a limited duration, subject to the mortgage, as, for instance, a conventional life estate,<sup>11</sup> or a widow's dower or homestead estate,<sup>12</sup> such person is entitled to be subrogated. And a merely inchoate right of dower has been regarded as sufficient for the purpose.<sup>13</sup>

The right of subrogation does not exist in favor of a mere stranger who voluntarily pays the debt and by such payment the mortgage is extinguished,<sup>14</sup> unless at

474; *Lang v. Cadwell*, 13 Mont. 458, 34 Pac. 957; *Parkey v. Veatch*, 164 Mo. 375, 86 Am. St. Rep. 627, 64 S. W. 114; *Fluck v. Replogle*, 13 Pa. 405.

10. *Ketchum v. Crippen*, 37 Cal. 223; *Swain v. Stockton Savings & Loan Society*, 78 Cal. 600, 12 Am. St. Rep. 118, 21 Pac. 365; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Erwin v. Acker*, 126 Ind. 133, 25 N. E. 888; *Bowen v. Gilbert*, 122 Iowa, 448, 98 N. W. 273; *Cobb v. Dyer*, 69 Me. 494; *Allen v. Alden*, 109 Me. 516, 85 Atl. 3; *Long v. Long*, 111 Mo. 12, 19 S. W. 537; *Skinkle v. Huffman*, 52 Neb. 20, 71 N. W. 1004; *Weld v. Sabin*, 20 N. H. 533, 51 Am. Dec. 240; *Ellsworth v. Lockwood*, 42 N. Y. 89, 96; *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900; *Miligan's Appeal*, 104 Pa. St. 503; *Ward v. Seymour*, 51 Vt. 320; *James v. Brainard Jackson & Co.*, 64 Wash. 175, 116 Pac. 633; *Webb v. Crouch*, 70 W. Va. 580, Ann. Cas. 1914A 728, 74 S. E. 730. But see *Lewis v. Hinman*, 56 Conn. 55, 13 Atl. 143.

11. *Kocher v. Kocher*, 56 N. J.

Eq. 545, 39 Atl. 535; *Kinhead v. Ryan*, 64 N. J. Eq. 454, 53 Atl. 1053; *Wilder's Ex'x v. Wilder*, 75 Vt. 178, 53 Atl. 1072. Or a tenant for years. *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Wunderle v. Ellis*, 212 Pa. 618, 4 Ann. Cas. 806, 62 Atl. 106.

12. *Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. 1003; *Norris v. Morrison*, 45 N. H. 490; *Roach v. Hacher*, 2 Lea (Tenn.) 633; *Smith v. Stephens*, 164 Mo. 415, 61 S. W. 260.

13. *Davis v. Wetherell*, 13 Allen (Mass.) 60; *Fitcher v. Griffiths*, 216 Mass. 174, 103 N. E. 471; *Kopp v. Thele*, 104 Minn. 267, 17 L. R. A. (N. S.) 981, 15 Ann. Cas. 313, 116 N. W. 472; *Gatewood v. Gatewood*, 75 Va. 407.

14. *Rodman v. Sanders*, 44 Ark. 504; *Guy v. DeUprey*, 16 Cal. 195, 76 Am. Dec. 518; *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 48, 7 S. W. 173; *Meeker v. Larsen*, 65 Neb. 158, 57 L. R. A. 901, 90 N. W. 958; *VanWinkle v. Williams*, 38 N. J. Eq. 105; *Arnold v.*

least he makes the payment in the belief that he has an interest in the land or that one who has requested him to do it has such an interest.<sup>15</sup> But it does exist in favor of one who, though not personally liable, and without any interest in the land to protect, pays the mortgage debt at the request and for the benefit of the person primarily liable, with an agreement or understanding that he shall have the benefit of the existing mortgage.<sup>16</sup> And one who loans money to the owner of the land in order to pay the mortgage debt, and takes another mortgage in order to secure him, is by the weight of authority entitled to the benefit of the prior mortgage, if the new mortgage turns out to be ineffective for purposes of security,<sup>17</sup> although there are

Green, 116 N. Y. 566, 23 N. E. 1; Quaschneck v. Blodgett, 32 N. D. 603, 156 N. W. 216; Campbell v. Foster Home Ass'n, 163 Pa. St. 609, 26 L. R. A. 117, 43 Am. St. Rep. 818, 30 Atl. 222; Fievei v. Zuber, 67 Tex. 275, 3 S. W. 273; Pelton v. Knapp, 21 Wis. 63; Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476. A mere possibility of inheritance is not a sufficient interest. Kelly v. Kelly, 54 Mich. 30, 19 N. W. 580; Blydenburgh v. Seabury, 104 N. Y. App. Div. 141, 93 N. Y. Supp. 330.

15. See *post*, this section, note 19, and editorial note 24 Harv. Law Rev. 162.

16. Arnett v. Willoughby, 190 Ala. 530, 67 So. 426; Davis v. Pugh, 81 Ark. 253, 99 S. W. 78; Tolman v. Smith, 85 Cal. 280, 24 Pac. 743; Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; Howard v. Burns, 279 Ill. 256, 116 N. E. 703; Heuser v. Sharman, 89 Iowa, 355, 48 Am. St. Rep. 390, 56 N. W. 525; Watson v. Bowman,

142 Iowa, 528, 119 N. W. 623; Thomas v. Hall, 116 Me. 140, 100 Atl. 502; Robertson v. Mowell, 66 Md. 530, 8 Atl. 273; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Lockwood v. Marsh, 3 Nev. 138; Gans v. Thieme, 93 N. Y. 225; Commercial & Farmers' Bank v. Scotland Neck Bank, 158 N. C. 238, 73 S. E. 157; Fievel v. Zuber, 67 Tex. 275, 3 S. W. 273; Wilton v. Mayberry, 75 Wis. 191, 6 L. R. A. 61, 17 Am. St. Rep. 193, 43 N. W. 901; Citizens' Nat. Bank v. West, 26 Fed. 294. *Contra*, Lackawanna Trust & Deposit Co. v. Gomeringer, 236 Pa. 179, 84 Atl. 757.

17. Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Merchants' & Mechanics' Bank v. Tillman, 106 Ga. 55, 31 S. E. 794; Johnson v. Barrett, 117 Ind. 551, 10 Am. St. Rep. 83, 19 N. E. 199; Kent v. Bailey, 181 Iowa, 489, 164 N. W. 852; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; Emmert v. Thompson, 49 Minn.

decisions to an opposite effect, that he has no right to subrogation, as against an intervening lien.<sup>18</sup>

One who pays the mortgage debt under the mistaken impression that he has a valid title to or a valuable interest in the property, is entitled to subrogation to the creditor's rights,<sup>19</sup> provided, at least, the rights and equities of others have not intervened. And a like doctrine has been applied in the case of a purchaser of the mortgaged land who, having assumed the mortgage debt, paid it under the mistaken impression that there was no other incumbrance on the property.<sup>21</sup>

386, 32 Am. St. Rep. 566, 52 N. W. 31; *Frederick v. Gehling*, 92 Neb. 204, 137 N. W. 998; *Homeopathic Mut. Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Patterson v. Bird-sall*, 64 N. Y. 294, 21 Am. Rep. 609; *Amick v. Woodworth*, 58 Ohio, St. 86, 50 N. E. 437; *George v. Butler* 16 Utah, 111, 50 Pac. 1032; *Helm v. Lynchburg Trust & Savings Bank*, 106 Va. 603, 56 S. E. 598; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Wilton v. Mayberry*, 75 Wis. 191, 6 L. R. A. 61, 17 Am. St. Rep. 193; *Hughes v. Thomas*, 131 Wis. 315, 11 L. R. A. (N. S.) 744, 11 Ann. Cas. 673, 111 N. W. 474.

18. *Nelson v. McKee*, 53 Ind. App. 344, 99 N. E. 447, 101 N. E. 651; *Mather v. Jenswold*, 72 Iowa, 550, 32 N. W. 512, 34 N. W. 327; *Milholland v. Tiffany*, 64 Md. 455, 2 Atl. 831; *Kitchell v. Mudgett*, 37 Mich. 81; *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, 60 N. W. 576; *Banta v. Garmo*, 1 Sand. Ch. (N. Y.) 383; *Downer v. Wilson*, 33 Vt. 1. See Editorial note, 13 Columbia Law Rev. 58.

19. *Faulk v. Calloway*, 123 Ala. 325, 26 So. 504; *Paton v. Robinson*, 81 Conn. 547, 71 Atl. 730; *Spauld-*

*ing v. Harvey*, 129 Ind. 106, 13 L. R. A. 619, 28 Am. St. Rep. 176, 28 N. E. 323; *Overturf v. Martin*, 170 Ind. 308, 84 N. E. 531; *Detroit & North Mich. Building & Loan Ass'n v. Oram*, 200 Mich. 485, 167 N. W. 50; *Jelly v. Lamar*, 242 Mo. 44, 145 S. W. 799; *Betts v. Sims*, 35 Neb. 840, 37 Am. St. Rep. 470, 53 N. W. 1005; *Kelly v. Duff*, 61 N. H. 435; *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Stitt v. Sringham*, 55 Ore. 89, 105 Pac. 252; *Jelly v. Lamar*, 242 Mo. 44, 145 S. W. 799, But See *Wadsworth v. Blake* 43 Minn. 509, 45 N. W. 1131; *Kleimann v. Gieselmann*, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. 796; *Deavitt v. Ring*, 76 Vt. 216, 59 Atl. 978. There are cases denying the right of subrogation when one pays the mortgage debt under a mistake of law. *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267; *Warren v. Jennison*, 6 Gray (Mass.) 559; *Bentley v. Whittemore*, 18 N. J. Tq. 366; *Peters v. Florence*, 38 Pa. St. 194. See *Gerber v. Upton*, 123 Mich. 605, 82 N. W. 363. And editorial note, 13 Harv. Law Rev. 297.

21. *Matzen v. Shaeffer*, 65 Cal. 81,

An important application of the doctrine of subrogation occurs in the case of an invalid sale for the purpose of foreclosing a mortgage, whether under a decree of court or under a power of sale in the mortgage. In such case, the purchaser paying the purchase money, which is applied to the payment of the debt secured by the mortgage, he is ordinarily regarded as subrogated to the rights of the holder of the mortgage.<sup>22</sup>

A payment of part only of the debt gives no right of subrogation, in the absence of express agreement therefor at the time of payment, or unless the balance of the debt has been previously paid, but the person so paying may take an assignment of part of the mortgage to secure him.<sup>23</sup>

If one is primarily liable for the debt, as between himself and others, the fact that on paying the debt he takes an assignment is immaterial. His payment

2 Pac. 92; *Heisler v. C. Aultman & Co.*, 56 Minn. 454 45 Am. St. Rep. 486, 57 N. W. 1053; *Stantons v. Thompson*, 49 N. H. 272; *Barnes v. Mott*, 64 N. Y. 397; *Johnson v. Tootle*, 14 Utah, 482, 47 Pac. 1033. But see *Hayden v. Huff*, 60 Neb. 625, 83 N. W. 920, 63 Neb. 99, 88 N. W. 179.

22. *Jordan v. Sayre*, 29 Fla. 100; *Dutcher v. Hobby*, 86 Ga. 198, 10 L. R. A. 472, 22 Am. St. Rep. 444, 12 S. E. 356; *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813; *Wilson v. Brown*, 82 Ind. 471; *Equitable Mortgage Co. v. Gray*, 68 Kan. 100, 74 Pac. 614; *Johnson v. Robertson*, 34 Md. 165; *Martin v. Kelly*, 59 Miss. 652; *Crosby v. Farmers' Bank of Andrew County*, 107 Mo. 436, 17 S. W. 1004; *Pettit v. Louis*, 88 Neb. 496, 34 L. R. A. (N. S.)

356, 129 N. W. 1005; *Harding v. Gillett*, 25 Okla. 199, 107 Pac. 665; *Cooke v. Cooper*, 18 Ore. 142, 7 L. R. A. 273, 17 Am. St. Rep. 709, 22 Pac. 945; *Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857; *Griffin v. Griffin*, 82 S. C. 256, 64 S. E. 160; *Jones v. McKenna*, 4 Lea (Tenn.) 630; *Lawrence v. Murphy*, 45 Utah, 572, 142, 147 Pac. 903; *Smithson Land Co. v. Brantigam*, 16 Wash. 174, 47 Pac. 434; *Brobst v. Brock*, 10 Wall. (U. S.) 519, 19 L. Ed. 1002, And see *post*, § 656, note 88.

23. *Stuckman v. Roose*, 147 Ind. 402, 46 N. E. 680; *Commonwealth of Virginia v. State*, 32 Md. 501, 545; *Troxell v. Silverthorn*, 45 N. J. Eq. 330, 12 Atl. 614, 19 Atl. 622; *Kyner v. Kyner*, 6 Watts. (Pa.) 221; *Sheldon, Subrogation*, § 127.

discharges the debt, regardless of his endeavor to prevent this result by taking the assignment.<sup>24</sup>

If one paying the mortgage debt is otherwise entitled to be subrogated to the rights of the creditor as against the debtor or against the land, the fact that, upon such payment, an acknowledgment of satisfaction or release is entered upon the records is immaterial,<sup>25</sup> except as against a third person who purchases the property or otherwise changes his position on the strength of the record satisfaction or release.<sup>26</sup> A subsequent purchaser has a right to assume, in the absence of knowledge otherwise, that the satisfaction or release of record was based on payment made by the per-

24. *Clay v. Banks*, 71 Ga. 363; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Bunch v. Grave*, 111 Ind. 351, 12 N. E. 514; *Moore v. Olive*, 114 Iowa, 650, 87 N. W. 720; *Kingsley v. Purdom*, 53 Kan. 56, 35 Pac. 811; *Kelly v. Jenness*, 50 Me. 455, 79 Am. Dec. 623; *Pike v. Goodnow*, 12 Allen (Mass.) 472; *Byles v. Kellogg*, 67 Mich. 318, 34 N. W. 671; *Hussey v. Hill*, 120 N. C. 312, 58 Am. St. Rep. 789, 26 S. E. 919; *Cooley's Appeal*, 1 Grant (Pa.) 401; *Dargan v. McSween*, 33 S. C. 324, 11 S. E. 1077. But it has apparently been decided in New York that a debtor paying his mortgage debt may have it assigned by the payee to one who is his creditor to the amount of the payment, this being regarded as in effect a purchase by such creditor. *Champney v. Coope*, 32 N. Y. 543; *Hubbell v. Blakeslee*, 71 N. Y. 63; *Coles v. Appleby*, 87 N. Y. 111. And see *Sheddy v. Geran*, 113 Mass. 378.

25. *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep.

146, 48 N. E. 161; *Johnson v. Barrett*, 117 Ind. 551, 10 Am. St. Rep. 83, 19 N. E. 199; *Cobb v. Dyer*, 69 Me. 194; *Gato v. Christian*, 112 Me. 427, 92 Atl. 489; *Milholland v. Tiffany*, 61 Md. 455, 2 Atl. 831; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Whitney v. Lowe*, 59 Neb. 87, 80 N. W. 266; *Hammond v. Barker*, 61 N. H. 53; *Rossiter v. Sanaghiaro*, 78 N. H. 484, 102 Atl. 759; *Kocher v. Kocher*, 56 N. J. Eq. 545, 39 Atl. 535; *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1; *Commercial & Farmers' Nat. Bank v. Scotland Neck Bank*, 158 N. C. 238, 73 S. E. 157; *Duffy v. McGuinness*, 13 R. I. 595; *Anderson v. Robertson*, 137 Tenn. 182, 192 S. W. 917; *First Nat. Bank of Houston v. Ackerman*, 70 Tex. 315, 8 S. W. 45; *Johnson v. Tootle*, 14 Utah, 482, 47 Pac. 1033.

26. *Persons v. Shaeffer*, 65 Cal. 79, 3 Pac. 94; *Richards v. Griffith*, 92 Cal. 493, 27 Am. St. Rep. 156, 28 Pac. 481; *Home Savings Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161.

son primarily liable, and that there is no right of subrogation in some third person.<sup>27</sup>

Whether one, who is entitled to subrogation upon paying the mortgage debt, can demand and compel an assignment to him by the creditor of the mortgage debt, does not appear to be entirely settled. In New York his right to an assignment appears to be fully recognized,<sup>28</sup> while more generally, it seems, he is entitled to demand and compel an assignment only when he is personally liable for the debt as surety thereon.<sup>29</sup> And by some cases it appears to be denied that a right to an assignment exists in any case.<sup>30</sup>

**§ 647. Marshaling of securities.** When one holds a mortgage on two tracts of land, and a second mortgage or other lien in the hands of another person covers but one of these tracts, the prior mortgagee may be compelled to resort first to the parcel not covered by the inferior lien, in order to leave the other, so far as possible, to the second lienor, and the latter is, in case the prior mortgagee does proceed against such other land in the first place, entitled to be subrogated to the rights of the prior mortgagee against the land covered by the first mortgage only, this being an application of the general equitable principle that one having two funds to satisfy his demands shall not, by his election, disappoint a person who has only one fund.<sup>31</sup> The

Ahern v. Freeman, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677. See Rand v. Cutler, 155 Mass. 451, 29 N. E. 1085.

27. Ahren v. Freeman, 46 Minn. 156, 24 Am. St. Rep. 206, 48 N. W. 677; Amick v. Woodworth, 58 Ohio St. 86, 50 N. E. 437; Clark Bros. v. Watson (Iowa), 159 N. W. 761.

28. Twombly v. Cassidy, 82 N. Y. 155; Clark v. Mackin, 95 N. Y. 346; Nelson v. Loder, 132 N.

Y 288, 30 N. E. 369. And see Hopkins Mfg. Co. v. Kellerer, 237 Pa. 285, 85 Atl. 421.

29. Bigelow v. Cassedy, 26 N. J. Eq. 557; Holland v. Citizens' Sav. Bank, 16 R. I. 734, 8 L. R. A. 553, 19 Atl. 654; Gatewood v. Gatewood, 75 Va. 407.

30. See Handley v. Munsell, 109 Ill. 362; Lumsden v. Manson, 96 Me. 357, 52 Atl. 783; Lamb v. Montague, 112 Mass. 352.

31. 3 Pomeroy, Eq. Jur., §



principle will not be applied, however, if it will in any way prejudice the first mortgagee, the mortgagor, or third persons.<sup>32</sup> And, as before indicated,<sup>33</sup> the prior mortgagee is not charged with notice of the debtor's right to such marshaling of the securities by the mere record of the junior mortgage or other lien.

## VII. FORECLOSURE.

§ 648. **Accrual of the right to foreclose.** Foreclosure is the proceeding by which a mortgagor or other owner of an interest in the land is, upon his failure to comply with the stipulations of the mortgage or of the instrument secured thereby, deprived of his right to discharge the land from the lien of the mortgage. Though we speak of the foreclosure of a mortgage, what is really foreclosed is the right to redeem from the mortgage, that is, the right, by a belated performance of the obligation secured, to extinguish the lien of the mortgage.

The right to foreclose accrues upon a non compliance with a stipulation, the performance of which

1414; *Aldrich v. Cooper*, 2 White & Tudor, Lead. Cas. Eq. 228, notes; *Abbott v. Powell*, 6 Sawy. 91, Fed. Cas. No. 13; *Hannah v. Carrington*, 18 Ark. 85; *Andreas v. Hubbard*, 50 Conn. 351; *Brooks v. Matledge*, 100 Ga. 367, 28 S. E. 119; *Newby v. Fox*, 90 Kan. 317, 47 L. R. A. (N. S.) 302, 33 Pac. 890; *Griffin v. Gingell*, 25 Ky. L. Rep. 2031, 79 S. W. 284; *Dickson v. Sledge* (Miss.), 38 So. 673; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Merchants State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; *Wilson v. Magill*,

105 S. C. 312, 89 S. E. 547; *Ball v. Setzer*, 33 W. Va. 444, 10 S. E. 798; *White v. Polleys*, 20 Wis. 505.

32. *Boone v. Clark*, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850; *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430; *Farwell v. Bigelow*, 112 Mich. 285, 70 N. W. 285; *Sternberger v. Sussman*, 69 N. J. Eq. 197, 60 Atl. 195, 85 N. J. Eq. 593, 98 Atl. 1087; *French & Co. v. Hattenhoff*, 73 Ore. 244, 144 Pac. 480; *McGinnis Appeal*, 16 Pa. St. 445; *Hudkins v. Ward*, 30 W. Va. 294, 8 Am. St. Rep. 22, 3 S. E. 600.

33. *Ante* § 644, note 3.

the mortgage is intended to secure, and not before.<sup>34</sup>

Usually, the mortgage instrument or the note or bond accompanying it, provides that a default in the payment of an installment of principal or interest shall cause the whole principal immediately to become due, at the mortgage's option, thus authorizing a foreclosure for the whole amount upon such a default.<sup>35</sup> The institution of a suit to foreclose for the whole amount is regarded as a sufficient exercise by the mortgagee of such an option, without any previous declaration by the mortgage creditor of his desire that the total principal be considered due,<sup>36</sup> unless there is an express requirement of such a declaration.<sup>37</sup> On the other hand the

34. *Pendleton v. Rowe*, 34 Cal. 149; *Cumberland Island Co. v. Bunkley*, 108 Ga. 756, 33 S. E. 183; *Dorn v. Gender*, 171 Ill. 362, 49 N. E. 492; *Gassert v. Black*, 18 Mont. 35, 44 Pac. 401; *Ohio Cent. R. Co. v. New York Cent. Trust Co.*, 133 U. S. 83, 33 L. Ed. 561.

35. *Phillips v. Taylor*, 96 Ala. 426, 11 So. 223; *Clark v. Paddock*, 24 Idaho, 142, 46 L. R. A. (N. S.) 475, 132 Pac. 795; *Heath v. Hall*, 60 Ill. 344; *Brown v. McKay*, 151 Ill. 215, 37 N. E. 1037; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; *Buffalo Center Land & Investment Co. v. Swigart*, 176 Iowa, 422, 156 N. W. 701; *Adams v. Essex*, 1 Bibb (Ky.) 149, 4 Am. Dec. 623; *Schooley v. Romain*, 31 Md. 574, 100 Am. Dec. 87; *Noell v. Gaines*, 68 Mo. 649; *Fletcher v. Daugherty*, 13 Neb. 224, 13 N. W. 207; *Baldwin v. VanVorst*, 10 N. J. Eq. 577; *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316; *Parker v. Banks*, 79 N. C. 480; *Bushfield v. Meyer*, 10 Ohio St. 334; *Flesher v. Hubbard*, 37 Okla. 587, 132 Pac. 1080; *Atkinson*

*v. Walton*, 162 Pa. St. 219, 29 Atl. 898. And the statute in a number of states expressly authorizes foreclosure for the whole on non-payment of an installment. 1 *Stimson's Am. St. Law*, § 1929.

36. *Prince v. Mahin*,—Fla. —74 So. 696; *Gloding v. Implementation & Hardware Co.*, 20 Idaho, 348, 118 Pac. 666; *Brown v. McKay*, 151 Ill. 315, 37 N. E. 1037; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 910; *Ogilvie v. Union Cent. Life Ins. Co.*, 171 Ky. 134, 188 S. W. 309; *Dunton v. Sharpe*, 70 Miss. 850, 12 So. 800; *Lowenstein v. Phelan*, 17 Neb. 429, 22 N. W. 561; *Doolittle v. Nurnberg*, 27 N. D. 521, 147 N. W. 400; *Atkinson v. Walton*, 162 Pa. St. 219, 29 Atl. 898; *Lee v. Security Bank & Trust Co.*, 124 Tenn. 582, 139 S. W. 690; *Musselman v. Knottingham*, 77 Wash. 435, 137 Pac. 1012. Compare *English v. Carney*, 25 Mich. 178; *Schoenmaker v. Taylor*, 11 Wis. 313.

37. *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510;

creditor may, in such case, unless prohibited by some statutory provision or otherwise, foreclose for such portion only of the debt, principal or interest, as may be actually in default.<sup>38</sup>

The courts will usually enforce such a provision for "acceleration" according to its terms, without reference to any suggested hardship upon the debtor,<sup>39</sup> provided the creditor is entirely free from fault and has in no way misled the debtor.<sup>40</sup> And it has even been held that the debtor's inability to find the creditor in order to make payment is no reason for not enforcing such a provision.<sup>41</sup> A case is, however, to be found to the effect that a foreclosure for the principal should not be allowed because of a failure to pay interest, if such failure resulted from a reasonable doubt as to whether any interest was due.<sup>42</sup>

The acceptance by the mortgage creditor of an instalment of interest after the proper time for payment will usually preclude him from thereafter declaring the whole debt due on account of non payment of such instalment.<sup>43</sup> But it does not affect his right to

Chicago & V. R. R. Co. v. Fosdeck, 106 U. S. 47, 27 L. Ed. 47.

38. Phillips v. Taylor, 96 Ala. 426, 11 So. 323; Hatcher v. Chancy, 71 Ga. 689; Morgernstern v. Klees, 30 Ill. 422; McCarthy v. Benedict, 89 Neb. 293, 131 N. W. 598; Anderson v. Pilgram, 30 S. C. 499, 4 L. R. A. 205, 14 Am. St. Rep. 917, 9 S. E. 587; Dupee v. Salt Lake Valley Loan & Trust Co., 20 Utah, 103, 77 Am. St. Rep. 902, 57 Pac. 845.

39. Bennett v. Stevenson, 53 N. Y. 528; Hunt v. Keech, 3 Abb. Pr. (N. Y.) 204; Osborne v. Ketcham, 76 Hun. (N. Y.) 325, 27 N. Y. Supp. 694; Serrell v. Rothstein, 49 N. J. Eq. 385, 24 Atl. 369; Warwick Iron Co. v. Morton, 148 Pa.

St. 72, 23 Atl. 1065.

40. See Noyes v. Clark, 7 Paige (N. Y.) 179, 32 Am. Dec. 620; Schieck v. Donohue, 92 N. Y. App. Div. 330, 87 N. Y. Supp. 206; Wilson v. Bird, 28 N. J. Eq. 352.

41. Atkinson v. Walton, 162 Pa. St. 219, 29 Atl. 898.

42. Wilcox v. Allen, 36 Mich. 160.

43. Mason v. Luce, 116 Cal. 232, 48 Pac. 72; Smalley v. Ranken, 85 Iowa, 612, 52 N. W. 507; Sire v. Wightman, 25 N. J. Eq. 102; Bizzell v. Roberts, 156 N. C. 272, 72 S. E. 378; Alabama & G. Mfg. Co. v. Robinson, 56 Fed. 690, 6 C. C. A. 79. But the contrary was held when there was no option or right of election given to the mort-

so declare on account of a default in the payment of a subsequent instalment.<sup>44</sup> Nor, after he has declared the whole debt due for default in the payment of interest, will his right to foreclose be excluded by his subsequent acceptance of part of the debt.<sup>45</sup>

There may be, by express stipulation, a right to foreclose for the principal upon the mortgagor's failure to pay taxes on the land,<sup>46</sup> or upon any other default by the mortgagor, as in the payment of insurance, which is calculated to affect the security.<sup>47</sup> A demand of performance after such a default is not necessary before beginning suit to foreclose.<sup>48</sup> But a performance, even after default, will usually prevent the subsequent institution of a suit to foreclose.<sup>49</sup> And it has been held that when there was a reasonable effort to comply with a covenant to insure, and the debtor supposed that he had so complied, the principal should not be

gage creditor. *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466. That tender of the amount overdue will prevent a declaration that the whole debt is due, see *Wolz v. Parker*, 134 Mo. 458, 35 S. W. 1149.

44. *Parker v. Olliver*, 106 Ala. 549, 18 So. 40; *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

45. *LaPlant v. Beechley*, — Iowa, —, 165 N. W. 1019.

46. *Pope v. Durant*, 26 Iowa, 233; *Stanclift v. Norton*, 11 Kan. 218; *Union Central Life Ins. Co. v. Puckett*, 97 Kan. 428, 155 Pac. 930; *Condon v. Maynard*, 71 Md. 601, 18 Atl. 957; *Pearman v. Massachusetts Hospital Life Ins. Co.*, 206 Mass. 377, 92 N. E. 497; *O'Connor v. Shipman*, 48 How. Pr. (N. Y.) 126; *Farmers' Security Bank of Park River, North Dakota v. Martin*, 29 N. D. 269, L. R. A.

1915D, 432, 150 N. W. 572; *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345.

47. *Johnson v. Northern Minnesota Land & Investment Co.*, 168 Iowa, 340, 150 N. W. 596; *Porter v. Schroll*, 93 Kan. 297, 144 Pac. 216; *First Nat. Bank of Stronghurst, Illinois v. Kirby (Mo.)*, 175 S. W. 926; *Churchill v. Meade*, 88 Ore. 120, 171 Pac. 565.

48. *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032; *Ferris v. Spooner*, 102 N. Y. 10, 5 N. E. 773.

49. *Smalley v. Ranken*, 85 Iowa, 612, 52 N. W. 507; *Noyes v. Anderson*, 124 N. Y. 175, 21 Am. St. Rep. 657, 26 N. E. 316; *Ver Planck v. Godfrey*, 42 N. Y. App. Div. 16, 58 N. Y. Supp. 784. A subsequent performance cannot affect the right to prosecute a proceeding for sale already instituted. *Parker v. Olliver*, 106 Ala. 549, 18 So. 40.

regarded as due under such a stipulation, unless the debtor was first given another opportunity to effect the insurance.<sup>50</sup>

The right to enforce the security of an indemnity mortgage, by sale or otherwise, does not ordinarily arise until the maturity of the obligation as to which the mortgagee is surety or guarantor, and the satisfaction thereof by him.<sup>51</sup> But if the mortgage is not one of indemnity against damage only, but also provides for the actual payment of certain sums by the mortgagor, a right of foreclosure arises upon a failure on the part of the mortgagor to make such payment.<sup>52</sup>

Recovery in an action on the debt does not, apart from statute, affect the right subsequently to foreclose.<sup>53</sup> Nor does the completion of the foreclosure by sale prevent a subsequent suit to recover on the personal liability, unless the result of the foreclosure is to satisfy the debt.<sup>54</sup>

**§ 649. Bar by lapse of time.** Not infrequently the state statute expressly provides that a suit to foreclose

50. *Provident Sav. Life Ass'n Society v. Georgia Industrial Co.*, 124 Ga. 399, 52 S. E. 289. Compare *Moore v. Crandall*, 146 Iowa, 25, 140 Am. St. Rep. 276, 124 N. W. 812.

51. *Lewis v. Starke*, 10 Sm. & M. (Miss.) 120; *Forbes v. McCoy*, 15 Neb. 632, 20 N. W. 17; *Newark Nat. State Bank v. Davis*, 24 Ohio St. 190; *Learned v. Bishop*, 42 Bishop, 42 Wis. 470; *Hampton v. Phipps*, 108 U. S. 260, 27 L. Ed. 719.

52. *Lathrop v. Atwood*, 21 Conn. 117; *Goff v. Hedgecock*, 144 Ind. 415, 43 N. E. 644.

53. *Connecticut Mut. Life Ins. Co. v. Jones*, 1 McCrary, 388, 8 Fed. 303; *Thornton v. Pigg*, 24

Mo. 249; *Wahl v. Phillips*, 12 Iowa, 81. See *ante*, § 640(g).

54. *Blumberg v. Birch*, 99 Cal. 416, 37 Am. St. Rep. 67, 34 Pac. 162; *Webber v. Blanc*, 39 Fla. 224, 22 So. 655; *Morgan v. Sherwood*, 53 Ill. 171; *Marston v. Marston*, 45 Me. 412; *Leland v. Loring*, 10 Mete. (Mass.) 122; *National City Bank of Grand Rapids v. Torrent*, 130 Mich. 259, 89 N. W. 938; *Stark v. Mercer*, 3 How. (Mass.) 377; *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660, 26 N. E. 732; *Doyle v. West*, 60 Ohio St. 438, 54 N. E. 469; *Paris v. Hulett*, 26 Vt. 308.

a mortgage shall be brought within a time named. In the absence of such a provision, equity has occasionally applied, by way of analogy, the state statute fixing the limitation period for an action to recover land.<sup>55</sup> More usually, however, the courts have refused to apply such a statute in the case of a foreclosure proceeding, for the reason that the possession of the mortgagor, or of the mortgagor's transferee,<sup>56</sup> is not adverse to the mortgage creditor,<sup>57</sup> except when the former in some way repudiates the mortgage relation.<sup>58</sup> There might, moreover, be some question whether an analogy does exist between an action to recover land and a proceeding to foreclose by sale of the land, particularly when the mortgagee has not the legal title.<sup>59</sup>

Even though there is no statute of limitations applicable to the foreclosure of a mortgage, a suit for that purpose may be in effect barred by the application of the common law presumption of payment which arises after the lapse of twenty years from the maturity of an indebtedness, a presumption which has been

55. *Christopher v. Shockley*, — Ala. —, 75 So. 158; *Guthrie v. Field*, 21 Ark. 379; *Hall v. Denkla*, 28 Ark. 506; *Haskell v. Bailey*, 22 Conn. 569; *Hough v. Bailey*, 32 Conn. 288; *Blue v. Everett*, 56 N. J. Eq. 455, 39 Atl. 765; *Wilkinson v. Flowers*, 37 Miss. 378, 75 Am. Dec. 78; *Baldwin v. Trimble*, 85 Md. 396, 36 L. R. A. 489, 37 Atl. 176; *Martin v. Bowker*, 19 Vt. 526 (*semble*).

56. *Elsberry v. Boykin*, 65 Ala. 336; *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Lynch v. Hancock*, 14 S. C. 66.

57. *Bailey v. Butler*, 138 Ala. 153, 35 So. 111; *Duke v. State*, 56 Ark. 485, 20 S. W. 600; *Joy v. Adams*, 26 Me. 330; *Sweetser v. Lowell*, 33 Me. 446; *Cape Girar-*

*déau Co. v. Harbison*, 58 Mo. 90; *Tripe v. Marcy*, 39 N. H. 439; *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Allen v. Everly*, 24 Ohio St. 97; *Pickens v. Love's Adm'r*, 44 W. Va. 725, 29 S. E. 1018; *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434.

58. *Birne v. Main*, 29 Ark. 591; *Reed v. Kidder*, 70 Ill. App. 498; *Jamison v. Perry*, 38 Iowa, 14; *Holmes v. Turners Falls Lumber Co.*, 150 Mass. 535, 548, 6 L. R. A. 283, 23 N. E. 305; *Green v. Mizelle*, 54 Miss. 220; *Gardner v. Terry*, 99 Mo. 523, 7 L. R. A. 67, 12 S. W. 888; *St. Louis v. Priest*, 103 Mo. 652, 15 S. W. 988.

59. See *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434.

frequently applied in the case of an indebtedness secured by mortgage.<sup>60</sup> This presumption may, however, be rebutted by showing that, within this period, the mortgagor or his representative in interest has acknowledged the existence of the indebtedness by making a partial payment thereon or otherwise,<sup>61</sup> and according to some cases, the presumption may be rebutted by evidence of other facts tending to show that the indebtedness has not been paid.<sup>62</sup> In asserting and applying the presumption in connection with an indebtedness secured by mortgage, the fact that the mortgagee or his transferee was in possession of the land during the twenty years is ordinarily referred to as an

60. *Hughes v. Edwards*, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; *Loper v. Dickey* (Ala.), 67 So. 255; *Locke v. Caldwell*, 91 Ill. 417; *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; *Hunt v. Forman*, 2 Dana (Ky.) 471; *Chick v. Rolins*, 44 Me. 104; *Sweetser v. Lowell*, 33 Me. 446; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; *Baent v. Kennicutt*, 57 Mich. 268, 23 N. W. 808; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Tripe v. Marcy*, 39 N. H. 439; *Magee v. Bradley*, 54 N. J. Eq. 326, 35 Atl. 103; *Stimis v. Stimis*, 54 N. J. Eq. 17, 33 Atl. 468; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Giles v. Baremore*, 5 Johns. (Ch. (N. Y.)) 545; *Barnard v. Underdunk*, 98 N. Y. 158; *Roberts v. Welch*, 8 Ired. Eq. (N. Car.) 287; *Ray v. Pearce*, 84 N. C. 485; *Green v. Fricker*, 7 Watts & S. (Pa.) 171; *Hart v. Bucher*, 182 Pa. St. 604, 38 Atl. 472; *Staples v. Staples*, 20 R. I. 264, 38 Atl. 498; *Simms v. Kearsse*, 42 S. C. 43, 20 S. E.

19; *Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288; *Pickens v. Love's Adm'r*, 44 W. Va. 725, 29 S. E. 1018; *Christophers v. Sparke*, 2 Jac. & W. 223.

61. *Cross v. Allen*, 141 U. S. 528, 35 L. Ed. 843; *Locke v. Caldwell*, 91 Ill. 417; *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; *Brown v. Hardecastle*, 63 Md. 484; *Kellogg v. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223; *Blairst v. Carpenter*, 75 Mich. 167, 42 N. W. 790; *Frye v. Hubbell*, 74 N. H. 358, 17 L. R. A. (N. S.) 1197, 68 Atl. 325; *Jackson v. Pierce*, 10 Johns. (N. Y.) 417; *Kendall v. Traey*, 64 Vt. 522, 24 Atl. 1118.

62. *Brobst v. Brock*, 10 Wall. (U. S.) 519, 19 L. Ed. 1002; *Philbrook v. Clark*, 77 Me. 176; *Knight v. McKinney*, 84 Me. 107, 21 Atl. 744; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; *Barker v. Jones*, 62 N. H. 497; *Wanmaker v. VanBuskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748; *Stimis v. Stimis*, 60 N. J. Eq. 313,

important consideration, and that the mortgage creditor was in possession during a part of that time would apparently prevent the application of the presumption of payment, or rather, would rebut such presumption.<sup>63</sup> As before stated,<sup>64</sup> by the weight of authority, the expiration of the period allowed for bringing suit on the personal obligation secured by the mortgage does not bar suit to foreclose, while in some states, however, a different view is taken, and the running of the statute against the personal obligation defeats the right of foreclosure.

**§ 650. Strict foreclosure in equity.** Before the right of redemption was recognized by courts of equity, no foreclosure was necessary, since the mere breach of

47 Atl. 20; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 Am. Dec. 315; *Allen v. Everly*, 24 Ohio St. 97; *Hale v. Pack's Ex'rs*, 10 W. Va. 145. But see *Cheever v. Perley*, 11 Allen (Mass.) 584; *Kellogg v. Dickinson*, 147 Mass. 432, 1 L. R. A. 346, 18 N. E. 223, to the effect that some act of recognition of the claim is necessary in order to rebut the presumption.

63. See *Brobst v. Brock*, 10 Wall. (U. S.) 519, 19 L. Ed. 1002; *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; *Chick v. Rollins*, 44 Me. 104; *Howland v. Shurtleff*, 2 Metc. (Mass.) 26, 35 Am. Dec. 384; *Stimis v. Stimis*, 54 N. J. Eq. 17, 33 Atl. 468; *Collins v. Torry*, 7 John. (N. Y.) 278, 5 Am. Dec. 273. In *Jackson v. Slater*, 5 Wend. (N. Y.) 295, the presumption was held to be rebutted by the fact that the possession was in a stranger. In *Jenkins v. Andover Theological Seminary*,

205 Mass. 376, 91 N. E. 552, and *Crooker v. Crooker*, 49 Me. 416, it was held that there was no presumption of payment if the mortgagee could not have taken possession owing to an outstanding estate in another person.

In Massachusetts there appear to be recognized two presumptions, one applicable to a mortgage debt, as well as any other debt, to the effect that the debt has been paid, this presumption being rebuttable by any evidence to show that the debt has not been paid, and the other presumption being applicable only in the case of a mortgage debt, and being dependent on the mortgagor's possession, and this presumption being rebuttable only by evidence of recognition or admission of the debt. *Jenkins v. Andover Theological Seminary*, 205 Mass. 376, 91 N. E. 552.

64. *Ante*, § 640(f).



the condition vested an absolute estate in the mortgagee. When, however, the right of redemption came to be recognized, it was, in justice to the mortgagee, necessary that a time be limited within which this right should be exercised, and chancery accordingly adopted the practice of issuing a decree, upon the filing of a bill by the mortgagee, cutting off, that is, foreclosing, the right of redemption if not exercised by a time named.<sup>65</sup> Such a decree, in effect vesting the title to the land in the mortgagee unless there was a redemption within a period named, was at one time the only method of foreclosure; but since the introduction of a foreclosure by sale of the land, it has acquired the distinctive name of "strict foreclosure."<sup>66</sup>

This method of foreclosure has not been favored in this country, since it is liable to result in forfeiting the whole property on account of a debt considerably less than the value of the property. It is however recognized in a number of states as an appropriate form of proceeding under special circumstances, when not calculated to prejudice either of the parties in interest.<sup>67</sup> It has been regarded as particularly appropriate for the purpose of cutting off the rights of subsequent incumbrancers and lienholders who were not made parties to a prior foreclosure proceeding under which a sale of the property was made.<sup>68</sup> And in one state at

65. 4 Kent's Comm. 181; Coote, Mortgages (4th Ed.) 990.

66. See 4 Kent's Comm. 181; 2 Jones, Mortgages, §§ 1538-1570; Lansing v. Goelet, 9 Cow. (N. Y.) 346; Clark v. Reyburn, 8 Wall. (U. S.) 318, 19 L. Ed. 354.

67. Farrell v. Parlier, 50 Ill. 274; Stephens v. Biehnell, 27 Ill. 444, 81 Am. Dec. 242; Illinois Starch Co. v. Ottawa Hydraulic Co., 125 Ill. 237, 17 N. E. 486; Shepard v. Barrett, 84 N. J. Eq. 408, 93 Atl. 852; Moulton v. Cor-

nish, 138 N. Y. 133, 20 L. R. A. 370. 33 N. E. 842; Harding v. Gillett, 25 Okla. 199, 107 Pac. 665; Bresnahan v. Bresnahan, 46 Wis. 335, 1 N. W. 39.

68. Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465; Shaw v. Hersey, 48 Iowa, 468; Eldridge v. Eldridge, 14 N. J. Eq. 195; Donovan v. Smith (N. J. Ch.), 88 Atl. 167; Bolles v. Duff, 43 N. Y. 469; Ross v. Boardman, 22 Hun. (N. Y.) 527; Koerner v. Williamette Iron

least such a foreclosure is recognized as proper when the property is worth less than the amount of the debt, and the mortgagor is insolvent, and the mortgage creditor is willing to take the property in discharge of the debt.<sup>69</sup> In some states a strict foreclosure is never allowed.<sup>70</sup> It is apparently a usual method of foreclosure in Connecticut and Vermont.<sup>71</sup>

A decree of strict foreclosure vests the absolute title in the mortgagee,<sup>72</sup> but the mortgage debt is not necessarily satisfied, and the mortgagor's personal liability for any excess in the amount of the mortgage over the value of the land may be enforced in an action at law.<sup>73</sup>

**§ 651. Foreclosure by entry.** Akin to strict foreclosure in equity, as vesting in the mortgagee an absolute estate in the land itself, is foreclosure by the peaceable entry of the mortgagee upon the premises, and his retention of possession thereafter for a specified time. This is provided for by the statutes of Maine, Massachusetts, New Hampshire, and Rhode Island.<sup>74</sup>

Works, 36 Ore. 90, 78 Am. St. Rep. 759, 58 Pac. 863.

69. *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *McCormick v. Higgins*, 199 Ill. App. 241.

70. See *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Nevin v. Lulu & White Silver Min. Co.*, 10 Colo. 357, 15 Pac. 611; *Browne v. Browne*, 17 Fla. 607, 623, 35 Am. Rep. 96; *Blood v. Shepard*, 69 Kan. 752, 77 Pac. 565; *Davis v. Holmes*, 55 Mo. 349.

71. *Waters v. Hubbard*, 44 Conn. 340; *Devereaux v. Fairbanks*, 52 Vt. 587; Gen. St. Conn. § 3023; St. Vt. 1894, §§ 978, 979; 2 Jones, Mortgages, §§ 1326, 1361.

72. *Waters v. Hubbard*, 44

Conn. 340; *Ellis v. Leek*, 127 Ill. 60, 3 L. R. A. 259, 20 N. E. 218; *Brainard v. Cooper*, 10 N. Y. 356; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Champion v. Hinkle*, 45 N. J. Eq. 162, 16 Atl. 701.

73. *Hatch v. White*, 2 Gall. 152, Fed. Cas. No. 6209; *Vansant v. Allmon*, 23 Ill. 30; *Spencer v. Harford*, 4 Wend. (N. Y.) 386; *Hazard v. Robinson*, 15 R. I. 226, 2 Atl. 433; *Devereaux v. Fairbanks*, 52 Vt. 587; *Paris v. Hulett*, 26 Vt. 208. See *Windham County Sav. Bank v. Himes*, 55 Conn. 433, 12 Atl. 517.

74. *Stimson's Am. St. Law*, § 1921. See 2 Jones, Mortgages, c. 28.

The entry must be in the presence of witnesses, whose certificate as to the entry is filed for record, and this serves as notice to the owner and persons interested in the land.<sup>75</sup> The statutes require that the entry be peaceable, and, if it is opposed, judicial proceedings must be resorted to.<sup>76</sup> After entry, the mortgagee must retain possession, by himself or some person in his behalf.<sup>77</sup>

The severity of foreclosure in this way without a sale is mitigated by provisions of the statutes giving a considerable time after entry in which the property may be redeemed, this being three years, except in New Hampshire, where it is one year.<sup>78</sup> The effect of the foreclosure is to cancel the mortgage debt to the extent of the value of the land at the time at which the foreclosure is completed.<sup>79</sup>

**§ 652. Foreclosure by writ of entry.** In Maine, Massachusetts, and New Hampshire, the mortgagee may bring a writ of entry for the purpose of foreclosure. This proceeding, though in form a common-law action, has, when used for the purpose of foreclosure, the general characteristics of an equity proceeding, the amount due being ascertained on equitable principles, and the judgment being that, if this sum is not paid within a certain time, the mortgagee shall be put into possession of the land.<sup>80</sup> When so put into possession,

75. *Thompson v. Kenyon*, 100 Mass. 108; *Bennett v. Conant*, 10 Cush. (Mass.) 163; *Snow v. Pressey*, 82 Me. 552, 20 Atl. 78; *Thompson v. Ela*, 58 N. H. 490.

76. Rev. Laws Mass. 1902, c. 187, § 1; Rev. St. Me. 1916 c. 95 § 3; Gen. Laws R. I. 1896, c. 207, § 3; Pub. St. N. H. 1901, c. 139, § 14.

77. *Bennett v. Conant*, 10 Cush. (Mass.) 163; *Lucier v. Marsales*, 133 Mass. 454; *Jarvis v. Albro*,

67 Me. 310.

78. *Stimson's Am. St. Law*, § 1921.

79. *Hatch v. White* 2 Gall. 152. Fed. Cas. 6,209; *Morse v. Merritt*, 110 Mass. 458; *Hunt v. Stiles*, 10 N. H. 466; *Stevens v. Fellows*, 70 N. H. 148, 47 Atl. 135; *Flint v. Winter Harbor Land Co.*, 89 Me. 420, 36 Atl. 634; *Newall v. Wright*, 3 Mass. 138, 3 Am. Rep. 98.

80. *Holbrook v. Bliss*, 9 Allen (Mass.) 69; *Ladé v. Putnam*, 79

the mortgagee is in the position of a mortgagee who has peaceably entered without action, and possession by him for the length of time required in such case, as stated in the preceding section, will give him an indefeasible title.<sup>81</sup>

§ 653. **Foreclosure by scire facias.** In Pennsylvania, foreclosure is by a writ of *scire facias*, issued twelve months after default, requiring the mortgagor, his heirs or executors, to show cause why the mortgaged land should not be taken in execution for the mortgage, and, on the rendition of judgment in favor of the mortgagee, a writ of *levari facias* issues, under which the land is sold.<sup>82</sup> Foreclosure by *scire facias* is also allowed by the statutes of two or three other states, but it is not apparently a usual method of procedure.<sup>83</sup>

§ 654. **Equitable proceeding for sale.** The most usual method of foreclosure in this country is by a suit in equity, or by a civil proceeding under the code in the nature of a suit in equity, to obtain a sale of the land, and payment of the mortgage debt from the proceeds.<sup>84</sup> The right to proceed in equity is not affected by the fact that the mortgage instrument gives a power of sale on default, the mortgagee having the option to adopt either remedy.<sup>85</sup> And this is the case

Me. 568, 12 Atl. 628; 2 Jones, Mortgages, c. 29.

81. Stimson's Am. St. Law, § 1925 (A) (3), (C) (2); 2 Jones, Mortgages, § 1306.

82. 1 Brightley, Purd. Dig. § 169, p. 659, *et seq.*

83. Laws Del. 1893, p. 843; 2 Starr & Curt. Ann. St. Ill. c. 95 § 18; Gen. St. N. J. p. 2103, §§ 4, 5.

84. See 2 Jones, Mortgages, § 1317; Wiltsie, Mortgage Foreclosure, § 3; 1 Stimson's Am. St. Law, § 1925.

85. Eslava v. New York Nat. Building & Loan Ass'n, 121 Ala. 480, 25 So. 1013; Martin v. Ward, 60 Ark. 510, 30 S. W. 1041; Reid v. McMillan, 189 Ill. 411, 59 N. E. 948; McFadden v. May's Landing & E. H. C. R. Co., 49 N. J. Eq. 176, 22 Atl. 932; McLarty v. Urquhart, 153 N. C. 339, 69 S. E. 245; Dupee v. Rose, 10 Utah, 305, 37 Pac. 567; Herrick's Adm'r v. Teachout, 74 Vt. 196, 52 Atl. 432; Guaranty Trust Safe Deposit Co. v. Green Cove Springs & M.

even though the mortgagee first attempted, but for some reason unsuccessfully, to exercise the power of sale.<sup>86</sup>

That the creditor has some ulterior motive, other than obtaining payment of the debt secured, in prosecuting the suit to foreclose, would seem to be no defense thereto.<sup>87</sup>

— **Decree for sale.** The court should, by its decree, determine the amount of the indebtedness, to satisfy which a sale of the property is to be made.<sup>88</sup> It may include an instalment of the debt which was not due at the time of the institution of the suit, but which has since become due,<sup>89</sup> provided at least this was asked for in the bill or complaint, or a supplementary pleading was filed for this purpose.<sup>90</sup>

The court cannot, it is evident, adjudge in its decree the whole debt to be due when a part thereof is

R. Co., 139 U. S. 137, 35 L. Ed. 116.

86. Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Wolff v. Ward, 104 Mo. 127, 16 S. W. 161; Martin v. McNeely, 101 N. C. 634, 8 S. E. 231; Shepherd v. Pepper, 133 U. S. 626, 33 L. Ed. 706. *Aliter* where the sale under the power was valid, although the mortgagee was the purchaser. McLean v. Presley, 56 Ala. 211.

87. Davis v. Flagg, 35 N. J. Eq. 491; Trenor v. Le Count, 84 Hun. (N. Y.) 426, 32 N. Y. Supp. 412; Williams v. Brown, 127 N. C. 51, 37 S. E. 86.

88. Tompkins v. Wiltberger, 56 Ill. 385; Travellers Ins. Co. v. Patten, 98 Ind. 209; Wernwag v. Brown, 3 Blackf. (Ind.) 457, 26 Am. Dec. 433; Wilson Sewing

Mach. Co. v. Rutledge, 60 Iowa, 39, 14 N. W. 92; Vaughn v. Nims, 36 Mich. 297; Rumsey v. People's Ry. Co., 144 Mo. 175, 46 S. W. 144; Collier v. Ervin, 2 Mont. 335; Hoy v. Bramhall, 19 N. J. Eq. 74; Kelly v. Searing, 4 Abb. Pr. (N. Y.) 354; Gore v. Davis, 124 N. C. 234, 32 S. E. 554.

89. Adams v. Essex, 1 Bibb. (Ky.) 149; Clark v. Abbott, 1 Md. Ch. 474; Vaughn v. Nims, 36 Mich. 297; Clark v. Clark, 62 N. H. 267; Manning v. McClurg, 14 Wis. 350.

90. McLane v. Piaggio, 24 Fla. 71, 3 So. 823; Magruder v. Eggleston, 41 Miss. 284; King v. Longworth, 7 Ohio St. 2, 231; Smith v. Osborne, 33 Mich. 410 (*semble*); Sherman v. Foster, 158 N. Y. 587, 53 N. E. 504; Cooke v. Pennington, 15 S. C. 185.

yet to become due.<sup>91</sup> The effect of such a finding would be to prevent a redemption before sale by payment of what is actually due.<sup>92</sup> In case there are instalments of the debt not due at the time of the making of the decree for sale, the court may decree a sale of so much of the property as is necessary to pay the overdue instalments, or of the whole property, subject to the payment of future instalments, or of the whole property, free and clear of the mortgage lien.<sup>93</sup> A sale of the whole property is proper when it cannot advantageously be sold in parts,<sup>94</sup> and also, it has been held, when the property is insufficient to pay the whole debt, and the person in possession of the property is irresponsible, the theory being that, in such case, a sale to satisfy the instalments due might leave but a small residuum of the property, and the rents and profits thereof might be wasted.<sup>95</sup> A sale of the whole property subject to the instalments yet to fall due has been said to be undesirable as tending to depreciate the price which will be bid for the property.<sup>96</sup> And it appears, as a matter of fact, that in case of a sale of the whole property, it is ordinarily sold free of the mortgage, and the court retains control of the case for the purpose of applying the surplus proceeds upon the subsequent instalments as they fall due,<sup>97</sup> or even before they fall due.<sup>98</sup> If a part only is ordered to be

91. *King v. Longworth*, 7 Ohio St. 2, 231.

92. *Grape Creek Coal Co. v. Farmers Loan & Trust Co.*, 63 Fed. 891, 12 C. C. A. 350; *Blazey v. Delius*, 74 Ill. 299.

93. *Fulgham v. Morris*, 75 Ala. 245; *Warren v. Harrold*, 92 Tex. 417, 49 S. W. 364.

94. *McDowell v. Lloyd*, 22 Iowa, 448; *Peyton v. Ayres*, 2 Md. Ch. 67; *Parkhurst v. Cory*, 11 N. J. Eq. 233; *Brinkerhoff v. Thallheimer*, 2 Johns. Ch. (N. Y.) 486;

*King v. Longworth*, 7 Ohio St. 2, 231; *Warren v. Harrold*, 92 Tex. 417, 49 S. W. 364; *Black v. Reno*, 59 Fed. 917.

95. *Suffern v. Johnson*, 1 Paige (N. Y.) 450, 19 Am. Dec. 440. Compare *Bank of Ogdensburgh v. Arnold*, 5 Paige's Ch. (N. Y.) 38.

96. *Hards v. Burton*, 79 Ill. 504.

97. *Fulgham v. Morris*, 75 Ala. 245; *Warren v. Harrold*, 92 Tex. 417, 49 S. W. 364.

98. See *Hards v. Burton*, 79 Ill.

sold, the court will ordinarily provide, in its decree, for subsequent sales as other instalments of the debt come due, either with or without application to the court for supplementary orders of sale.<sup>99</sup>

The decree for sale, or decree confirming the sale, if rendered by a court having jurisdiction, is, like any other judgment or decree, immune from collateral attack.<sup>99a</sup>

The rule which ordinarily obtains in connection with judicial sales, that a reversal of the decree for sale, unless for a jurisdictional defect, does not affect the rights of an innocent purchaser at the sale under the decree, who was not a party to the proceeding,<sup>99b</sup> applies in the case of a foreclosure sale under a mortgage.<sup>99c</sup>

One having an interest in the land subject to the mortgage, if not made a party to the foreclosure proceeding, is not, it seems, concluded by the decree therein as an adjudication of the validity of the mortgage lien,<sup>99d</sup> nor as to the existence or amount of the debt.<sup>99e</sup>

504; *King v. Longworth*, 7 Ohio St. 2, 231; *Peyton v. Ayres*, 2 Md. Ch. 67; *Olcott v. Bynum*, 17 Wall. (U. S.) 44, 62, 21 L. Ed. 570; *Black v. Reno*, 59 Fed. 917.

99. *Arnett v. Willoughby*, 190 Ala. 530, 67 So. 426; *Bank of Napa v. Godfrey*, 77 Cal. 612, 20 Pac. 142; *Kilmer v. Gallaher*, 107 Iowa, 676, 78 N. W. 685; *Skelton v. Ward*, 51 Ind. 46; *Wylie v. McMakin*, 2 Md. Ch. 413; *Brinckerhoff v. Thallheimer*, 2 Johns Ch. 486.

99a. *Carpenter v. Zarbuck*, 74 Ark. 474, 86 S. W. 299; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Bechtel v. Wier*, 152 Cal. 443, 92 Pac. 75; *Woolery v. Grayson*, 110 Ind. 149, 10 N. E. 935; *Rouskulp v. Kershner*, 49 Md. 516;

*Kopp v. Blessing*, 121 Mo. 391, 25 S. W. 757; *Mayer v. Wick*, 15 Ohio St. 548; *Finley v. Houser*, 25 Ore. 562, 30 Pac. 494.

99b. 17 Am. & Eng. Enc. Law (2nd Ed.) 1017-1019; *Kleber*, *Void Judicial Sales*, § 293.

99c. *Phillips v. Benson*, 82 Ala. 500, 2 So. 93; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Fraser v. Prather*, 1 MacA. (D. C.) 206; *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352; *Gott v. Powell*, 41 Mo. 416; *Hubbell v. Broadwell's Adm'rs*, 8 Ohio, 120; *Adams v. Odom*, 74 Tex. 206, 15 Am. St. Rep. 827, 12 S. W. 34; *Armstrong v. Humphries*, 5 S. C. 128. *Contra*, *Woodard v. Bird*, 105 Tenn. 671, 59 S. W. 143.

99d. *Williams v. Terrell*, 54 Ga.

The decree is, however, *prima facie* conclusive as to the amount of the debt, and it is for him to show that this was arrived at by fraud or collusion,<sup>99f</sup> or that there were specific errors therein.<sup>99g</sup>

— **Sale in parcels.** It is within the province of the court to provide in the decree of foreclosure for the sale of the mortgaged property in separate parcels or *en masse*, as the best interests of the parties may require. But a decree ordering a sale *en masse* will not ordinarily be disturbed unless it is clearly shown that the court abused its discretion in this regard.<sup>1</sup> And the fact that the person complaining of the sale failed to ask that it be made in separate parcels appears usually to be regarded as a reason for sustaining the sale *en masse*.<sup>2</sup> If the decree contains no direction as to the mode of sale, a discretion in this regard is lodged with the official making the sale, and his action in the premises will likewise not be interfered with in

462; *Landigan v. Mayer*, 32 Ore. 245, 67 Am. St. Rep. 521, 51 Pac. 649; *Clark v. Lesser*, 106 Ark. 207, 153 S. W. 112.

99e. *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485; *Renshaw v. Taylor*, 7 Ore. 315.

99f. *Needler v. Deeble*, 1 Cas. in Ch. 299; *Williams v. Day*, 2 Cas. in Ch. 32; *Knight v. Bampf- field*, 1 Vern. 179. That he may question the decree in this regard only for fraud or collusion is asserted in *Sumner v. Coleman*, 20 Ind. 486; *Roswell v. Simonton*, 2 Ind. 516; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 158. Compare *Hosford v. Johnson*, 74 Ind. 479.

99g. *Hall v. Heyward*, 32 Ch. Div. 430, 435; *Wrixon v. Vize*, 2 Dru. & War. 192.

1. *Homer v. Schonfeld*, 84 Ala.

313, 4 So. 105; *Howland v. Done- hoo*, 141 Ga. 687, 82 S. E. 32; *Kel- ley v. Canary*, 129 Ind. 460, 29 N. E. 11; *Geuda Springs Town & Water Co. v. Lombard*, 57 Kan. 625, 47 Pac. 532; *Macomb v. Pren- tis*, 57 Mich. 225, 23 N. W. 788; *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441; *Guarantee Trust & Safe Deposit Co. v. Jenkins*, 40 N. J. Eq. 451, 2 Atl. 13; *Miller v. Trudgeon*, 16 Okla. 337, 8 Ann. Cas. 739, 86 Pac. 523.

2. *Homer v. Schonfeld*, 84 Ala. 313, 4 So. 105; *Hopkins v. Wiard*, 72 Cal. 259, 13 Pac. 687; *Geuda Spring Town & Water Co. v. Lom- bard*, 57 Kan. 625, 47 Pac. 532; *McLaughlin v. Teasdale*, 9 Daly (N. Y.) 23; *Miller v. Trudgeon*, 16 Okla. 337, 8 Ann. Cas. 739, 86 Pac. 523.



the absence of a showing that a sale *en masse* was prejudicial to the party complaining.<sup>3</sup> That the property is described in the mortgage instrument as a single tract of land,<sup>4</sup> or is used as a single tract,<sup>5</sup> is a consideration tending to justify the offer of it for sale as such. Whether the sale of the whole property is necessary to satisfy the debt,<sup>6</sup> or such part of the debt as is due,<sup>7</sup> and whether the property is readily susceptible of division for purposes of sale, so that selling it in parts is calculated to bring as high or a higher return,<sup>8</sup> are weighty considerations in this connection. In several states there are statutory provisions in regard to the sale of the mortgaged property in parts or as a whole.<sup>9</sup>

The rule previously discussed,<sup>10</sup> making parts of

3. *Stone v. Missouri Guarantee, etc., Ass'n*, 58 Ill. App. 78; *Benton v. Wood*, 17 Ind. 260; *Hughes v. Riggs*, 84 Md. 502, 36 Atl. 269; *Parkhurst v. Cory*, 3 N. J. Eq. 233; *Kane v. Jonasen*, 55 Neb. 757, 76 N. W. 441; *Barnwell v. Marion*, 60 S. C. 314, 38 S. E. 593.

4. *Field v. Brokaw*, 159 Ill. 560, 42 N. E. 877; *Shannon v. Hay*, 106 Ind. 589, 7 N. E. 376; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Clark v. Birge*, 100 Neb. 769, 161 N. W. 427; *Griswold v. Fowler*, 24 Barb. (N. Y.) 135; *Thomas v. Thomas*, 44 Mont. 102, Ann. Cas. 1913B, 616, 119 Pac. 283.

5. *Meux v. Trezevant*, 132 Cal. 487, 64 Pac. 848; *Craig v. Stevenson*, 15 Neb. 362, 18 N. W. 510; *Clarke v. Birge*, 100 Neb. 769, 161 N. W. 427; *Guarantee Trust & Safe Deposit Co. v. Jenkins*, 40 N. J. Eq. 451, 2 Atl. 13; *McLaughlin v. Teasdale*, 9 Daly (N. Y.) 23; *Thompson v. Browne*, 10 S. D. 344, 73 N. W. 194; *Elgutter v. Northwestern Mut. Life Ins. Co.*,

86 Fed. 500, 30 C. C. A. 218.

6. *Kelley v. Canary*, 129 Ind. 460, 29 N. E. 11; *Thomas v. Fewster*, 95 Md. 446, 52 Atl. 750; *Parkhurst v. Cory*, 11 N. J. Eq. 233.

7. *Blazey v. Delius*, 74 Ill. 299; *James v. Fisk*, 9 Sm. & M. (Miss.) 144, 47 Am. Rep. 211; *American Life, etc., Ins. Co. v. Ryerson*, 6 N. J. Eq. 9; *Hiles v. Brooks*, 105 Wis. 256, 81 N. W. 422 (statute); *Black v. Reno*, 59 Fed. 917. See *ante*, this section, note 93.

8. *Bernhard v. Hovey*, 9 Kan. App. 25, 57 Pac. 245; *Stone v. Missouri Guarantee Sav., etc., Ass'n*, 58 Ill. App. 78; *Parkhurst v. Cory*, 11 N. J. Eq. 233; *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 22 Atl. 932.

9. See *c. g.*, *Haynes v. Cox*, 118 Ind. 184, 20 N. E. 758; *McIntyre v. Wyckoff*, 119 Mich. 557, 78 N. W. 654; *Hiles v. Brooks*, 105 Wis. 256, 81 N. W. 422.

10. *Ante*, § 625.

the mortgaged property liable for the mortgage debt in the "inverse order of alienation," should ordinarily be observed by the court in its decree for sale, by ordering the sale of the different parts in the order of their liability.<sup>11</sup> And if a part only of the mortgaged property is subject to a junior mortgage, the court will ordinarily "marshal" the securities by requiring the other part to be first sold to satisfy the prior mortgage, in order to protect, so far as possible, the junior lien.<sup>12</sup> On the other hand it may be proper, under the particular circumstances of the case, to order a sale of the entire mortgage premises in order to protect the interests of subsequent incumbrancers, although a sale of a part would bring enough to satisfy the mortgage sought to be foreclosed.<sup>13</sup>

— **Effect of sale.** The sale is, in most jurisdictions, not valid for the purpose of vesting title in the purchaser until it has been confirmed by the court.<sup>14</sup> In a few states, however, confirmation of the sale, although usual, appears not to be absolutely necessary.<sup>15</sup>

The completed sale vests in the purchaser whatever title the mortgagor had when he executed the mort-

11. *Monarch Coal & Mining Co. v. Hand*, 197 Ill. 288, 64 N. E. 381; *Thomaston Sav. Bank v. Hurley*, 117 Me. 211, 103 Atl. 234; *Bradfield v. Sewall*, 58 Neb. 637, 79 N. W. 615; *Sternberger v. Hanna*, 42 Ohio St. 305.

12. *Raun v. Reynolds*, 11 Cal. 14; *Chicago & G. W. Railroad Land Co. v. Peck*, 112 Ill. 408; *Millsaps v. Bond*, 64 Miss. 453, 1 So. 506; *Craig v. Miller*, 41 S. C. 37, 19 S. E. 192. *Ante*, § 647.

13. *Livingston v. Mildrum*, 19 N. Y. 440; *Dobbs v. Niebuhr*, 15 Daly (N. Y.) 52.

14. See *Williamson v. Berry*, 8 How. (U. S.) 495, 12 L. Ed.

1170; *Lathrop v. Nelson*, 4 Dill. 194, Fed. Cas. No. 8,111; *De Yampart v. Manley*, 127 Ark. 153, 19 S. W. 905; *Hart v. Burch*, 130 Ill. 425, 6 L. R. A. 371, 22 N. E. 831; *Allen v. Poole*, 54 Miss. 323; *State v. Campbell*, 5 S. D. 636, 60 N. W. 32; *State v. Holden*, 96 Wash. 35, 164 Pac. 595; *Wehler v. Endter*, 46 Wis. 301, 1 N. W. 329, 50 N. W. 1099.

15. *Brown v. Marzyck*, 19 Fla. 840; *Fuller v. Van Geesen*, 4 Hill. (N. Y.) 171; *Ward v. Ward*, 131 Fed. 946 (New York); *Hochgraef v. Hendrie*, 66 Mich. 556, 34 N. W. 15; *State v. Evans*, 176 Mo. 310, 75 S. W. 914.

gage,<sup>16</sup> and thus cuts off the interests of any subsequent purchasers or incumbrancers, who were made parties to the proceeding, and deprives them of all right of redemption.<sup>17</sup> Persons whose interests and claims were prior to the mortgage are not affected by the sale, and the purchaser acquires, as against them, no better title than the mortgagor had at the time of making the mortgage.<sup>18</sup> If, however, a prior mortgagee is made a party to the proceeding, and the bill contains sufficient allegations, he is barred by the decree, the bill in such case being one both to foreclose the second mortgage and to redeem from the first mortgage.<sup>19</sup>

Any surplus proceeds of sale remaining after the payment of the debt secured by the mortgage are paid to the mortgagor or, if there are subsequent purchasers or incumbrancers, such surplus proceeds belong to them, in the order of priority in which their rights against the land could have been asserted.<sup>20</sup> In other words,

16. *Davis v. Connecticut Mut. Life Ins. Co.*, 84 Ill. 508; *Poweshiek County v. Dennison*, 36 Iowa. 244, 14 Am. Rep. 521; *Allis v. Foley*, 126 Minn. 14, 147 N. W. 670; *Champion v. Hinkle*, 45 N. J. Eq. 162, 16 Atl. 701; *Christ Protestant Episcopal Church v. Mack*, 94 N. Y. 488, 45 Am. Rep. 260; *King v. McCully*, 38 Pa. St. 76.

17. *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Shaw v. Heisey*, 48 Iowa, 468; *Gamble v. Horr*, 40 Mea. 561; *McMurray v. McMurray*, 258 Mo. 405, 167 S. W. 513; *Christ Protestant Episcopal Church v. Mack*, 93 N. Y. 488; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368.

18. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 31 L. Ed. 309; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *San*

*Francisco v. Lawton*, 18 Cal. 465; *Eozarth v. Landers*, 113 Ill. 181; *Summers v. Bromley*, 23 Mich. 125; *Bannings v. Bradford*, 21 Minn. 308 18 Am. Rep. 398; *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Iowa County Sup'rs v. Mineral Point R. Co.*, 24 Wis. 93, 121. And see 1 *Stimson's Am. St. Law*, § 1927.

19. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 31 L. Ed. 309; *Hagan v. Walker*, 14 How. (U. S.) 29, 37, 14 L. Ed. 312; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Haines v. Reach*, 3 Johns. Ch. (N. Y.) 459; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Cronin v. Hazeltine*, 3 Allen (Mass.) 324.

20. See 2 *Jones, Mortgages*, §§

the proceeds of sale are substituted for the land itself, and become subject to outstanding liens and claims to the same extent and in the same order as the land itself was subject thereto.

In a very considerable proportion of the states, the statute gives to the mortgagor and other persons interested in the property, or certain classes of such persons, a right to redeem for a named period after the sale, such period varying in different states from two months to two years. This right is purely the creation of statute, and is to be carefully distinguished from the right of redemption in equity before foreclosure. The equitable right is a right to redeem from the mortgage, by paying the debt secured by the mortgage, while the statutory right is a right to redeem from the sale, by paying the amount of the purchase money with interest thereon regardless of whether this is more or less than the amount of the debt.<sup>21-22</sup> These statutory provisions for redemption quite usually apply in terms to sales under execution, and to judicial sales generally, as well as to sales under foreclosure of mortgages, and differ greatly in different states. No discussion thereof will be here attempted. Apart from such a statutory right of redemption, there is no right to redeem after the sale,<sup>23</sup> except when such a right is created by an agreement to that effect.<sup>24</sup>

1684-1698; Wiltsie, Mortgage Foreclosure, cc. 32, 33.

21-22. See First Nat. Bank of Anniston v. Elliott, 125 Ala. 646, 47 L. R. A. 742, 82 Am. St. Rep. 268, 27 So. 7; Wood v. Holland, 57 Ark. 198, 21 S. W. 223; Hooker v. Burr, 137 Cal. 663, 99 Am. St. Rep. 17, 70 Pac. 778; Tuttle v. Dewey, 44 Iowa, 306; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834; Schroeder v. Richardson, 101 Wis. 529, 78 N. W. 178.

23. Weiner v. Heintz, 17 Ill.

259; Leary v. New, 90 Ind. 502; Mayer v. Farmers' Bank, 44 Iowa, 212; Butler v. Seward, 10 Allen (Mass.) 466; White v. Smith, 174 Mo. 186, 73 N. W. 610; Parker v. Dacres, 130 U. S. 43, 32 L. Ed. 848; Powers v. Andrews, 84 Ala. 289, 4 So. 263.

24. See Swain v. Jacks, 125 Cal. 215, 57 Pac. 989; Traeger v. Mutual Building & Loan Ass'n, 192 Ill. 166, 61 N. E. 424; Heald v. Jardine, — (N. J. Ch.) —, 21 Atl. 586; Agate v. Agate, 11 N.

The purchaser is, usually, if not invariably, entitled to a conveyance from the officer making the sale. In jurisdictions, however, in which a right of redemption after sale is given by the statute, the purchaser is not ordinarily entitled to a conveyance until the period allowed for redemption has expired, he having in the meantime merely a certificate showing his purchase of the property.

In case the foreclosure sale is for some reason invalid, the purchaser paying the purchase price is subrogated to the rights of the mortgage creditor under the mortgage,<sup>25</sup> and if he takes possession he is regarded as in the position of a mortgagee in possession,<sup>26</sup> for the purpose of the doctrine, asserted in a number of states, that the mortgagor, although otherwise entitled to the possession as having the legal title, cannot recover the possession from the mortgagee who has acquired possession under circumstances indicative of the mortgagor's consent thereto.<sup>27</sup>

**§ 655. Parties to proceeding—Persons interested in mortgage debt.** The mortgagee, if he has not assigned his rights, is the proper party plaintiff in a foreclosure suit. An assignee of the mortgage debt, with or without an express assignment of the mortgage, may foreclose, and is the proper person to do so, since he is the person interested in realizing on the security;<sup>28</sup>

Y. St. 579; *Yarborough v. Hughes*, 139 N. C. 199, 51 S. E. 904; *First Tex. Civ. App.* 476, 79 S. W. 53; *Nat. Bank of El Paso v. Moor*, 34 Orme v. Wright, 3 Jur. 19.

25. *Ante*, § 646.

26. The numerous cases to this effect are collected in an editorial note in 40 L. R. A. (N. S.) 839.

27. *Ante*, § 612.

28. *Bendey v. Townsend*, 109

U. S. 665, 27 L. Ed. 1065; *Center v. Planters' & Merchants' Bank*, 22 Ala. 743; *Adler v. Sargent*, 109 Cal. 42, 41 Pac. 799; *Austin v. Burbank*, 2 Day (Conn.) 474, 2 Am. Dec. 119; *Carper v. Munger*, 62 Ind. 481; *Holmes v. French*, 70 Me. 341; *Mooreland v. Houghton*, 94 Mich. 548, 54 N. W. 285; *Merritt v. Bartholick*, 36 N. Y. 44; *Smith v. Commercial Nat. Bank*, 7 S. D. 465, 64 N. W.

and one to whom the mortgage and the debt are assigned merely as collateral security may foreclose,<sup>29</sup> as may his assignor, since the latter is still interested in the mortgage debt.<sup>30</sup> One who is entitled to but part of the mortgage debt, as being the assignee of one of the notes secured, or otherwise,<sup>31</sup> and likewise a person who is subrogated to the rights of the mortgagee, may foreclose.<sup>32</sup>

One who has assigned the mortgage debt absolutely cannot institute a foreclosure suit, since he is no longer a party in interest,<sup>33</sup> nor can one to whom the mortgage alone is attempted to be assigned, without the debt.<sup>34</sup>

In cases in which all the persons interested in the mortgage debt do not join as plaintiffs in the institution of the proceeding, those not so joining must be made

529; *Castleman v. Berry*, 86 Va. 604, 10 S. E. 884.

29. *Hunter v. Levan*, 11 Cal. 11; *Moore v. Boise Land & Orchard Co.*, 31 Idaho, 390, 173 Pac. 117; *Chicago v. G. W. Railroad Land Co. v. Peck*, 112 Ill. 408, 439; *Brown v. Tyler*, 8 Gray (Mass.) 135; *McKinney v. Miller*, 19 Mich. 142; *Bard v. Poole*, 12 N. Y. 495. See *Chew v. Brumagen*, 13 Wall. (U. S.) 497, 20 L. Ed. 663.

30. *Consolidated Nat. Bank of San Diego v. Hayes*, 112 Cal. 75, 44 Pac. 469; *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597; *Benjamin v. Peterson Heat, Light & Power Co.*, 170 Iowa, 461, 153 N. W. 71; *Norton v. Warner*, 3 Edw. Ch. (N. Y.) 106; *Wells v. Wells*, 53 Vt. 1.

31. *Sanford v. Bulkley*, 30 Conn. 344; *Berry v. Van Hise*, — Ga. —, 95 S. E. 690; *Goodall v. Mopley*, 45 Ind. 355; *Utz v. Utz*, 34 La. Ann. 752; *First State Bank*

of *Le Sueur v. Sibley County Bank*, 93 Minn. 317, 101 N. W. 309; *Pugh v. Holt*, 27 Miss. 401; *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Neb. 500, 30 N. W. 686.

32. *Risk v. Hoffman*, 69 Ind. 137; *Wood v. Smith*, 51 Iowa, 156, 50 N. W. 581; *Shinn v. Shinn*, 91 Ill. 477; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Burnett v. Hoffman*, 40 Neb. 569, 58 N. W. 1134. See *ante*, § 646.

33. *Cutler v. Clementson (C. C.)* 67 Fed. 409; *Barraque v. Manuel*, 7 Ark. 516; *Call v. Leisner*, 23 Me. 25; *Pryor v. Wood*, 31 Pa. St. 142. See *McGuffey v. Finley*, 20 Ohio, 474; *Gould v. Newman*, 6 Mass. 239; *Crabtree v. Levings*, 53 Ill. 526.

34. *Bulkley v. Chapman*, 9 Conn. 5; *Pope v. Jacobus*, 10 Iowa, 263; *Ellison v. Daniels*, 11 N. H. 274; *Merritt v. Bartholick*, 36 N. Y. 44; 4 Kent's Comm. 194.

parties defendant, in order to cut off their interests, and pass a clear title to the purchaser at the mortgage sale.<sup>35</sup> Accordingly, one who has assigned the mortgage as collateral security,<sup>36</sup> or received such an assignment,<sup>37</sup> and joint owners with the plaintiff of the mortgage debt, including owners of other notes secured thereby,<sup>38</sup> must be made parties in order to cut off their rights against the land.

— **Personal representatives of mortgage claimant.**

Upon the death of the owner of the mortgage debt, the title thereto, with the right to proceed by foreclosure, passes to his personal representatives, and not to his heirs, and consequently the former are the proper persons to foreclose,<sup>39</sup> unless the debt has passed to another, either in course of distribution or otherwise.<sup>40</sup>

In the case of a mortgage debt owned jointly by more than one person, the doctrine of "survivorship" applies, and, on the death of one, the survivor or survivors may foreclose without making the representatives of the deceased owner parties to the suit.<sup>41</sup>

35. *Mangels v. Donau Brewing Co.* (C. C.) 53 Fed. 513; *Pine v. Shannon*, 30 N. J. Eq. 501; *Goodall v. Mopley*, 45 Ind. 355; *Hopkins v. Ward*, 12 B. Mon. (Ky.) 185.

36. *Woodruff v. Depue*, 14 N. J. Eq. 168; *Dalton v. Smith*, 86 N. Y. 176.

37. *Plowman v. Riddle*, 14 Ala. 169; *Simson v. Satterlee*, 64 N. Y. 657.

38. *Myers v. Wright*, 33 Ill. 285; *Goodall v. Mopley*, 45 Ind. 355; *Rankin v. Major*, 9 Iowa, 297; *Brown v. Bates*, 55 Me. 520; *Johnson v. Brown*, 31 N. H. 405; *Delespine v. Campbell*, 45 Tex. 628; *Pettibone v. Edwards*, 15 Wis. 95.

39. *Thornborough v. Baker*, 3 Swanst. 628; *Buck v. Fischer*, 2 Colo. 182; *Roath v. Smith*, 5 Conn. 133; *White v. Rittenmyer*, 30 Iowa, 268; *Felch v. Hooper*, 20 Me. 163; *Newton v. Stanley*, 28 N. Y. 61; *Griffin v. Lovell*, 42 Miss. 402; *Miller v. Donaldson*, 17 Ohio, 264; *Douglass v. Durin*, 51 Me. 121.

40. *White v. Secor*, 58 Iowa, 533, 12 N. W. 586; *Walter v. Wala*, 10 Neb. 123, 4 N. W. 938; *Babbitt v. Bowen*, 32 Vt. 437; *Ford v. Smith*, 60 Wis. 222, 18 N. W. 925.

41. *Erwin v. Ferguson*, 5 Ala. 158; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Lannay v. Wilson*, 30 Md. 536; *Blake v. Sa-*

— **Beneficiary under trust deed.** In the case of a deed of trust to secure a debt, any beneficiary may institute a foreclosure proceeding, it has been held, if the trustee refuses to act,<sup>42</sup> or if the trustee is disqualified by interest or otherwise properly to represent the beneficiaries.<sup>43</sup> There are decisions apparently to the effect that a beneficiary may bring the suit even though the trustee has not refused to do so, and is not incapacitated,<sup>44</sup> but this view is clearly repudiated in other decisions.<sup>45</sup> An express stipulation that no individual bondholder shall proceed to foreclose unless the trustee refused so to do on the request of a certain percentage of the bondholders has been regarded as rendering necessary such a request and refusal as a condition to foreclosure by a bondholder.<sup>45a</sup>

In the case of a deed of trust to secure, it is necessary, ordinarily, to make the creditor or creditors secured, as well as the trustee, parties to a proceeding for the sale of the property.<sup>46</sup> This requirement is

born, 8 Gray (Mass.) 154; *Martin v. McReynolds*, 6 Mich. 70. But that such representatives must be made parties, see *Mutual Life Ins. Co. of New York v. Sturges*, 32 N. J. Eq. 678.

42. *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *Citizens' Bank of Los Angeles v. Los Angeles Iron & Steel Co.*, 121 Cal. 187, 82 Am. St. Rep. 341, 63 Pac. 462; *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 22 Atl. 932; *Com. v. Susquehanna & D. R. R. Co.*, 122 Pa. St. 306, 1 L. R. A. 225, 15 Atl. 448.

43. *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199; *Webb v. Vermont, etc., R. Co.*, 9 Fed. 793, 20 Blatchf. 218; *Cochran v. Pittsburg, etc., R. Co.*, 150 Fed. 682; *Etlinger*

*v. Persian Rug & Carpet Co.*, 142 N. Y. 189, 40 Am. St. Rep. 587, 36 N. E. 1055; *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543, 45 Pac. 141.

44. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 30 L. Ed. 905; *Dorn v. Colt*, 180 Ill. 397, 54 N. E. 167; *Hutchison v. Myers*, 52 Kan. 290, 34 Pac. 742; *Hammond v. Tarver*, 89 Tex. 290, 32 S. W. 511, 34 S. W. 729.

45. *General Electric Co. v. La-grande Edison Electric Co.*, 87 Fed. 590, 31 C. C. A. 118; *Consolidated Water Co. v. San Diego*, 92 Fed. 759.

45a. *Seibert v. Minneapolis & St. L. Ry. Co.*, 52 Minn. 148, 20 L. R. A. 535, 38 Am. St. Rep. 530, 53 N. W. 1134.

46. *Boyd v. Jones*, 44 Ark. 314; *Butler v. Farry*, 68 N. J. Eq. 760,



not, however, enforced when the creditors secured are so numerous that compliance therewith would be difficult, if not impossible.<sup>47</sup> And it has been regarded as non-existent when there is a statutory provision that the trustee of an express trust may sue without joining his beneficiaries.<sup>48</sup>

— **Persons having estates in land.** One in whom the legal title is vested as being the original mortgagee, or an assignee of the latter, should be a party to any proceeding instituted by the owner of the debt, since otherwise the legal title would not pass by the sale,<sup>49</sup> and so the trustee under a deed of trust must usually be made a party to a proceeding instituted by an owner or part owner of the debt secured.<sup>50</sup>

In order that the decree for sale may be binding upon any particular person who has an interest subject to the mortgage, so as to extinguish such interest, with its incidental right to "redeem" from the mortgage lien by payment of the mortgage debt, it is necessary that such a person be a party to the proceeding. One limitation upon the generality of this rule is, however, to be noticed. One who acquires an estate in the land subject to the mortgage is, it has been decided, bound by the decree and sale, even though not a party, if he did not record his deed until after the commencement of the foreclosure proceeding,<sup>51</sup> pro-

63 Atl. 240; *Springer v. Sheets*, 115 N. C. 370, 20 S. E. 469; *Day v. Wetherby*, 29 Wis. 363.

47. *Chicago & G. W. Railroad Land Co. v. Peck*, 112 Ill. 408; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162; *Butler v. Farry*, 68 N. J. Eq. 760, 63 Atl. 240.

48. *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706; *Rinker v. Bissell*, 90 Ind. 375; *Vance v. Lane*, 26 Ky. L. Rep. 619, 82 S. W. 297; *Tainter v. Adams*, 76 Neb. 109,

107 N. W. 225; *Hays v. Galion Gas Light & Coal Co.*, 29 Ohio St. 330.

49. *Langley v. Andrews*, 132 Ala. 147, 31 So. 469; *Nichol v. Henry*, 89 Ind. 54.

50. *Hambrick v. Russell*, 86 Ala. 199; *Harlow v. Mister*, 64 Miss. 25, 8 So. 164; *Shelby v. Burtis*, 18 Tex. 644; *Gardner v. Brown*, 21 Wall. (U. S.) 36, 22 L. Ed. 527.

51. *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824; *Bolce v. Michl-*

vided at least the mortgage creditor did not have notice, by the transferee's possession or otherwise, that the latter claimed an interest in the property.<sup>52</sup> Occasionally a statute relieves the mortgage creditor from any obligation to make a transferee, whose conveyance is not recorded at the time of the commencement of the proceeding, a party thereto.<sup>53</sup> Furthermore, if one does not acquire his interest in the land until after the institution of the foreclosure proceeding, he is usually, by force of the doctrine of *lis pendens*,<sup>54</sup> bound by the decree in such proceeding, though not a party thereto.

As regards one who has an estate in the land subject to the mortgage, an owner or part owner of the equity of redemption, as he would ordinarily be called, if he is not made a party, he will, as above indicated, in spite of the decree and sale thereunder, ordinarily retain the right of redemption,<sup>55</sup> and also, it would seem, any right of possession incident to his estate.<sup>56</sup>

gan Mut. Life Ins. Co., 114 Ind. 480, 15 N. E. 825; Wolfenberger v. Hubbard, 184 Ind. 25, Ann. Cas. 1918C, 81, 110 N. E. 198; Porter v. Kilgore, 32 Iowa, 379 (*dictum*); Shippen v. Kimball, 47 Kan. 173, 27 Pac. 813.

52. Connely v. Rue, 148 Ill. 207, 35 N. E. 824; Boice v. Michigan Mut. Life Ins. Co., 114 Ind. 480, 15 N. E. 825; Webb v. Maxan, 11 Tex. 678. See Batterman v. Albright, 122 N. Y. 484, 11 L. R. A. 800, 19 Am. St. Rep. 510, 25 N. E. 856.

53. See Hager v. Astorg, 145 Cal. 548, 104 Am. St. Rep. 68, 79 Pac. 68; Batterman v. Albright, 122 N. Y. 484, 11 L. R. A. 800, 19 Am. St. Rep. 510, 25 N. E. 856; Dinsmore v. Westcott, 25 N. J. Eq. 302.

54. *Ante*, § 579.

55. Dickinson v. Duckworth,

74 Ark. 138, 4 Ann. Cas. 846, 85 S. W. 82; Randall v. Duff, 79 Cal. 115, 3 L. R. A. 754, 756, 19 Pac. 532, 21 Pac. 610; Jordan v. Sayre, 29 Fla. 100, 10 So. 823; Walker v. Warner, 179 Ill. 16, 70 Am. St. Rep. 85, 53 N. E. 594; Alsup v. Stewart, 194 Ill. 595, 88 Am. St. Rep. 169, 62 N. E. 795; Barrett v. Blackmar, 47 Iowa 565; Sumner v. Coleman, 20 Ind. 486; Fowler v. Lilly, 122 Ind. 297, 23 N. E. 767; Lenox v. Reed, 12 Kan. 223; Brundred v. Walker, 12 N. J. Eq. 140; Winslow v. Clark, 47 N. Y. 261; Frische v. Kramer, 16 Ohio, 125; Harding v. Gillett, 25 Okla. 199, 107 Pac. 665; Tualatin Academy v. Keene, 59 Ore. 496, 117 Pac. 424; Stark v. Brown, 12 Wis. 572, 78 Am. Dec. 761.

56. But, by the doctrine adopted in a number of states, if the

His estate, in other words, remains unaffected by a proceeding to which he is not a party. It is occasionally said that the owner of the equity of redemption is a necessary party to the foreclosure proceeding, but this can only mean, it would seem, that if he is not a party, he is not affected by the decree or the sale thereunder,<sup>57</sup> and that the court will not knowingly decree a sale in the absence of such a party.<sup>58</sup> The proceeding can not well be absolutely void, as to those who are made parties, by reason of the fact that one who has an estate in the land, even though in fee simple, is not a party thereto. In accordance with this view are occasional decisions that if the mortgagee had the legal title, such title passes on the sale, although the owner of the land was not a party,<sup>59</sup> and so, it is conceived, a junior mortgagee, who is a party to a proceeding by a senior mortgagee, would, in spite of the omission to make the fee simple owner a party, lose his right to redeem from the prior mortgage, as well as the right to foreclose his own mortgage, his rights in these respects passing by subrogation to the purchaser at the sale under the decree.<sup>60</sup> But although, if the

purchaser takes possession by force of the invalid sale, he cannot be dispossessed unless the mortgage debt is paid. See *ante*, 613(c).

57. See *Ohling v. Luitjens*, 32 Ill. 23; *Douglas v. Bishop*, 27 Iowa, 214; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441; *Bull v. Campbell*, 225 Fed. 923, 141 C. C. A. 47.

58. *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *Hall v. Higgins*, 19 Ala. 200; *Kunkel v. Markell*, 26 Md. 390; *Franklin v. Beegle*, 102 N. Y. App. Div. 412, 92 N. Y. Supp. 449; *Brandon v. Vroman*,

29 N. Y. App. Div. 597, 51 N. Y. Supp. 943; *Reed v. Marble*, 10 Paige (N. Y.) 409; *Carpenter v. Ingalls*, 3 S. D. 49, 44 Am. St. Rep. 753, 51 N. W. 948 (*semble*); *Hawkenson v. Rostad*, 86 Ore. 704, 169 Pac. 350.

59. *Kelgour v. Wood*, 64 Ill. 345; *Taylor v. Adams*, 115 Ill. 570, 4 N. E. 837; *Frische v. Kramer*, 16 Ohio, 125; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 528; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762. These cases criticize *Watson v. Spence*, 20 Wend. (N. Y.) 260, which is apparently *contra*.

60. *Ante*, § 646.

person instituting the foreclosure suit has the legal title to the land, this will pass under the sale in spite of the failure to make the owner of the equity of redemption, that is, of an estate in the land, a party to the proceeding,<sup>61</sup> this is not so when the legal title is not in the mortgagee, and he has only a lien on the land. In such a case the legal title is in the mortgagor or his transferee, and he must be a party to the proceeding in order that his legal title may be divested, and pass to the purchaser.<sup>62</sup>

As to the particular classes of persons having interests in the land who should or should not be made parties, the following statements may be made.

The mortgagor need not be made a party if he has transferred all his interest, unless it is desired to obtain a personal judgment against him.<sup>63</sup>

On the death of an owner of the mortgaged land, his heirs should be made parties<sup>64</sup> or, in case the

61. *Ante*, note 59.

62. *Skinner v. Buck*, 29 Cal. 253; *Berlack v. Halle*, 22 Fla. 236, 1 Am. St. Rep. 185; *Landon v. Townshend*, 112 N. Y. 93, 8 Am. St. Rep. 712, 19 N. E. 424; *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *South Carolina Mfg. Co. v. Price*, 4 Rich. (S. C.) 338; *Ballard v. Carter*, 71 Tex. 161, 9 S. W. 92.

63. *Boutwell v. Steiner*, 84 Ala. 307, 5 Am. St. Rep. 375, 4 So. 184; *Hinson v. Gammon*, 61 Fla. 641, Ann. Cas. 1913A, 83, 54 So. 374; *Brockway v. McClun*, 243 Ill. 196, 90 N. E. 374; *Davis v. Hardy*, 76 Ind. 272; *Fitzgerald v. Flanagan*, 155 Iowa, 217, Ann. Cas. 1914C, 1104, 135 N. W. 738; *Miller v. Thompson*, 34 Mich. 10; *Munger v. T. J. Beard & Bros.*, 87 Neb. 527, 127 N. W. 872; *Andrews v.*

*Stelle*, 22 N. J. Eq. 478; *Bigelow v. Bush*, 6 Paige (N. Y.) 343; *Carpenter v. Ingalls*, 3 S. D. 49, 44 Am. St. Rep. 753, 51 N. W. 948; *Buchanan v. Munroe*, 22 Tex. 537; *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633.

64. *Hunt v. Acre*, 28 Ala. 580; *Kiernan v. Blackwell*, 27 Ark. 235; *Lane v. Erskine*, 13 Ill. 501; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833; *White v. Rittenmeyer*, 30 Iowa, 286; *Richards v. Thompson*, 43 Kan. 209, 23 Pac. 106; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Isler v. Koonce*, 83 N. C. 55; *Renshaw v. Taylor*, 9 Ore. 315; *Aurud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364; *Stark v. Brown*, 12 Wis. 572, 78 Am. Dec. 762. Occasionally the statute provides for the making of the personal representative a

mortgaged land is devised, his devisees.<sup>65</sup>

The wife of the mortgagor or of a subsequent purchaser of the property, if entitled to dower, should be made a party if her right of dower is subordinate to the mortgage, as where she joined therein;<sup>66</sup> and the wife's right of redemption by reason of her right of homestead cannot generally be foreclosed unless she is a party to the foreclosure proceeding.<sup>67</sup>

One having a beneficial interest in the land subject to the mortgage should be made a party, in order to extinguish her right of redemption, although the person having the legal title is also a party.<sup>68</sup>

One to whom the owner of land, after having mortgaged the land, makes a lease for years, should be a party to a proceeding to foreclose, and if not a party his rights should, it seems, not be affected by the decree.<sup>69</sup> Conceding that he has a right of redemp-

party rather than the heir. See *e. g.*, *Tierney v. Spiva*, 97 Mo. 98, 10 S. W. 433; *Kelsey v. Welch*, 8 S. Dak. 255.

65. *Chew v. Hyman*, 7 Fed. 7; *Chadbourn v. Johnston*, 119 N. C. 282, 25 S. E. 705.

66. *Leonard v. Villars' Adm'r*, 23 Ill. 377; *Bigoness v. Hibbard*, 267 Ill. 301, 108 N. E. 294; *Swan v. Wiswall*, 15 Pick. (Mass.) 126; *Byrne v. Taylor*, 46 Miss. 95; *McArthur v. Franklin*, 15 Ohio St. 485, 16 Ohio St. 193; *Franklin v. Beegle*, 102 N. Y. App. Div. 412, 92 N. Y. Supp. 449. See *Merchants Bank v. Thompson*, 55 N. Y. 7, and *ante* § 222.

67. *Hefner v. Urton*, 71 Cal. 479, 12 Pac. 486; *Revalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 304; *Morris v. Ward*, 5 Kan. 246; *Larson v. Reynolds*, 13 Iowa, 584. See *Townsend Sav. Bank of New Haven v. Epping*, 3 Woods, 390,

*Fed. Cas. No. 14,120*; *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185.

68. *Clark v. Reyburn*, 8 Wall. (U. S.) 318, 19 L. Ed. 354; *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909; *Roberts v. Atlanta Cemetery Ass'n*, 146 Ga. 490, 91 S. E. 675; *Rodman v. Quick*, 211 Ill. 546, 71 N. E. 1087; *Johnson v. Robertson*, 31 Md. 491; *Lockman v. Reilly*, 95 N. Y. 64; *Landon v. Townshend*, 112 N. Y. 93, 8 Am. St. Rep. 712, 19 N. E. 424; *Mavrich v. Grier*, 3 Nev. 52, 93 Am. Dec. 373; *Union Bank v. Bell*, 14 Ohio St. 200. *Contra*, *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6.

69. *Dundee Naval Stoves Co. v. McDowell*, — Fla. —, 61 So. 108; *Richardson v. Hadsall*, 106 Ill. 476; *Hirsch v. Livingston*, 3 Hun (N. Y.) 9; *Welsh v. Schoen*, 59 Hun (N. Y.) 356, 13 N. Y. Supp. 71;

tion<sup>70</sup> he cannot well be deprived of this right by a proceeding to which he is not a party. And so far as he has, in any state, before the foreclosure decree, the right of possession as against the mortgagee, he cannot well be deprived of this right by such a proceeding. There is, on principle, no distinction in this regard between the rights of one to whom the mortgagor transfers the land in fee simple and the rights of one to whom he transfers the land for years, whether for one or a thousand years. Occasional decisions to the effect that a foreclosure decree is conclusive as against a tenant for years, although he is not a party thereto,<sup>70a</sup> are, it is submitted, open to serious question.

— **Junior lienors.** One who has a junior mortgage, or other lien junior to the mortgage sought to be foreclosed, will ordinarily, if not a party to the proceeding, retain his right to redeem from the mortgage.<sup>71</sup> Moreover, a junior mortgagee,<sup>72</sup> and presumably any

Lockhart v. Ward, 45 Tex. 227; Collins v. Cunningham, 21 Can. Sup. Ct. 139; Canada Permanent L. & S. Soc. v. Macdonnell, 22 Grants Ch. 461. See 1 Tiffany, Landl. & Ten., p. 419.

70. *Ante*, § 645(a), note 10.

70a. McDermott v. Burke, 16 Cal. 580; Downard v. Groff, 40 Iowa, 597; Western Union Tel. Co. v. Ann Arbor R. Co., 61 U. S. App. 741, 33 C. C. A. 113, 90 Fed. 379.

71. Howard v. Milwaukee & St. P. Ry. Co., 101 U. S. 837, 25 L. Ed. 1081; Wiley v. Ewing, 47 Ala. 423; Alexander v. Greenwood, 24 Cal. 506; Goodman v. White, 26 Conn. 317; Strang v. Allen, 44 Ill. 428; Hosford v. Johnson, 74 Ind. 479; Street v. Beal, 16 Iowa, 68, 85 Am. Dec. 504; Harris v. Hooper, 50 Md. 537; Cram v. Cotrell, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452;

Brainard v. Cooper, 10 N. Y. 356; Peabody v. Roberts, 47 Barb. (N. Y.) 91; Sellwood v. Gray, 11 Ore. 534, 5 Pac. 196; Froelich v. Swafford, 32 S. D. 142, 144 N. W. 925. See cases cited in note to Jones v. Williams, 36 L. R. A. (N. S.) 426.

72. Catterlin v. Armstrong, 79 Ind. 514, 101 Ind. 258; Anson v. Anson, 20 Iowa, 55, 89 Am. Dec. 514; Karl v. Conner, 30 Ky. L. Rep. 238, 97 S. W. 1111; Foster v. Johnson, 44 Minn. 290, 46 N. W. 350; Vanderkemp v. Shelton, 11 Paige (N. Y.) 28; Walsh v. Rutgers Fire Ins. Co., 13 Abb. Pr. 33; Bigelow v. Devol, 62 Hun (N. Y.) 245, 16 N. Y. Supp. 646; Jones v. Williams, 155 N. C. 179, 36 L. R. A. (N. S.) 426, 71 S. E. 222; Stewart v. Johnson, 30 Ohio St. 24; Besser v. Hawthorn, 3 Ore. 129, 512. *Contra*, Dickinson v. Duckworth,

other junior lienor, will also, if not a party, retain his former right of foreclosure as against the land, subject, however, to the superior lien of the senior mortgage, which will usually have passed, by subrogation, into the hands of the purchaser at the foreclosure sale. But the holder of a junior mortgage will be concluded although not a party to the proceeding, at least in some states, if by reason of his failure to record his mortgage, or the assignment to him, the plaintiff was without notice of his interest at the time of instituting the proceeding,<sup>73</sup> and acquiring the mortgage after the institution of the proceeding, he would ordinarily, under the doctrine of *lis pendens*, take subject to the decree therein.<sup>74</sup>

The failure to make the junior lienor a party to the proceeding does not affect the validity of the decree and sale thereunder, except as regards such lienor,<sup>75</sup> and the purchaser at the sale will acquire the property, subject, however, to the rights of such lienor, as above stated, either to redeem or foreclose. Such purchaser is, as regards the junior incumbrancer, an assignee of the mortgage debt,<sup>76</sup> and he may according-

74 Ark. 138, 85 S. W. 82, 4 Am. & Eng. Ann. Cas. 846. In *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126, it is said that the junior mortgagee, not made a party, might be precluded from subsequently foreclosing, if he knew at the time of the prior foreclosure and did not assert any rights in connection therewith.

73. *Reel v. Wilson*, 64 Iowa, 13, 19 N. W. 814; *Walker v. Fisher*, 117 Mich. 72, 75 N. W. 144; *Atwater v. West*, 28 N. J. Eq. 361; *Pinney v. Merchants' Nat. Bank*, 71 Ohio St. 173, 72 N. E. 884.

74. *Jones v. Williams*, 155 N. C. 179, 36 L. R. A. (N. S.) 426, 71

S. E. 222; *Winchester v. Paine*, 11 Ves. Jr. 194.

75. *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407, 12 N. E. 522; *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Porter v. Kilgore*, 32 Iowa, 379; *Johnson v. Hambleton*, 52 Md. 378; *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; *Kay v. Whittaker*, 44 N. Y. 565; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *McCredie v. Dubuque Fire & Marine Ins. Co.*, — Okla. —, 163 Pac. 535.

76. *Ante*, § 646, note 22.

ly institute a new foreclosure proceeding against such junior incumbrancer not made a party to the former proceeding,<sup>77</sup> and he may, according to some decisions, obtain therein a decree of strict foreclosure.<sup>78</sup>

The failure to make a junior lienor a party to the foreclosure proceeding, since it leaves his rights outstanding, is calculated to prevent proper competition at the sale, and indeed to render the sale nugatory, since it justifies the purchaser in asking to be relieved of his purchase. Consequently, the court will, when cognizant of a junior lien, ordinarily require the lienor to be made a party before granting a decree.<sup>79</sup>

The cases are usually to the effect that a junior claimant who is not made a party to a foreclosure proceeding cannot be required, as a condition of redeeming, to pay any part of the costs incurred in such proceeding.<sup>80</sup>

— **Senior lienors.** Persons holding mortgages or other liens prior to the mortgage sought to be fore-

77. *Rogers v. Holyoke*, 14 Minn. 220; *Martin v. Adams Brick Co.*, 180 Ind. 181, 102 N. E. 831; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Ten Eyck v. Casad*, 15 Iowa, 524; *Shaw v. Heisey*, 48 Iowa, 468; *Parker v. Child*, 25 N. J. Eq. 41; *Sellwood v. Gray*, 11 Ore. 534, 5 Pac. 196;

78. See *Ante*, § 650. But, that strict foreclosure will not be allowed in such case in favor of a senior mortgagee who purchased at his foreclosure sale, if he failed to make the junior lienor a party though knowing, or having reason to know, of his interest as such, see *Moulton v. Cornish*, 138 N. Y. 133, 20 L. R. A. 370, 33 N. E. 842, provided at least the junior lienor was not guilty of laches or

negligence. *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126, 44 N. E. 781.

79. *Winchester v. Beavor*, 3 Ves. Jr. 317; *Montgomery v. Tutt*, 11 Cal. 307; *Leonard v. Groome*, 47 Md. 499; *Gould v. Wheeler*, 28 N. J. Eq. 541; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 959; *Ensworth v. Lambert*, 4 Johns. Ch. (N. Y.) 605; *Hinsen v. Adrian*, 86 N. C. 61.

80. *Rodman v. Quick*, 211 Ill. 546, 71 N. E. 1087; *Gaskell v. Viquesney*, 122 Ind. 244, 23 N. E. 791; *Jones v. Dutch*, 3 Neb. (Unof.) 673, 92 N. W. 735; *Gage v. Brewster*, 31 N. Y. 218; *Raynor v. Selmes*, 52 N. Y. 579. *Contra, semble*, *Stanbrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443.



closed are not necessary parties to the proceeding to foreclose, the object of the proceeding being to extinguish the rights of those whose interests are subject to the mortgage.<sup>81</sup> It is, however, a very usual practice to make such a senior mortgagee a party, in order to obtain a sale of the property free from such mortgage, such senior claim to be first paid from the proceeds of sale.<sup>82</sup> Or he may be made a party merely to obtain an adjudication as to the amount of his lien, in order that the purchaser may be advised of what he is purchasing.<sup>83</sup> And one claiming a prior lien may, in some jurisdictions, be made a party merely to determine the question of priority.<sup>81</sup> When the purpose of making him a party is to obtain a sale free from his lien, the proceeding, as regards him, bears somewhat the aspect of a bill to redeem.<sup>85</sup> In case his claim is not yet due, a sale can be made free from his lien

81. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Hagan v. Walker*, 14 How. (U. S.) 29, 37, 14 L. Ed. 312; *White v. Holman*, 32 Ark. 753; *Krutsinger v. Brown*, 72 Ind. 466; *Tome v. Merchants & Mechanics' Permanent Bldg. & Loan Co.*, 34 Md. 12; *Hancock v. Hancock*, 22 N. Y. 568; *Mims v. Mims*, 1 Humph. (Tenn.) 425; *Hague v. Jackson*, 71 Tex. 761, 12 S. W. 63; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709, note. But see *Clark v. Prentice*, 3 Dana (Ky.) 468.

82. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Harwell v. Lehman*, *Durr & Co.*, 72 Ala. 344; *Persons v. Alsup*, 2 Ind. 67; *Masters v. Templeton*, 92 Ind. 447; *Tobin v. Rogers*, 121 Md. 249, 88 Atl. 133; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Emigrant Industrial Sav. Bank v.*

*Goldman*, 75 N. Y. 127; *Jacobie v. Mickle*, 144 N. Y. 237, 39 N. E. 66; *First Nat. Bank v. Salem Flour Mills Co.*, 31 Fed. 580.

83. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Metropolitan Trust Co. v. Tonawanda, etc.*, *R Co.*, 18 Abb. N. Cas. (N. Y.) 368, 106 N. Y. 673; *Missouri, K. & T. Trust Co. v. Richardson*, 57 Neb. 617, 78 N. W. 273; *Bexar Building & Loan Ass'n v. Newman*. — (Tex. Civ. App.) —, 25 S. W. 461.

84. *Masters v. Templeton*, 92 Ind. 447; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Missouri, K. & T. Trust Co. v. Richardson*, 57 Neb. 617, 78 N. W. 273.

85. See *Walsh v. Rutgers Fire Ins. Co.*, 13 Abb. Prac. (N. Y.) 33; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288.

only if he consents thereto,<sup>86</sup> and in any case, in order that his lien be extinguished by the sale, it must appear from the language of the pleadings or decree that the sale was to be free therefrom, merely making him a party being insufficient for this purpose.<sup>87</sup> Whether, when the claim secured by the prior mortgage is due, the prior mortgagee can refuse to be made a party for the purpose of selling free of his lien, or can refuse his consent to such a sale, does not clearly appear. It would seem, on principle, that the prior mortgagee should be at liberty to select his own time for enforcing his claim against the property, and not be subject to the control of a junior lienor in this regard.<sup>88</sup>

— **Adverse claimants.** Persons asserting adverse claims to the mortgaged land, alleged to be paramount to the rights of the mortgagor are usually, in most jurisdictions, not proper parties to the foreclosure proceeding, since the object of such a proceeding is, not to determine the title to the property, but, by means of a sale, to extinguish all rights subject to the mortgage.<sup>89</sup> In a few jurisdictions, however, the courts,

86. *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136; *Hagan v. Walker*, 14 How. (U. S.) 29, 14 L. Ed. 312; *Wylie v. McMakin*, 2 Md. Ch. 413.

87. *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Jacobie v. Mickle*, 144 N. Y. 237, 39 N. E. 66.

88. See, to this effect, *Three-foot v. Hillman*, 130 Ala. 244, 89 Am. St. Rep. 39, 30 So. 513; *Gihon v. Belleville W. L. Co.*, 7 N. J. Eq. 531; *Bigelow v. Cassidy*, 26 N. J. Eq. 557; *Waters v. Bossel*, 55 Miss. 602; *Bexar Bldg & Loan Ass'n v. Newman*, — (Tex. Civ. Ap.) —, 25 S. W. 461; *Wytheville Crystal Ice & Dairy Co. v. Frick*

*Co.*, 96 Va. 141, 30 S. E. 491; and also remarks in *Jacobie v. Mickle*, 144 N. Y. 237, 39 N. E. 66.

89. *Dial v. Reynolds*, 96 U. S. 340, 24 L. Ed. 644; *Equitable Mortgage Co. v. Finley*, 133 Ala. 575, 31 So. 985; *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Gage v. Perry*, 93 Ill. 176; *Summers v. Bromley*, 28 Mich. 125; *Banning v. Bradford*, 21 Minn. 208, 18 Am. Rep. 398; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Bogey v. Shute*, 57 N. C. 174; *Kinsley v. Scott*, 58 Vt. 470, 5 Atl. 390; *California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co.*, 12 Wash. 138, 40 Pac.

by reason of local practice acts, or otherwise, have allowed such claimants to be made parties for the purpose of litigating and settling the title to the property in connection with the foreclosure of the mortgage.<sup>90</sup>

**§ 656. Power of sale.** Owing to the delays and expense incident to foreclosure by bill in equity, and the difficulty of making proper parties thereto, the device has been largely resorted to of inserting in the mortgage instrument a "power of sale," as it is called, this being a provision authorizing the mortgagee to sell the property, without resort to a judicial proceeding, in case of default. In this country, such powers were in general use earlier than in England, and they have been recognized as valid, even in the absence of any statute authorizing them.<sup>91</sup> There are, however, in many states, statutes expressly authorizing or recognizing such powers.<sup>92</sup> In a few states, on the other hand, it is provided by statute that a power of sale in a mortgage shall not authorize a sale otherwise than by decree of court, or there is an implication to that effect from a requirement that foreclosure shall be by judicial proceedings,<sup>93</sup> while in a number of states there are statutory provisions as to the mode of exercising such a power, as regards notice, time or place of sale, and the like. In a number of states, in order to avoid any

732; *Strobe v. Downer*, 13 Wis. 10, 80 Am. Dec. 709, note.

90. See 9 *Encyclopedia Plead. & Prac.* 357. Note to *Provident Loan Trust Co. v. Marks*, 68 Am. St. Rep. 357.

91. *Walthall's Ex'rs v. Rives*, 34 Ala. 91; *Calloway v. Bank*, 54 Ga. 441; *Bloom v. Van Rensselaer*, 15 Ill. 503; *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *First Nat. Bank of Butte v. Bell Silver & Cop-*

*per Min. Co.*, 8 Mont. 32, 19 Pac. 403; *Very v. Russell*, 65 N. H. 646, 23 Atl. 522; *Clark v. Condit*, 18 N. J. Eq. 358; *Hyman v. Devereux*, 63 N. C. 624; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141.

92. See 1 *Stimson's Am. St. Law*, § 1924; *Wiltzie, Mortgage Foreclosure*, c. 34.

93. 1 *Stimson's Am. St. Law*, § 1924 (D).

question as to the validity of such a power when vested in the mortgage creditor himself, the practice is to name a trustee to exercise the power, the instrument ordinarily being, for this purpose, framed in the form of a deed of trust rather than a mortgage.

In view of the very general utilization of powers of sale of this character, it is surprising that the courts have not more closely investigated their fundamental character. As originally introduced in connection with mortgages involving a conveyance of the legal title to the mortgagee, they would appear to be similar to the case of a power of sale given to a trustee,<sup>93a</sup> as enabling the mortgagee to convey his legal title clear of the equitable claim of the mortgagor.<sup>93b</sup> But in some decisions in states in which the legal title is vested in the mortgagee, without any express repudiation of the above view, it is assumed that the mortgagee's power to sell is a legal power of appointment, taking effect under the Statute of Uses.<sup>93c</sup> Adopting such a view, a mere sale by the mortgagee, at least if evidenced by writing, would operate as an appointment of the use and vest the legal title in the purchaser, without any conveyance by the mortgagee,<sup>93d</sup> an effect which appears never to have been given to the sale, apart from statute.<sup>93e</sup> Furthermore, a mortgage in the ordinary form would seem to be inadequate for the creation of a

93a. *Ante*, § 314.

93b. Edwards, *Prop. Land*, (4th Ed.) 172. "When the legal fee is vested in the mortgagee, a power of sale given to him operates in equity only, and is in effect a trust." 2 Hayes, *Conveyancing* (5th Ed.) 141, note. So in *Re Hodson & Howe's Contract*, 35 Ch. Div. 668, it is said by Cotton, L. J., that a power of sale in a mortgage "is an equitable authority which enables the mortgagee to sell so as to give the

purchaser the estate discharged from the equity of redemption." A like view appears to be taken in *Varnum v. Meserve*, 8 Allen (Mass.) 158.

93c. *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476, *per Gray, C. J.*, *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255.

93d. *Ante*, § 315.

93e. See 2 Jones, *Mortgages*, § 1889 *et seq.*

power of appointment, it not raising any seisin to serve uses, and not containing any declaration of uses.<sup>93f</sup> The former view as to the nature of such a power would appear to be much more satisfactory, but it is obviously inapplicable in any state in which the mortgagee does not have the legal title, or in any case in which, the mortgagor not having such title, he cannot transfer it to the mortgagee. In such states, and in such cases, it is somewhat difficult to regard the mortgagee's power as other than a power of agency conferred on him by the mortgagor as principal, but the courts have usually refused to adopt such a view or, when adopting it, to push it to its logical conclusion.<sup>93g</sup>

The right to sell under a power in a mortgage or deed of trust will ordinarily, by the express terms of its creation, not accrue until a default occurs in the performance of the obligation, and a sale made before such a default will usually be invalid.<sup>94</sup>

When the mortgage authorizes the mortgagee to declare the principal due upon a default in the payment of interest, his advertisement of the intended sale as for a default in the payment of the whole sum has been regarded as a sufficient declaration in this regard.<sup>95</sup>

A deed of trust to secure a debt ordinarily provides that the sale shall be made by the trustee on the request of the creditor, and a sale made without such request has been regarded as invalid.<sup>96</sup> But it has

93f. Compare 2 Sugden, Powers, 149; Farwell, Powers, 3.

93g. *Post*, this section, notes 3, 38-42.

94. Chicago, R. I. & P. R. Co. v. Kennedy, 70 Ill. 350; Rogers v. Barnes, 169 Mass. 179, 38 L. R. A. 145, 47 N. E. 602; Pratt v. Tinkcom, 21 Minn. 142; Eitel-george v. Mutual House Bldg. Ass'n, 69 Mo. 52; Potomac Mfg.

Co. v. Evans, 84 Va. 717, 6 S. E. 2.

95. Hodgdon v. Davis, 6 Dak. 21, 50 N. W. 478; Hoodless v. Reid, 112 Ill. 105, 1 N. E. 118; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; Dunton v. Sharpe, 70 Miss. 850, 12 So. 800.

96. Cheney v. Crandell, 28 Colo. 383, 65 Pac. 56; Equitable Trust Co. v. Fisher, 106 Ill. 139; Magee

been held that a sale which is invalid on this ground may be ratified by the conduct of the creditor showing his acquiescence in the sale.<sup>97</sup> And a sale so made has been upheld in favor of an innocent purchaser.<sup>98</sup>

Since a power which involves the exercise of discretion cannot be transferred or delegated, in the absence of express authority so to do,<sup>99</sup> it would seem that if a power is given to the mortgagee alone to sell on default, one to whom he transfers the mortgage debt would not be able to exercise it. It has been so decided in England, though the fact that the power is given to the mortgagee "and assigns" is regarded even there as authorizing its exercise by an assignee of the mortgage or debt.<sup>1</sup> Occasionally an implication to this effect is to be found in cases in this country, it being said or decided that, the power being in terms given to the mortgagee "and assigns," it may be exercised by an assignee.<sup>2</sup> But more usually one to whom, as it is ordinarily expressed, the mortgage is assigned, has been regarded as having the right to exercise the power, without reference to whether the power is in terms given to assigns.<sup>3</sup> These cases do not discuss the

v. Burch, 108 Mo. 336, 18 S. W. 1078; Boone v. Miller, 86 Tex. 74, 23 S. W. 574. See Walker v. Brungard, 13 Sm. & M. (Miss.) 723; Todd v. Bemis, — Tex. Civ. App. —, 158 S. W. 182.

97. Blake v. McKusic, 8 Minn. 338; Norwood v. Lassiter, 132 N. C. 52, 43 S. E. 509; Price v. Blankenship, 71 Mo. App. 548.

98. Cheney v. Crandell, 28 Colo. 383, 65 Pac. 56. See Biffle v. Pullam, 125 Mo. 108, 28 S. W. 223.

99. *Ante*, § 322.

1. Bradford v. Belfield, 2 Sim. 264; Rumney v. Smith (1897), 2 Ch. 351. See Barry v. Anderson, 18 Ont. App. 247.

2. See Pardee v. Lindley, 31 Ill. 174; Strother v. Law, 54 Ill. 413; Sanford v. Kane, 133 Ill. 199, 8 L. R. A. 724, 23 Am. St. Rep. 602, 24 N. E. 414; Dolbear v. Norduft, 84 Mo. 619.

3. Ramsey v. Sibert, 192 Ala. 176, 68 So. 349; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Patten v. Pearson, 60 Me. 220; Mastin v. Marshall, 94 Md. 480, 51 Atl. 85; Holmes v. Turners Falls Lumber Co., 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Bell v. Twilight, 22 N. H. 500; Morris v. McKnight, 1 N. D. 226, 47 N. W. 375. In several states any difficulty in re-

question, or indicate the theory on which an assignee is to be regarded as entitled to exercise the power given to the mortgagee, and this failure is perhaps the more noticeable in view of the fact that it is generally agreed that such a power, given to the trustee in a deed of trust to secure a debt, cannot be delegated or transferred to another.<sup>4</sup> It would seem that the right of the mortgagee's assignee to exercise the power must be based on the view that, by giving the power to the mortgage creditor himself, rather than to a third person as trustee, the mortgagor in effect authorizes the transfer or delegation of the power to any person who may, by assignment, become creditor in his place, and that an assignment is construed as involving an exercise of the right to delegate the power. Conceding that the power is exercisable by an assignee of the mortgagee, a mortgagee cannot, it has been decided, after making an assignment of the debt, exercise the power.<sup>5</sup>

As to who is an assignee of the mortgage and as such entitled to exercise the power, it has been decided in one state in which the legal title is vested in the mortgagee, that only one to whom the legal estate in the land has been transferred can exercise the power.<sup>6</sup> In some states the statute requires that, in case a mortgage has been assigned, the assignment must be of

gard to the right of an assignee to exercise the power is obviated by a statutory provision that it may be exercised by any person who, by assignment or otherwise, becomes entitled to the money secured. See New York Real Prop. Law, § 146; Michigan Comp. Laws 1915, § 11651; Wisconsin St. 1913, § 2156.

4. *Post*, this section, note 15.

5. *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am

Dec. 458; *Cutler v. Clementson*, 67 Fed. 409; *Sadler v. Jefferson*, 143 Ala. 669, 39 So. 380 (*semble*). So when the mortgagee has "assigned the mortgage," *Cushing v. Ayer*, 25 Me. 383. *Aliter* as to an "assignment of the mortgage" without the debt. *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562.

6. *Dameron v. Eskridge*, 104 N. C. 621, 10 S. E. 700; *Hussey v. Hill*, 120 N. C. 312, 58 Am. St. Rep. 789, 26 S. E. 919.

record in order to authorize a sale under a power therein, the effect of which requirement is that one to whom the debt alone is specifically transferred, cannot exercise the power, such transfer not being susceptible of record. Apart from such a statute, it would seem that a transferee of the debt might be regarded as an assignee for the purpose of the exercise of the power of sale,<sup>7</sup> while one to whom the debt is not assigned, although he holds what purports to be as assignment of the mortgage, cannot be so regarded.<sup>8</sup>

In one state it has been decided that one to whom a mortgage debt is assigned as collateral security cannot exercise the power of sale, by reason of the existence of conflicting equities which should be settled in court.<sup>9</sup> But that such an assignee may exercise the power is elsewhere clearly declared.<sup>10</sup>

Whether, upon the death of the mortgagee, another may exercise the power in his place, would seem properly to depend on what intention appears in the mortgage instrument in that regard. If the power is expressly given to his "personal representatives," or to his "executors and assigns," the personal representative may unquestionably exercise the power.<sup>11</sup> There are, however, occasional decisions to the effect that the mortgagee's personal representative may exercise the power even in the absence of any mention of him in the mortgage instrument, these being usually based on the theory that he is in the position of an assignee by operation of law.<sup>12</sup> A power expressly

7. See *Pardee v. Lindley*, 31 Ill. 174; *Strother v. Law*, 54 Ill. 413; *Mason v. Ainsworth*, 58 Ill. 163.

8. *Sanford v. Kane*, 133 Ill. 199, 8 L. R. A. 724, 23 Am. St. Rep. 602, 24 N. E. 414.

9. *Olcott v. Crittenden*, 68 Mich. 230, 36 N. W. 41.

10. *Holmes v. Turners Falls*

*Lumber Co.*, 150 Mass. 535, 6 L. R. A. 283, 23 N. E. 305.

11. *Merwin v. Lewis*, 90 Ill. 505; *Stevens v. Shannahan*, 160 Ill. 330, 43 N. E. 350; *Collins v. Hopkins*, 7 Iowa, 463; *Yount v. Morrison*, 109 N. C. 520, 13 S. E. 892; *Richmond v. Hughes*, 9 R. I. 228.

12. *Lewis v. Wells*, 50 Ala. 198;



given to executors and administrators has been held to include a foreign executor or administrator.<sup>13</sup> And the requirement of the record of any assignment as a prerequisite to the exercise of the power has been held not to require the record of evidence of his appointment.<sup>14</sup>

— **In case of trust deed.** In case the power of sale is given, not to the creditor, but to a third person as trustee, he is the person to execute the power, and he cannot transfer or delegate the power to another.<sup>15</sup> If he dies,<sup>16</sup> or is in any way disqualified to act,<sup>17</sup> or refuses to act,<sup>18</sup> a court of equity will appoint another to act as trustee in his place, or the deed may itself name a substitute, or provide for the appointment of a successor in the trust,<sup>19</sup> or that, in

Harnickell v. Orndorff, 35 Md. 341; Miller v. Clark, 56 Mich. 337, 23 N. W. 35; Baldwin v. Allison, 4 Minn. 25; People v. Prescott, 3 Hun. (N. Y.) 419.

13. Holcombe v. Richards, 38 Minn. 38, 35 N. W. 714; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45; Hayes v. Frey, 54 Wis. 503, 11 N. W. 695; Stevens v. Shanahan, 160 Ill. 330, 43 N. E. 350.

14. Cone v. Nimocks, 78 Minn. 249, 80 N. W. 1056; Hayes v. Frey, 54 Wis. 503, 11 N. W. 695; see Miller v. Clark, 56 Mich. 337, 23 N. W. 35.

15. Greenfield v. Stout, 122 Ga. 303, 50 S. E. 111; Flower v. Ellwood, 66 Ill. 438; Doe v. Robinson, 24 Miss. 688; Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182; Fuller v. O'Neil, 69 Tex. 349, 5 Am. St. Rep. 59, 6 S. W. 181; Morriss v. Virginia State Ins. Co., 90 Va. 370, 18 S. E. 843; Copelan v. Sohn, 75 W. Va. 83, 82 S. E. 1016.

16. Less v. English, 75 Ark. 288, 87 S. W. 447; Holden v. Stickney, 2 MacArth. (D. C.) 111; Marsh v. Green, 79 Ill. 385; Clark v. Wilson, 53 Miss. 119; Fresh v. Million, 9 Mo. 315; Wilson v. Towle, 36 N. H. 129; Wright v. Fort, 126 N. C. 615, 36 S. E. 113; Williamson v. Wickersham, 3 Cold. (Tenn.) 52; Converse v. Davis, 90 Tex. 462, 39 S. W. 277.

17. New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 88 Hun, 569, 157 N. Y. 689, 51 N. E. 1092; Hunter's Ex'x v. Vaughan, 24 Gratt. (Va.) 400.

18. Lill v. Neafie, 31 Ill. 101; Clark v. Wilson, 53 Miss. 119; Machir v. Sehon, 14 W. Va. 777.

19. Leech v. Karthaus, 141 Ala. 509, 37 So. 696; Irish v. Antioch College, 126 Ill. 474, 9 Am. St. Rep. 638, 18 N. E. 768; Moore v. Isbel, 40 Iowa, 383; Polle v. Rouse, 73 Miss. 713, 19 So. 481; Weir v. Jones, 84 Miss. 602, 36 So. 533; Reynolds v. Kroff, 144

case of the death or incapacity of the trustee, the sale shall be made by a public official, such as the sheriff.<sup>20</sup> When the instrument provides for a sale by a substituted trustee in a certain contingency, a sale by such substitute has been regarded as invalid unless the contingency, such as the original trustee's refusal to act, has actually occurred.<sup>21</sup> There are, however, statements to be found to the effect that, when the deed of trust provides that, in case the trustee named refuses to make the sale, it may be made by another, a sale made by such other will, in favor of a *bona fide* purchaser, be supported, although the original trustee did not refuse to make it.<sup>22</sup>

The deed of trust may, it seems, validly provide that the trustee's personal representative shall exercise the power in case of his death.<sup>23</sup>

— **Extinguishment of the power.** Payment of the debt even after its maturity will no doubt extinguish the power of sale,<sup>24</sup> and in some jurisdictions a

Mo. 433, 46 S. W. 424; *Gooch v. Addison*, 13 Tex. Civ. App. 76, 35 S. W. 83; *Michael v. Crawford*, 108 Tex. 352, 193 S. W. 1070.

20. See *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741, 55 S. W. 233; *Woods v. Rozelle*, 75 Miss. 782, 23 So. 483. Or the statute may authorize a sale by the sheriff. See *Morrissey v. Dean*, 97 Wis. 302, 72 N. W. 873.

21. *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Watson v. Perkins*, 88 Miss. 64, 40 So. 643; *Kelsay v. Farmers' & Traders' Bank*, 166 Mo. 157, 65 S. W. 1007; *Davis v. Hughes*, 38 Tex. Civ. App. 473, 85 S. W. 1161.

22. *Kelsay v. Farmers' & Traders' Bank*, 166 Mo. 157, 65 S. W. 1007; *Adams v. Carpenter*, 187

Mo. 613, 86 S. W. 445. But see *Cox v. American Freehold & Land Mortgage Co. of London*, 88 Miss. 88, 40 So. 739.

23. *Sulphur Mines Co. of Virginia v. Thompson's Heirs*, 93 Va. 293, 25 S. E. 232. But *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111, appears to be *contra*.

24. *Askew v. Sanders*, 84 Ala. 356, 4 So. 167; *Ryan v. Rice*, 109 Ga. 448, 34 S. E. 569; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642; *Penny v. Cook*, 19 Iowa, 558; *Wells v. Estes*, 154 Mo. 291, 55 S. W. 255; *Cameron v. Irwin*, 5 Hill (N. Y.) 272; *Mills v. Traylor*, 30

mere tender by the mortgage debtor would have this effect.<sup>25</sup>

The payment of the debt, it has been decided, extinguishes the power of sale even as against one purchasing without notice of the extinguishment.<sup>26</sup> There are, on the other hand, decisions to the effect that such payment, not accompanied by any discharge of record, is not effective as against an innocent purchaser claiming by right of a sale made under the power.<sup>27</sup>

Whether the power of sale is extinguished by reason of the fact that the statutory period of limitations has run against the personal remedy on the debt would seem to depend on whether, in the particular jurisdiction, the lien of a mortgage is regarded as so extinguished,<sup>27a</sup> the power being created as an incident to the mortgage relation.<sup>28</sup>

— **Revocation.** The mortgagor cannot revoke the power of sale, even though it be regarded as one of agency only, since that would in effect involve a

Tex. 7; *Smith v. Woodward*, 122 Va. 356, 94 S. E. 916.

25. *Jackson v. Crafts*, 18 Johns. (N. Y.) 110; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Welch v. Greenalge*, 2 Heisk. (Tenn.) 209. *Contra*, *Hudson Bros. Commission Co. v. Glencoe Sand & Gravel Co.*, 140 Mo. 103, 62 Am. St. Rep. 722, 41 S. W. 450.

26. *Shippen v. Whittier*, 117 Ill. 282, 7 N. E. 642; *Crowley v. Adams*, 226 Mass. 582, 116 N. E. 241; *Adams v. Carpenter*, 187 Mo. 613, 86 S. W. 445; *Cameron v. Irwin*, 5 Hill (N. Y.) 272.

27. *Merchant v. Woods*, 27 Minn. 396, 7 N. W. 826; *Bansman v. Eads*, 46 Minn. 148, 24 Am. St. Rep. 201, 48 N. W. 769; *Garrett v. Crawford*, 128 Ga. 519, 119 Am.

St. Rep. 398, 57 S. E. 792; *Warner v. Blakeman*, 36 Barb. (N. Y.) 501.

27a. See *Grant v. Burr*, 54 Cal. 298; *Faxon v. All Persons*, 166 Cal. 707, 137 Pac. 919; *First Nat. Bank of Cincinnati v. Thomas*, 8 Ky. L. Rep. 690, 3 S. W. 12; *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270; *Swabey v. Boyers*, 274 Mo. 332, 203 S. W. 204; *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511; *Berkin v. Healy*, 52 Mont. 398, 158 Pac. 1020; *Menzel v. Hinton*, 132 N. C. 660, 95 Am. St. Rep. 647, 44 S. E. 385; *Goldfrank v. Young*, 64 Tex. 432; *Hayes v. Frey*, 54 Wis. 503, 11 N. W. 695.

28. But see *Schwertner v. Provident Mut. Building-Loan Ass'n*, 17 Ariz. 93, 148 Pac. 910; *House*

violation of his contract,<sup>29</sup> and he can evidently not do so when the power is to be regarded as "coupled with an interest" or as a power of appointment.<sup>30</sup> Likewise the power is not revoked by the insanity of the mortgagor, whether the mortgagee has,<sup>31</sup> or has not.<sup>32</sup> the legal title, or by the mortgagor's insolvency or bankruptcy.<sup>33</sup>

— **Effect of mortgagor's death.** The question whether a power of sale in a mortgage can be exercised after the death of the mortgagor has been the subject of a number of decisions. In those jurisdictions in which the mortgage operates to vest a legal title in the mortgagee, his right to exercise the power after the mortgagor's death is free from question,<sup>34</sup> the courts ordinarily applying the doctrine enunciated in the well known case of *Hunt v. Rousmanier*,<sup>35</sup> that a power

v. Carr, 185 N. Y. 453, 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, 78 N. E. 171.

29. *Ray v. Hemphill*, 97 Ga. 563, 25 S. E. 485; *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980. "Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law." *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. (U. S.) 174, 5 L. Ed. 589.

30. *Presnall v. D. R. Burgess & Co.*, 181 Ala. 263, 61 So. 804; *Hyde v. Warren*, 46 Miss. 13; *Schanework v. Hoberecht*, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949; *Bancroft v. Ashhurst*, 2 Grant (Pa.) 513; *Sulphur Mines Co. of Virginia v. Thompson's Heirs*, 93 Va. 293, 25 S. E. 232.

31. *Berry v. Skinner*, 30 Md. 567; *Vanmeter v. Darrah*, 115 Mo. 153, 22 S. W. 30.

32. *Lundberg v. Davidson*, 72 Minn. 49, 42 L. R. A. 103, 74 N. W. 1018; *Encking v. Simmons*, 28 Wis. 272; *Haggart v. Ranger*, 15 Fed. 860.

33. *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476.

34. *Hudgins v. Morrow*, 47 Ark. 515, 2 S. W. 104; *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583; *Strother v. Law*, 54 Ill. 413; *Berry v. Skinner*, 30 Md. 567; *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Hyde v. Warren*, 46 Miss. 13; *Bergen v. Bennett*, 1 Caines' Cas. (N. Y.) 1; *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714, 29 S. E. 720.

35. 8 Wheat (U. S.) 174, 5 L. Ed. 589.

coupled with an interest, being exercisable by the donee of the power in his own name, is not revoked by the donor's death. In such a case the mortgagee would seem to be in the position of a trustee with power of sale,<sup>36</sup> and a power of sale given to a trustee is obviously not extinguished by the death of the creator of the trust. In those states in which the mortgage does not operate to transfer the legal title to the mortgagee, and also, it would seem, in any case in which the mortgagor, by reason of having made a previous mortgage or otherwise, has not the legal title, the mortgagee's power of sale cannot be regarded as "coupled with an interest" as that expression is used in *Hunt v. Rousmanier*, meaning thereby a power in one who, having also a legal estate or right of ownership in the property, need not, in exercising the power, exercise it in the name of the donor of the power. It has accordingly been decided in two states<sup>37</sup> that the mortgagee, not having a legal estate in the property, has a mere power of agency, which he cannot exercise after the death of the mortgagor, for the reason that he cannot do it by a sale and conveyance in his own name, nor can he do it by a sale and conveyance in the name of one who is dead. In a number of states, on the other hand, it has been decided that, although the mortgagee acquires no legal title, the power of sale given him is "coupled with an interest," so as not to be revoked by the mortgagor's death.<sup>38-42</sup> This latter

36. *Ante*, this section, note 93b.

37. *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84; *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606; *Baum v. Raley*, 53 S. C. 32, 30 S. E. 713; *Lockett v. Hill*, 1 Woods, 552, Fed. Cas. No. 8,443.

38-42. *Muth v. Goddard*, 28 Mont. 237, 98 Am. St. Rep. 553, 72 Pac. 621; *Cleveland v. Bateman*,

21 N. Mex. 675, 158 Pac. 648; *Grandin v. Emmons*, 10 N. D. 223, 54 L. R. A. 610, 88 Am. St. Rep. 684, 86 N. W. 723; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 786; *Robertson's Adm'x v. Paul*, 16 Tex. 472; *Roger's Heirs v. Watson*, 81 Tex. 400, 17 S. W. 29; *Wiener v. Zwieb*, 105 Tex. 262, 141 S. W. 771, 147 S. W. 867. In New York, though the mortgagee has

view, that although the mortgagee has no legal estate, his power of sale is coupled with an interest, can be supported only by giving to the word "interest" a meaning entirely different from that given to it in *Hunt v. Rousmanier*, where it was evidently used in the sense of legal estate or right of ownership.

— **Procedure.** The mortgagee need not, before proceeding to sell under the power, notify the mortgagor of his intention to do so,<sup>43</sup> nor need he give personal notice of the time and place of sale to the mortgagor or other person interested in the property, unless required to do so by the statute or the provisions of the mortgage.<sup>44</sup>

The statute frequently contains provisions as to notice of the sale, to be given by publication or otherwise, and as to the manner of conducting the sale, and these are controlling, even when in conflict with the terms of the power in the mortgage.<sup>45</sup> These latter control, however, in the absence of an overruling statutory provision, and they must be strictly complied with.<sup>46</sup>

— **Who may purchase.** In the absence of a statutory provision or an express stipulation in the mort-

there no legal title, his right to exercise the power of sale after the mortgagor's death, appears to be assumed. *Jenks v. Alexander*, 11 Paige (N. Y.) 620; *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *George v. Arthur*, 2 Hun. (N. Y.) 406.

43. *Jopling v. Walton*, 138 Mo. 485, 40 S. W. 99; *Manning v. Elliott*, 92 N. C. 48.

44. *Garrett v. Crawford*, 128 Ga. 519, 119 Am. St. Rep. 398, 57 S. E. 792; *Hoodless v. Reid*, 112 Ill. 105, 1 N. E. 118; *Jopling v.*

*Walton*, 138 Mo. 485, 40 S. W. 99; *McIver v. Smith*, 118 N. C. 73, 23 S. E. 971; *Fischer v. Simon*, 95 Tex. 234, 66 S. W. 447, 882.

45. *Butterfield v. Farnham*, 19 Minn. 85 (Gil. 38); *Webb v. Haeffer*, 53 Md. 187; *Pierce v. Grimley*, 77 Mich. 273, 43 N. W. 932; *Bragdon v. Hatch*, 77 Me. 433, 1 Atl. 140.

46. *Bigler v. Waller*, 14 Wall. (U. S.) 297, 20 L. Ed. 891; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; *Calloway v. People's Bank*, 54 Ga. 441; *Hall v. Towne*, 45 Ill. 493; *Ormsby v.*

gage to the contrary,<sup>47</sup> a mortgagee cannot usually purchase at a sale made by him under a power of sale in the mortgage, since he bears, so far as concerns the exercise of such a power, at least a *quasi* trust relation towards others interested in the land, and a sale to him will be set aside upon an application, made with reasonable promptness, by the owner of the land or other person interested therein.<sup>48</sup> The same rule applies to a purchase by the trustee selling under the power as to a sale by a mortgagee, and a sale to himself may be set aside.<sup>49</sup> But the creditor whose debt is secured by a deed of trust to another is under no disability in this regard.<sup>50</sup>

— **Injunction against sale.** If a person interested in the property has reason to question the right to

Tarascon, 3 Litt. (Ky.) 404; Cranston v. Crane, 97 Mass. 459; Thornburg v. Jones, 36 Mo. 514.

47. Knox v. Armistead, 87 Ala. 511, 5 L. R. A. 297, 13 Am. St. Rep. 65, 6 So. 311; Ellenbogen v. Griffey, 55 Ark. 268, 18 S. W. 126; Kennedy v. Dunn, 58 Cal. 339; Mutual Loan & Banking Co. v. Haas, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980; Stone v. Haskell, 212 Mass. 283, 98 N. E. 1032; Houston v. National Mut. Building & Loan Ass'n, 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 546; Elliott v. Wood, 45 N. Y. 71.

48. McCall v. Mash, 89 Ala. 487, 18 Am. St. Rep. 145, 7 So. 770; Blockley v. Fowler, 21 Cal. 326, 82 Am. Dec. 747; Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7; Hall v. Towne, 45 Ill. 493; Howard v. Ames, 3 Metc. (Mass.) 308; Dyer v. Shurtleff, 112 Mass. 165; Allen v. Ranson, 44 Mo. 263, 100

Am. Dec. 282; McKenna v. Pleasant, 96 Neb. 581, 148 N. W. 479; Very v. Russell, 65 N. H. 646; Shew v. Call, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 33; Owens v. Branning Mfg. Co., 168 N. C. 397, 84 S. E. 389. *Contra*, Bohn v. Davis, 75 Tex. 24, 12 S. W. 837.

49. Carter v. Thompson, 41 Ala. 375; Walker v. McEntire, 41 App. Cas. (D. C.) 380; Sypher v. McHenry, 18 Iowa, 232; Jodd v. Lee, 256 Mo. 536, 165 S. W. 991; Harrison v. Manson, 95 Va. 593, 29 S. E. 420.

50. Easton v. German-American Bank, 127 U. S. 532, 32 L. Ed. 210; Hamilton v. Rhodes, 72 Ark. 625, 83 S. W. 351; Sacramento Bank v. Copsey, 133 Cal. 663, 85 Am. St. Rep. 242, 66 Pac. 7; Mutual Fire Ins. Co. v. Barker, 17 App. Cas. (D. C.) 205; Monroe v. Fuchter, 121 N. C. 101, 23 S. E. 63.

make a sale under the power, his remedy is to seek an injunction in a court of equity to restrain the proposed sale. The sale will not be restrained merely because it is likely to involve a sacrifice of the property,<sup>51</sup> nor because the person asking for an injunction desires a foreclosure under decree of court.<sup>52</sup> It has even been decided, in one state, that a sale will not be enjoined because the statute of limitations has run against the mortgage, although this would be a good defence to a proceeding in equity to foreclose.<sup>53</sup> On the other hand, a sale has been enjoined on the ground that the debt which purported to be secured had never existed,<sup>53a</sup> had been paid,<sup>53b</sup> or tendered,<sup>54</sup> or was not yet due.<sup>55</sup> The fact that the amount of the debt is uncertain has been regarded as ground for enjoining a sale until an accounting could be effected.<sup>56</sup> And in one

51. *Anderson v. White*, 2 App. Cas. (D. C.) 408; *Bedell v. McClellan*, 11 How. Pr. (N. Y.) 172; *Muller's Adm'r v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223.

52. *Muller's Adm'r v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223.

53. *House v. Carr*, 185 N. Y. 453, 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, 78 N. E. 171. *Contra*, *Gardner v. Terry*, 99 Mo. 523, 7 L. R. A. 67, 12 S. W. 888. In *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78, an injunction against the sale was dissolved under such circumstances, because the sale would be a nullity, and the mortgagor could defend in ejectment by the purchaser.

53a. *Long v. Little*, 119 Ill. 600, 8 N. E. 194; *Devlin v. Quigg*, 44 Minn. 534, 10 L. R. A. 665, 20 Am. St. Rep. 592, 47 N. W. 258. *Brooks v. Owen*, 112 Mo. 251, 19

S. W. 723, 20 S. W. 492.

53b. *Verdine v. Olney*, 77 Mich. 310, 43 N. W. 975; *Whitley v. Dunham Lumber Co.*, 89 Ala. 493, 7 So. 810; *Long v. Little*, 119 Ill. 600, 8 N. E. 194; *Gray v. Bryson*, 87 Miss. 304, 39 So. 694.

54. *Wittmeier v. Tidwell*, 147 Ala. 354, 40 So. 963; *Capehart v. Biggs*, 77 N. C. 261; *Chappell v. Clark*, 92 Md. 98, 48 Atl. 36; *Tut-hill v. Morris*, 81 N. Y. 94.

55. *Wolz v. Parker*, 134 Mo. 458, 35 S. W. 1149; *Grinnan v. Platt*, 31 Barb. (N. Y.) 328.

56. *Alston v. Morris*, 113 Ala. 506, 20 So. 950; *Moore v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Carey v. Fulmer*, 74 Miss. 729, 21 So. 752; *Bridgers v. Morris*, 90 N. C. 32; *Gooch v. Vaughan*, 92 N. C. 610; *McCann v. Mortgage Bank & Investment Co.*, 3 N. D. 172, 54 N. W. 1026 (statute); *Hogan v. Duke*, 20 Gratt. (Va.) 244; *Muller's Adm'r v. Stone*, 84 Va. 834,



or two states a sale has been enjoined by reason of disputes or litigation as to the title.<sup>57</sup> The fact that the property was subject to conflicting liens and that it was doubtful whether part of the property was covered by the mortgage has also been regarded as grounds for an injunction.<sup>58</sup> A sale has also been enjoined on account of the lack of power of the mortgagor, a married woman, to mortgage her property,<sup>59</sup> because the property sought to be sold was not covered by the mortgage,<sup>60</sup> and because the advertisement of the sale was substantially defective.<sup>61</sup>

In one state it has been decided that it is cause for enjoining the sale that the mortgagee has an ulterior purpose in view, as, for instance, to compel the mortgagor to pay another debt,<sup>62</sup> and in another state there is a dictum to the same effect.<sup>63</sup> The correctness of such a view, that the motives with which one exercises the power, is a subject for inquiry by the court, appears to be open to question.<sup>64</sup>

The party seeking to enjoin the sale must, in so far as he does not deny the existence of any indebtedness whatever, offer to do equity by paying the amount justly due.<sup>65</sup>

10 Am. St. Rep. 889, 6 S. E. 223. Compare *Montgomery v. McEwen*, 9 Minn. 103; *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11.

57. *Miller v. Argyle*, 5 Leigh (Va.) 460; *Muller's Adm'r v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889, 6 S. E. 223; *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285.

58. *Draper v. Lewis*, 104 U. S. 347, 26 L. Ed. 783.

59. *Strom v. American Freehold Land & Mortgage Co.*, 42 S. C. 97, 20 S. E. 16.

60. *Preiss v. Campbell*, 59 Ala. 635.

61. *Vaught v. Rider*, 83 Va. 659, 5 Am. St. Rep. 305, 3 S. E.

293; *Walker v. Boggess*, 41 W. Va. 588, 23 S. E. 550. See *Conlin v. Carter*, 93 Ill. 536.

62. *Struve v. Childs*, 63 Ala. 473; *McCalley v. Otey*, 90 Ala. 302, 8 So. 157.

63. *Holland v. Citizens Sav. Bank*, 16 R. I. 734, 8 L. R. A. 553, 19 Atl. 654. But see *McCulla v. Beadleston*, 17 R. I. 20.

64. The later English cases are opposed to such a view. See *Warner v. Jacob*, 20 Ch. D. 22; *Nash v. Eads*, 25 Sol. Journal 95, overruling *Robertson v. Norris*, 1 Giff. 421. And see ante § 648, note 87.

65. *Wittmeier v. Tidwell*, 147 Ala. 354, 40 So. 963; *Tooke v.*

— **Setting aside sale.** It appears that the sale will ordinarily be set aside in equity on grounds on which it would have been previously enjoined, as for instance where the debt never existed,<sup>66</sup> or has been extinguished,<sup>67</sup> or where the notice of sale was substantially defective.<sup>68</sup> And conversely it will not be set aside by reason of conditions existing at the time of the sale which would not have justified an injunction, such as the severity of the terms on which the loan was made.<sup>69</sup> Fraud or oppressive conduct on the part of the trustee in the course of his execution of the power is ground for setting aside the sale,<sup>70</sup> as is a substantial departure by him from the method of proceeding prescribed by the statute or the power.<sup>71</sup> Likewise, a failure to conduct the sale in such a manner as to secure the highest possible price for the property will usually be regarded as ground for setting aside the sale.<sup>72</sup> The fact that the property

Newman, 75 Ill. 215; Sloan v. Coolbaugh, 10 Iowa, 31; Eakle v. Hagan, 101 Md. 22, 60 Atl. 615; Meysenburg v. Schlieper, 46 Mo. 269; Fanning v. Dunham, 5 John. Ch. (N. Y.) 122, 9 Am. Dec. 283; Vechte v. Brownell, 8 Paige (N. Y.) 212; Haggerson v. Phillips, 37 Wis. 364.

66. Walker v. Carleton, 97 Ill. 582.

67. Misener v. Gould, 11 Minn. 166; Liddell v. Carson, 122 Ala. 518, 26 So. 133; Baker v. Halligan, 75 Mo. 435.

68. Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024; Chace v. Morse, 189 Mass. 559, 76 N. E. 142; Reeside v. Peter, 33 Md. 120; Eubanks v. Rector, 158 N. C. 230, 75 S. E. 1009; Jenson v. Andrews, 39 S. D. 104, 163 N. W. 571.

69. Dunn v. McCoy, 150 Mo.

548, 52 S. W. 21; Robinson v. Amateur Literary, etc., Ass'n, 14 S. C. 148; Learned v. Geer, 139 Mass. 31, 29 N. E. 215.

70. Littell v. Grady, 38 Ark. 584; José Realty Co. v. Pavlicevich, 164 Cal. 613, 130 Pac. 15; Williamson v. Stone, 128 Ill. 129, 22 N. E. 1005; Thompson v. Heywood, 129 Mass. 401; Herring v. Sutton, 86 Miss. 283, 38 So. 235; Newman v. Ogden, 82 Wis. 53, 51 N. W. 1091.

71. Bent-Otero Imp. Co. v. Whitehead, 25 Colo. 354, 71 Am. St. Rep. 140, 54 Pac. 1023; Equitable Trust Co. v. Fisher, 106 Ill. 189; Cassell v. Ross, 33 Ill. 244, 85 Am. Dec. 270; Sears v. Livermore, 17 Iowa, 297, 85 Am. Dec. 564; Pratt v. Tinkcom, 21 Minn. 142.

72. Dozier v. Farrior, 187 Ala.

is sold at an inadequate price does not of itself invalidate the sale,<sup>73</sup> but in the case of a very great disparity in this respect the court will be astute in extracting from the facts of the case sufficient to justify it in annulling the sale by reason of mistake, surprise, inadvertence or unfair conduct.<sup>74</sup>

— **Conveyance to purchaser.** The mortgage usually authorizes the mortgagee, upon exercising the power of sale, to make a conveyance to the purchaser, and in some states the statute contains provisions as to a conveyance to the purchaser, sometimes authorizing a conveyance to be made by the sheriff. But apart from any express authority to make a conveyance, an authority to sell includes, it appears, an authority to convey to the purchaser.<sup>75</sup> Furthermore, regarding the power as one of appointment,<sup>76</sup> if it does not expressly provide for the making of a conveyance to the purchaser, the making of the sale, without any

181, 65 So. 364; *Cassidy v. Cook*, 99 Ill. 385; *Dearnaley v. Chase*, 126 Mass. 288; *Kelsay v. Farmers & Traders' Bank*, 166 Mo. 157, 65 S. W. 1007; *Shears v. Traders Bldg. Ass'n*, 58 W. Va. 665, 52 S. E. 860.

73. *Kennedy v. Dunn*, 58 Cal. 329; *Winbigler v. Sherman*, 175 Cal. 270, 165 Pac. 943; *Lathrop v. Tracy*, 24 Colo. 382, 65 Am. St. Rep. 229, 51 Pac. 486; *Laclede Bank v. Keeler*, 109 Ill. 385; *Stevenson v. Dana*, 166 Mass. 163, 44 N. E. 128; *House v. Clark*, — (Mo.) —, 187 S. W. 57; *Reynolds v. Kroff*, 144 Mo. 433, 46 S. W. 424; *Monroe v. Fuchtlcr*, 121 N. C. 101, 28 S. E. 63; *Babcock v. Wells*, 25 R. I. 23, 105 Am. St. Rep. 848, 54 Atl. 599; *Robinson v. Amateur Ass'n*, 14 S. C. 148;

*Lallance v. Fisher*, 29 W. Va. 512, 2 S. E. 775; *Clark v. Eaton*, 109 U. S. 149, 25 L. Ed. 573.

74. *Kerfoot v. Billings*, 160 Ill. 563, 43 N. E. 804; *Chilton v. Brooks*, 69 Md. 584, 16 Atl. 273; *Holdsworth v. Shannon*, 113 Mo. 508, 35 Am. St. Rep. 719, 21 S. W. 85; *Nugent v. Nugent*, 54 Mich. 557, 20 N. W. 584; *Stacy v. Smith*, 9 S. D. 137, 68 N. W. 198; *Fenton v. Bell*, — (Tenn. Ch.) —, 53 S. W. 984; *Rohrer v. Strickland*, 116 Va. 755, 82 S. E. 711.

75. *Lang v. Stansel*, 106 Ala. 389, 17 So. 519; *Fogarty v. Sawyer*, 17 Cal. 589; *Heath v. Hall*, 60 Ill. 344; *McNeill v. Lee*, 79 Miss. 455, 30 So. 821; *Hunter v. Wooldert*, 55 Tex. 433.

76. See *ante*, this section, note 93.

conveyance, would seem to be a sufficient appointment under the power, so as to vest the mortgagor's title in the purchaser, except in so far as the legal title may, by the mortgage, have been vested in the mortgagee. If the mortgagee has the legal title, a conveyance by him is necessary to divest it.<sup>77</sup>

In one state it has been decided that the conveyance to the purchaser must be in the name of the mortgagor and not of the mortgagee,<sup>78</sup> a view which evidently assumes that the mortgagee has a mere power of agency.<sup>79</sup> Occasionally the mortgage instrument provides that the conveyance to the purchaser at the sale under the power shall be executed in the name of the mortgagor, or, in other words, that the mortgagee shall execute it as attorney of the mortgagor.<sup>80</sup> It has been held that, in spite of such a provision, a conveyance in the name of the mortgagee passes the equitable title.<sup>81</sup> In at least one state effect has been given to a provision in the mortgage instrument authorizing the auctioneer who actually makes the sale to execute the conveyance as attorney for the mortgagor and in the latter's name.<sup>82</sup> It is to be remarked however that, in so far as the legal title is in the mortgagee, a conveyance in the name of the mortgagor alone would appear to be insufficient to vest the legal title in the purchaser, and why in any case the conveyance should be required to be in the name of the mortgagor is somewhat difficult to understand, unless it is intended that, in the particular case, the power of sale shall operate as a mere power of agency, subject to revocation by

77. See *Tripp v. Ide*, 3 R. I. 51; *Sanders v. Cassady*, 86 Ala. 246, 5 So. 503.

78. *Johnson v. Johnson*, 27 S. C. 309, 13 Am. St. Rep. 636, 3 S. E. 606; *Dendy v. Waite*, 36 S. C. 569, 15 S. E. 712.

79. *Ante*, this section, note 93g.

80. *Cranston v. Crane*, 97 Mass.

459, 93 Am. Dec. 106; *Speer v. Haddock*, 31 Ill. 439.

81. *Gibbons v. Hoag*, 95 Ill. 45; *Moseley v. Rambo*, 106 Ga. 597, 32 S. E. 638.

82. *Sanders v. Cassady*, 86 Ala. 246, 5 So. 503; *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424.

the mortgagor's death.<sup>83</sup> In some states the statute provides that the sheriff may exercise the power of sale and execute the conveyance to the purchaser.<sup>84</sup> The power of the sheriff in such case is a "statutory power."<sup>85</sup>

The cases are generally to the effect that the purchaser under the power of sale acquires the title which the mortgagor had at the time of making the mortgage, unaffected by any subsequent transfer by him or lien subsequently created.<sup>86</sup> This is necessarily the case on the theory that the mortgagor transfers to the mortgagee the legal title with a power to dispose thereof free from the equity of the mortgagor, as it is on the theory that the mortgagee has a power of appointment in favor of the purchaser at the sale. Even regarding the power as a power of agency only, it seems that one claiming under the power would be protected as against such subsequent transfer or lien, as he would against a revocation in express terms.

If the person exercising the power has, as mortgagee or trustee, the legal title to the land, his conveyance to the purchaser at the sale will, although the sale is invalid, transfer such legal title.<sup>87</sup> And without

83. *Ante*, this section, notes 35-42.

84. See *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 645; *Morrissey v. Dean*, 97 Wis. 302, 72 N. W. 873.

85. *Ante*, § 312.

86. *Powers v. Andrews*, 84 Ala. 289, 4 So. 263; *Aiken v. Bridgeford*, 84 Ala. 295, 4 So. 266; *Mutual Loan & Banking Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317, 27 S. E. 980; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *Jacoby v. Crowe*, 36 Minn. 93, 30 N. W. 441; *Sims v. Field*, 66 Mo. 111; *Plum v. Studebaker Bros. Mfg. Co.*, 89 Mo. 162, 1 S. W. 217;

*Decker v. Boice*, 19 Hun, 152, 83 N. Y. 215; *Nichols v. Tingstad*, 10 N. D. 172 (statute); *Bancroft v. Ashhurst*, 2 Grant's Cas. (Pa.) 520; *Woonsocket Sav. Institution v. American Worsted Co.*, 13 R. I. 255; *Bull's Petition*, 15 R. I. 534, 10 Atl. 484; *Fieval v. Zuber*, 67 Tex. 275, 3 S. W. 273; *Hampshire v. Greeves*, 104 Tex. 620, 143 S. W. 147. If the statute requires a notice of the sale to be given to one holding a subsequent lien, his lien is not divested if the notice is not given. *Root v. Wheeler*, 12 Abb. Pr. (N. Y.) 294.

87. *Robinson v. Cahalan*, 91 Ala. 479, 8 So. 415; *Tew v. Hen-*

reference to whether the person exercising the power has or has not the legal title, the purchaser will, on paying the amount of his bid, be subrogated to the rights of the mortgage creditor, to the extent of his payment, that is, he will be in the position of an equitable assignee of the debt with its incidental lien.<sup>88</sup> Moreover, without reference to the legal title to the land or to the doctrine of subrogation, the purchaser may, by some cases,<sup>89</sup> be regarded as in the position of an assignee of the mortgage, on the theory that the conveyance to him operates, under the circumstances, as an assignment of the debt and mortgage. If the person undertaking to make the sale is neither the creditor nor the holder of the legal title to the land, it appears that the mere conveyance by him, apart from the purchaser's payment therefor, can have no effect as substituting the latter in the position of the mortgagee.<sup>90</sup> In asserting the right of a purchaser at an

derson, 116 Ala. 545, 3 So. 128; Koester v. Burke, 81 Ill. 426; Dearnaley v. Chase, 136 Mass. 288; Holmes v. Turners' Falls Co., 142 Mass. 590, 8 N. E. 646; Springfield Engine & Thresher Co. v. Donovan, 120 Mo. 423, 25 S. W. 536; Schanewerk v. Hoberecht, 117 Mo. 22, 38 Am. St. Rep. 631, 22 S. W. 949; Lunsford v. Speaks, 112 N. C. 608, 17 S. E. 430; Crafts v. Daugherty, 69 Tex. 477, 6 S. W. 850. Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 746; Sulphur Mines Co. of Virginia v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232. *Contra*, Henderson v. Galloway, 8 Humph. (Tenn.) 692; Enochs v. Miller, 60 Miss. 19.

88. Sloan v. Frothingham, 72 Ala. 589; Littell v. Grady, 38 Ark. 584; Lewis v. Hamilton, 26 Colo. 263, 58 Pac. 196; Bruschke Rep. 125, 46 N. E. 813; Muir v.

Berkshire, 52 Ind. 149; Clark v. Wilson, 56 Miss. 753; Bonner v. Lessley, 61 Miss. 392; Brewer v. Nash, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857; Johnson v. Robertson, 34 Md. 165.

89. Brobst v. Brock, 10 Wall. (U. S.) 519, 19 L. Ed. 1002; Dearnaley v. Chase, 136 Mass. 288; Gilbert v. Cooley, Walk. Ch. (Mich.) 494; Lariverre v. Rains, 112 Mich. 276, 70 N. W. 583; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320; Nash v. Northwest Land Co., 15 N. D. 566, 108 N. W. 792; Williams v. Washington, 40 S. C. 457, 19 S. E. 1; Cooper v. Harvey, 21 S. D. 471, 113 N. W. 717; see Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889.

90. Sulphur Mines Co. of Vir. v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813; Muir v.

invalid sale to stand in the position of the mortgage creditor who made the sale, the courts do not always clearly indicate whether he does so as having paid the purchase money, that is, on the theory of subrogation, or as having acquired such right by the conveyance made pursuant to the sale.

— **Bona fide purchasers.** It is impossible to deduce from the cases any general rule or rules as to when a purchaser claiming under a sale made, or attempted to be made, under a power of sale given to secure a debt, can claim protection as an innocent purchaser as against defects in the power or irregularities in the sale. The matter lacks the importance which it would otherwise have, by reason of the fact that the purchaser at the sale is, upon his payment of the purchase money, subrogated to the rights of the mortgage creditor, or, it seems, by some decisions, substituted in the place of the mortgagee by the conveyance made under the invalid sale.

In case the power itself is defective in form or execution, any purchaser would necessarily be charged with notice of such defect, since it is his duty to examine the instrument under which he claims.<sup>91</sup> He cannot however be charged with notice that the debt secured is in any way fraudulent<sup>92</sup> or, it would seem, that it never existed, and, since the power of sale is not in terms made dependent upon the existence or legality of the debt, a subsequent purchaser claiming under the sale would seem to be protected in this regard.

The power of sale is ordinarily conditioned upon a failure to pay the debt at a time named, and consequently a sale before that time would, it seems, ordinarily be invalid for any purpose, even in favor of an innocent purchaser from the purchaser at the sale.<sup>93</sup>

293, 25 S. E. 232; *Hayes v. Lien-*  
*lokken*, 48 Wis. 509, 4 N. W. 584.

91. *Schmertz v. Hammond*, 47  
W. Va. 527, 35 S. E. 945.

92. *Mathews v. Lecomte*, 24

Mo. 545; *Moseley v. Rambo*, 106  
Ga. 597, 32 S. E. 638 (usury).

93. *Rogers v. Barnes*, 169  
Mass. 179, 38 L. R. A. 145, 47 N.  
E. 602; *Long v. Long*, 79 Mo.

That the sale was made before the day named for maturity of the debt would, however, be discoverable, ordinarily, by a subsequent purchaser. It has been held that a sale was not invalid as against an innocent purchaser because made during the period agreed upon for an extension of the debt.<sup>94</sup>

The original purchaser at the sale under the power is charged with notice of any irregularities in the actual exercise of the power.<sup>95</sup> And the sale may accordingly be set aside as against him,<sup>96</sup> while valid as against persons purchasing under him without notice of the irregularities.<sup>97</sup> An innocent purchaser may be protected in this regard, as in others, by inserting in the mortgage instrument a clause relieving the purchaser from any obligation to inquire into the validity or regularity of the proceedings for sale.

— **Proceeds of sale.** Any surplus over and above the amount of the debt secured and costs of sale must be paid over to the mortgagor, or his transferee,<sup>98</sup> or to the holders of subsequent liens on the land, these attaching to the surplus proceeds of sale as they at-

644. But in *Chicago, R. I. & P. R. Co. v. Kennedy*, 70 Ill. 350, a contrary view is suggested.

94. *Missouri Real Estate Syndicate v. Sims*, 179 Mo. 679, 78 S. W. 1006.

95. *Grinnell v. Cockerill*, 79 Ill. 79; *Equitable Trust Co. v. Fisher*, 106 Ill. 189 (*semble*); *Pratt v. Tinkcom*, 21 Minn. 142 (*semble*); *Sears v. Livermore*, 17 Iowa, 297, 85 Am. Dec. 564. See *Bigler v. Waller*, 14 Wall. (U. S.) 297, 20 L. Ed. 891.

96. *Fountain v. Pateman*, 189 Ala. 153, 66 So. 75; *Bent-Otero Imp. Co. v. Whitehead*, 25 Colo. 354, 71 Am. St. Rep. 140, 54 Pac. 1023; *Cassell v. Ross*, 33 Ill. 244, 85 Am. Dec. 270; *Dearnaley v. Chase*, 136 Mass. 288; *Sears v.*

*Livermore*, 17 Iowa, 297, 85 Am. Dec. 564; *Martini v. Emery*, 39 R. I. 463, 98 Atl. 52; *Shears v. Traders Bldg Ass'n*, 58 W. Va. 665, 52 S. E. 860.

97. *Fountain v. Pateman*, 189 Ala. 153, 66 So. 75; *Hamilton v. Lubukee*, 51 Ill. 415; *Grinnell v. Cockerill*, 79 Ill. 79; *Wilson v. South Park Commrs*, 70 Ill. 46; *Burns v. Thayer*, 115 Mass. 89; *Adams v. Carpenter*, 187 Mo. 613, 86 S. W. 445. But see *Enochs v. Miller*, 60 Miss. 19.

98. *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Johnson v. Wilson*, 77 Mo. 639; *Seller v. Wilber*, 29 Minn. 307, 13 N. W. 136; *Dennett v. Perkins*, 214 Mass. 449, 101 N. E. 994.



tached to the land itself.<sup>99</sup> In case of the mortgagee's failure to pay over such surplus, the remedy is by an action against him as for money had and received.<sup>1</sup>

§ 657. **Enforcement of personal liability.** It has usually been considered that the mortgage creditor may assert his different rights at the same time, pursuing concurrently his suit in equity to foreclose and his action at law to enforce the personal liability on the debt.<sup>2</sup> But occasionally it has been decided that, in so far as the mortgage creditor may be authorized by statute to obtain a personal decree in the foreclosure proceeding,<sup>3</sup> he is sufficiently protected thereby, and should not usually be allowed to maintain a separate action to

99. *Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69; *Converse v. Ware Sav. Bank*, 152 Mass. 407, 25 N. E. 733; *Pilok v. Bednarski*, 230 Mass. 56, 119 N. E. 360; *Fagan v. People's Savings & Loan Ass'n*, 55 Minn. 437, 57 N. W. 142; *Helweg v. Heikamp*, 20 Mo. 569; *Barber v. Cary*, 11 Barb. (N. Y.) 549; *Wynne v. State Nat. Bank of Ft. Worth*, 82 Tex. 378, 17 S. W. 918; *Markey v. Langley*, 92 U. S. 142, 23 L. Ed. 701. It has been held that a statute requiring the surplus to be paid to the mortgagor or his "assigns" applies in favor of second mortgagees (*Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694) and execution creditors (*Re Abbott & Medcalf*, 20 Ont. Rep. 299).

1. *Cope v. Wheeler*, 41 N. Y. 303; *Reynolds v. Hennessy*, 15 R. I. 215, 2 Atl. 701; *Stoever v. Stoever*, 9 Serg. & R. (Pa.) 434; *Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69. But that an

action for money had and received does not lie in favor of a subsequent lienor, see *Norman v. Hallsey*, 132 N. C. 6, 43 S. E. 473.

2. *Burnell v. Martin*, 2 Dougl. 417; *Booth v. Booth*, 2 Atk. 543; *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603, 616, 23 L. Ed. 405; *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829; *Micou v. Ashurst*, 55 Ala. 607; *Morris v. Fidelity Mortgage Bond Co.*, 187 Ala. 262, 65 So. 810; *Very v. Watkins*, 18 Ark. 546; *Coit v. Fitch*, Kirby (Conn.) 254, 1 Am. Dec. 20; *Vansant v. Allmon*, 23 Ill. 30; *Barchard v. Kohn*, 157 Ill. 579, 29 L. R. A. 803, 41 N. E. 902; *Brown v. Cascaden*, 43 Iowa, 103; *Hodgden v. Roy*, 102 Kan. 197, 169 Pac. 1143; *Copperthwait v. Dummer*, 18 N. J. L. 258; *Ellis v. Hussey*, 66 N. C. 501; *Spence v. Union Central Life Ins. Co.*, 40 Ohio St. 517; *Priddy v. Hartsook*, 81 Va. 67.

3. *Post*, note 6.

enforce the personal liability while the foreclosure proceeding is in progress.<sup>4</sup>

— **In foreclosure proceeding.** Formerly, in case the proceeds of the sale of the property were insufficient to pay the obligation, the only mode in which the mortgagee could enforce the mortgagor's personal liability was by a separate action at law against the mortgagor.<sup>5</sup> Of recent years, however, statutes have been passed in many states authorizing the entry in the foreclosure proceeding of a personal judgment or decree for the deficiency against the mortgagor or other person liable for the debt;<sup>6</sup> and in such states the mortgage creditor is usually subject to restrictions of a more or less stringent character upon his right to institute separate proceedings to enforce the personal liability and to foreclose.<sup>7</sup>

4. *Anderson v. Pilgram*, 30 S. C. 499, 4 L. R. A. 205, 14 Am. St. Rep. 917, 9 S. E. 587; *Franklin v. Hersch*, 3 Tenn. Ch. 467.

5. *Hunt v. Lewis*, 4 Stew. & P. (Ala.) 138; *Webber v. Blanc*, 39 Fla. 224, 22 So. 655; *Johnson v. Shepard*, 35 Mich. 115; *Stark v. Mercer*, 3 How. (Miss.) 377; *Fithian v. Monks*, 43 Mo. 502, 519; *Klapworth v. Dressler*, 13 N. J. Eq. 62, 78 Am. Dec. 69; *Dunkley v. Van Buren*, 3 Johns. Ch. (N. Y.) 330.

6. 1 *Stimson's Am. St. Law*, § 1926; 9 *Enc. Pl. & Pr.* 454; 2 *Jones, Mortgages*, c. 38.

7. The statute sometimes provides that there shall be but one action for the recovery of a debt secured by mortgage. See *Bartlett v. Cottle*, 63 Cal. 366; *McKean v. German-American Sav. Bank*, 118 Cal. 336, 50 Pac. 656;

*Jensen v. Lichtenstein*, 45 Utah, 320, 145 Pac. 1036. In some states, by statute, during the pendency of an action at law for the recovery of the debt, a foreclosure suit cannot be maintained, and a subsequent foreclosure suit is allowed only if execution on a judgment for the debt is returned unsatisfied. 1 *Stimson's Am. St. Law*, § 1932 (B). In other states, while a foreclosure suit is pending, an action on the debt cannot be brought except by leave of court. 1 *Stimson's Am. St. Law*, § 1932 (D). And the statute sometimes forbids the bringing of a subsequent action on the debt, after a decree of foreclosure, the creditor having a right to a personal decree in the foreclosure proceeding. *Code Civ. Proc. N. Y.*, § 1628.

§ 658. **Stipulation for attorney's fee.** A stipulation in the mortgage instrument, or in the bond or note, that, upon foreclosure of the mortgage, there shall be included in the decree the amount of a fee for attorney's services in the foreclosure proceeding, is valid in the majority of states,<sup>8</sup> though in some such a provision has been regarded as against public policy and invalid.<sup>9</sup> That the amount of the fee is named in such stipulation is not, it has been held, conclusive upon the court, and it may allow such less sum as may to it seem reasonable.<sup>10</sup>

8. *Mason v. Luce*, 116 Cal. 232, 48 Pac. 72; *Durham v. Stephenson*, 41 Fla. 112, 25 So. 284; *Lewis v. Sutton*, 21 Idaho, 541, 122 Pac. 911; *Barry v. Guild*, 126 Ill. 439, 2 L. R. A. 334, 18 N. E. 759; *Tholen v. Duffy*, 7 Kan. 405; *Bowie v. Hall*, 69 Md. 433, 1 L. R. A. 546, 9 Am. St. Rep. 433, 16 Atl. 64; *Murray v. Chamberlain*, 67 Minn. 12, 69 N. W. 474; *Gourley v. Williams*, 46 Okla. 629, 149 Pac. 229; *McAllister's Appeal*, 59 Pa. St. 204; *Galligan v. Heath*, 260 Pa. St. 457, 103 Atl. 878; *Branyan v. Kay*, 33 S. C. 283, 11 S. E. 970; *Carolina Spence Co. v. Black Mountain R. Co.*, 139 Tenn. 248, 201 S. W. 770; *Miner v. Paris Exchange Bank*, 53 Tex. 559; *Gordon v. Decker*, 19 Wash. 188, 52 Pac. 856.

9. *Jarvis v. Southern Grocery Co.*, 63 Ark. 225, 38 S. W. 148; *Thomasson v. Townsend*, 10 Bush (Ky.) 114; *Kittermaster v. Brosard*, 105 Mich. 219, 55 Am. St. Rep. 437, 63 N. W. 75; *Security Co. of Hartford v. Eyer*, 36 Neb. 507, 38 Am. St. Rep. 735, 54 N. W. 838; *Turner v. Bøger*, 126 N. C. 300, 49 L. R. A. 590, 35 S. E. 592; *Leavans v. Ohio Nat. Bank*, 50 Ohio St. 591, 34 N. E. 1089.

10. *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Dorn v. Ross*, 177 Ill. 225, 52 N. E. 321; *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. Rep. 457; *Amalgamated Gold Mines Co. v. Ridgely*, 100 Wash. 99, 170 Pac. 355. See *Gibson v. Southwestern Land Co.*, 89 Wis. 49, 61 N. W. 282. ♦

## CHAPTER XXXVI.

### EQUITABLE LIENS.

- § 659. General considerations.
- 660. Express charges on land.
- 661. Agreements for security (equitable mortgages).
- 662. Lien for improvements.
- 663. Lien for owelty of partition.
- 664. Implied lien of grantor (vendor's lien).
- 665. Express lien of grantor.
- 666. Vendor's lien before conveyance.
- 667. Vendee's lien.

§ 659. **General considerations.** At common law there was no lien upon a thing owned by one person in favor of another except when accompanied by possession and, furthermore, there could be no lien on land, but only on things of a personal nature.<sup>1</sup> In equity, however, there are certain classes of rights in regard to land, as there are in regard to personalty, not based on possession, yet of a character analogous to common-law liens, and known as "equitable liens." These rights involve a personal obligation upon the owner of land, which equity will enforce against the land, ordinarily by a decree for the sale thereof, and which will follow the land into whosoever hands it may pass, until it reaches those of a purchaser for value without notice.<sup>2</sup>

§ 660. **Express charges on land.** An "equitable lien" is created by a provision, in a conveyance *inter vivos* or in a will, charging the land, in the hands of

1. 2 Spence, Eq. Jur. 796.

C. Langdell, 1 Harv. Law Rev. 66,

2. Pomeroy, Eq. Jur. §§ 165, 70.

Ed.) 1387 *et seq.* Equitable liens

the grantee or devisee, with the payment of debts or legacies.<sup>3</sup> So, land may be charged by will, or in a family settlement, with the payment of an annuity,<sup>4</sup> or with the support of some person other than the owner.<sup>5</sup> And occasionally a testator charges upon particular land devised a sum or sums to be paid to beneficiaries named for the purpose of equalizing the distribution of his property.<sup>6</sup> The imposition of such a charge in effect involves an obligation upon the devisee or grantee to pay the debts or legacies, to pay the annuity, or to furnish support, as the case may be, under penalty, if he fails so to do, of having the land sold, or perhaps mortgaged, by decree of a court of equity, and the proceeds applied, so far as may be necessary, to the carrying out of the purposes declared. Such a charge is somewhat analogous to a trust created in favor of one person, upon a devise or

3. See 2 Jarman, Wills, (5th Ed.) 1387 et seq. Equitable liens of this class, as well as other such liens, are admirably treated in the work on Equity Jurisprudence by the late John Norton Pomeroy (volume 3, §§ 1233-1267), on which the present chapter is, to a considerable extent, based.

4. *In re Tucker* (1893), 2 Ch. 323; *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511; *Glenn v. Spry*, 5 Md. 110; *Hines v. Hines*, 95 N. C. 482; *In re Sharp's Estate*, 19 Pa. Super. Ct. 621; *In re Pierce*, 56 Wis. 560, 14 N. W. 588.

5. *Bell v. Watkins*, 104 Ga. 345, 30 S. E. 756; *Commons v. Commons*, 115 Ind. 162, 16 N. E. 820, 17 N. E. 271; *Low v. Ramsey*, 135 Ky. 333, 135 Am. St. Rep. 459, 122 S. W. 167; *Emery v. Swasey*, 97 Me. 136, 53 Atl. 992; *Byrne v. Byrne*, 250 Mo. 632, 157

S. W. 609; *Ellis v. Ellis*, 64 N. J. Eq. 375, 55 Atl. 103; *Richardson v. Bailey*, 77 N. H. 184, 89 Atl. 840; *Outland v. Outland*, 118 N. C. 138, 23 S. E. 972; *Ripple v. Ripple*, 1 Rawle (Pa.) 386; *Shired v. Nesbit*, 90 S. C. 20, 72 S. E. 545; *Dickson v. Field*, 77 Wis. 439, 9 L. R. A. 537, 46 N. W. 668. Occasionally a conveyance subject to an agreement or condition that the grantee support the grantor has been regarded as entitling the grantor to a lien to secure such support. *Webster v. Cadwallader*, 133 Ky. 500, 134 Am. St. Rep. 470, 118 S. W. 327; *Hopper v. Hopper*, 151 Ky. 120, 151 S. W. 359; *Patton v. Nixon*, 33 Ore. 159, 52 Pac. 1048.

6. *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Palmer v. Simpson*, 69 Ga. 792; *Farra v. Adams*, 12 Bush. (Ky.) 515.

conveyance to another;<sup>7</sup> but it is not properly a trust, there being an entire absence of any fiduciary relation between the owner of the land and the person entitled to the benefit of the charge.<sup>8</sup>

Under the common-law rule that lands were *prima facie* not liable for the simple contract debts of a decedent, the question frequently arose whether his will expressed an intention to the contrary, that is, charged his land with the payment of debts in favor of creditors. With the change in the law, making land as well as personalty liable for debts of the decedent, a rule which prevails in all the states, these questions have become of comparatively little importance, so far as the creditor is concerned. The question may still arise, however, whether, under a particular will, the land is charged with debts, so as to render it primarily liable for the payment thereof, thus reversing the ordinary rule that the personalty is the primary fund for that purpose. This concerns, not the creditor, but the devisees or heirs of the land on the one side, and the legatees or other persons entitled to share in the personalty on the other. The question also frequently arises whether land is charged with the payment of a particular legacy, so as to make it liable for this purpose, either before the personalty, which is ordinarily alone so liable, or *pari passu* with the personalty. In the absence of such a charge, the legacy must abate in case of insufficiency of such personal assets.

Since personalty is ordinarily the primary fund for the payment of both debts and legacies, the presumption is to that effect, and in order to charge the land with a legacy,<sup>9</sup> or to charge it with debts in exon-

7. See *Legard v. Hodges*, 1 Ves. 477; *Atty Gen'l. v. Persee*, 2 Dr. & W. 69; *Knox v. Kelly*, 6 Ir. Eq. Rep. 279.

8. *Francis v. Grover*, 5 Hare 39; *Dundas v. Blake*, 11 Ir. Eq.

138; *Harrison v. Dignan*, 2 Dru. & W. 295; *Hughes v. Kelly*, 3 Dru. & W. 483.

9. *Wright v. Denn*, 10 Wheat. (U. S.) 204, 6 L. Ed. 303; *Gridley v. Andrews*, 8 Conn. 1;

eration of the personal estate,<sup>10</sup> a clear intention to impose such a charge must appear. The mere fact, moreover, that the land is charged with the payment of debts does not exonerate the personalty from liability therefor, but the land will merely be liable in aid of the personalty, which would, at the present day, be the case without reference to the terms of the will.<sup>11</sup> An intention to exonerate the personalty will be much more readily inferred in favor of personalty disposed of by the will than that undisposed of.<sup>12</sup>

An intention that the land shall be charged with the payment of debts or legacies may be expressly stated, as by use of the word "charge," or by a devise to A "on condition that" he pay a certain debt or legacy.<sup>13</sup> Moreover, an intention to charge a legacy on the land is usually inferred from the fact that, in

Heslop v. Gatton, 71 Ill. 528; Morey v. Morey, 113 Iowa, 152, 84 N. W. 1039; Owens v. Claytor, 56 Ind. 129; McQueen v. Lilly, 131 Mo. 9, 31 S. W. 1043; Perry v. Hale, 44 N. H. 363; Morisey v. Brown, 144 N. C. 154, 56 S. E. 704; Clyde v. Simpson, 4 Ohio St. 445; Wright's Appeal, 12 Pa. St. 256; Arnold v. Dean, 61 Tex. 249; Lee v. Lee, 88 Va. 805, 14 S. E. 534.

10. *In re* Powers, 124 N. Y. 361, 26 N. E. 940; Graham v. Little, 5 Ired. Eq. (40 N. Car.) 407; Seaver v. Lewis, 14 Mass 83; Crone's Appeal, 103 Pa. St. 571.

11. Kilford v. Blaney, 31 Ch. Div. 56; Clinefelter v. Ayers, 16 Ill. 329; Chapin v. Waters, 116 Mass. 140; Perry v. Hale, 44 N. H. 363; Suydam v. Voorhees, 58 N. J. Eq. 157; Sweeney v. Warren, 127 N. Y. 426, 24 Am. St. Rep. 468, 28 N. E. 413; Riegelman's Estate, 174 Pa. St. 476, 34 Atl.

120; Calder v. Curry, 17 R. I. 610, 24 Atl. 103; Arnold v. Dean, 61 Tex. 249.

12. Marsh v. Marsh, 10 B. Mon. (Ky.) 360; Hoes v. VanHosen, 1 N. Y. 120; Robards v. Wortham, 2 Dev. Eq. (17 N. C.) 173, 22 Am. Dec. 738; Swann v. Swann, 5 Jones Eq. (58 N. Car.) 297.

13. Canal Bank v. Hudson, 111 U. S. 66, 28 L. Ed. 354; Sistrunk v. Ware, 69 Ala. 273; Daly v. Wilkie, 111 Ill. 382; Pearey v. Greenwell, 80 Ky. 616; Merritt v. Buckman, 78 Me. 504, 7 Atl. 383; Gardenville Permanent Loan Ass'n v. Walker, 52 Md. 452; Horning v. Wiederspalen, 28 N. J. Eq. 387; *In re* Gray's Estate, 27 N. D. 417, L. R. A. 1917A, 611, 146 N. W. 722; Pryer v. Mark, 129 Pa. St. 529, 19 Atl. 895; Warren's Adm'r v. Bronson, 81 Vt. 121, 69 Atl. 655; Korn v. Friz, 128 Wis. 428, 107 N. W. 659.

the same clause with a devise of land, there is a direction to the devisee to pay the legacy.<sup>14</sup>

If after the gift of a pecuniary legacy or legacies, there is a gift of the "residue" or "remainder" of testator's property, thereby blending the real and personal property into one fund, the legacy or legacies are usually regarded as charged upon the land, since the term "residue" or "remainder" can in such case refer only to what remains after the payment of the legacies.<sup>15</sup>

That the testator knew, at the time of executing the will, that the personalty was insufficient to pay the debts and legacies has frequently been regarded as tending to show an intention to charge the legacies on the land.<sup>16</sup> But such fact has been referred to as in

14. *Potter v. Gardner*, 12 Wheat. (U. S.) 498, 6 L. Ed. 706; *Henry v. Griffis*, 89 Iowa. 543, 56 N. W. 670; *Merrill v. Bickford*, 65 Me. 118; *Buchanan v. Lloyd*, 88 Md. 642, 41 Atl. 1075; *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285; *Chase v. Warner*, 106 Mich. 695, 64 N. W. 730; *Dudgeon v. Dudgeon*, 87 Mo. 218; *Wyckoff v. Wyckoff*, 49 N. J. Eq. 344, 25 Atl. 963; *Brown v. Knapp*, 79 N. Y. 136, 143; *Carter v. Worrell*, 96 N. C. 358, 60 Am. Rep. 420, 2 S. E. 528; *Yearly v. Long*, 40 Ohio St. 27. But see *Owens v. Claytor*, 56 Md. 129; *Penny's Appeal*, 109 Pa. St. 323; *In re Wallace's Estate*, 234 Pa. 459, 83 Atl. 280.

15. *Greville v. Brown*, 7 H. L. Cas. 689; *In re Dyson* (1896), 2 Ch. 720; *Lewis v. Darling*, 16 How. (U. S.) 1, 14 L. Ed. 819; *Turner v. Laird*, 68 Conn. 198, 35 Atl. 1124; *Reid v. Corrigan*, 143 Ill. 402, 32 N. E. 387; *Hill v. Bean*, 86 Me. 200, 29 Atl. 986;

*Peebles v. Acker*, 70 Miss. 356, 12 So. 248; *Bennett's Estate*, 148 Pa. St. 139, 23 Atl. 1108. See *Thayer v. Finnegan*, 134 Mass. 62, 45 Am. Rep. 285; *Hoyt v. Hoyt*, 85 N. Y. 142; *Lee v. Lee*, 88 Va. 805, 14 S. E. 534. In one or two states, however, such a disposition of testator's property is regarded as insufficient to show an intention to charge the land, when unaccompanied by other evidence of such an intention. *Davidson v. Coon*, 125 Ind. 497, 9 L. R. A. 584, 25 N. E. 601; *Pearson v. Wartman*, 80 Md. 528, 31 Atl. 446; *Brill v. Wright*, 112 N. Y. 129, 8 Am. St. Rep. 717, 19 N. E. 628; *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332. See *Simonson v. Hutchinson*, 231 Ill. 508, 83 N. E. 183; *Newsom v. Thornton*, 82 Ala. 402, 60 Am. Rep. 743, 8 So. 261; *Allen v. Ruddell*, 51 S. C. 366, 29 S. E. 198.

16. *Cunningham v. Cunningham*, 72 Conn. 253, 43 Atl. 1046; *Duncan v. Wallace*, 114 Ind. 169,



itself insufficient to show such an intention.<sup>17</sup>

In this country the use of general words directing the payment of debts does not usually have the effect of charging the debts on land devised, such words being found in most wills, and being merely a direction for the doing of what the law compels.<sup>18</sup> In one or two states, however, as in England, a mere direction by the testator that his debts shall be paid charges the land with the debts.<sup>19</sup>

— **Enforcement against purchaser.** A charge of a legacy or of some other specific sum or sums, or of an annuity, may be enforced, it is usually said, as against a purchaser from the heir or devisee,<sup>20</sup> but this statement is to be taken with the qualification that such a charge, like any other equitable lien, is not enforceable

16 N. E. 137; *Thissell v. Schilling-er*, 186 Mass. 180, 71 N. E. 300 (*semble*); *Clotilde v. Lutz*, 157 Mo. 439, 50 L. R. A. 847, 57 S. W. 1018; *Stuart v. Robinson*, 80 Miss. 290, 92 Am. St. Rep. 603. 31 So. 903; *Stroh v. O'Hearn*, 176 Mich. 164, 142 N. W. 865; *Price v. Price*, 52 N. J. Eq. 326, 29 Atl. 679; *McCorn v. McCorn*, 100 N. Y. 511, 3 N. E. 480; *Theobald v. Fugman*, 64 Ohio St. 473, 60 N. E. 606; *Dickerman v. Eddinger*, 168 Pa. St. 240, 32 Atl. 41; *Jaudon v. Ducker*, 27 S. C. 295, 3 S. E. 465.

17. *Taylor v. Tolen*, 38 N. J. Eq. 91; *Duvall's Estate*, 146 Pa. St. 176, 23 Atl. 231; *Dickerman v. Eddinger*, 168 Pa. St. 240, 32 Atl. 41. See *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777.

18. *Starke v. Wilson*, 65 Ala. 576; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *White v. Kauffman*, 66 Md. 89, 5 Atl. 865; *Hamilton v. Smith*, 110 N. Y. 159,

17 N. E. 740; *Byrne v. Byrne*, 3 Serg. & R. (Pa.) 548, 8 Am. Dec. 641; *Farmer v. Spell*, 11 Rich. Eq. (S. C.) 541.

19. 2 Jarman, Wills (5th Ed.) 1390; *Theobald, Wills* (5th Ed.) 725; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899 (*dictum*); *Shreve v. Shreve*, 17 N. J. Eq. 487; *McKinley v. Coe*, 66 N. J. Eq. 70, 57 Atl. 1030.

20. *Cato v. Gentry*, 28 Ga. 327; *Farra v. Adams*, 12 Bush. (Ky.) 515; *Meakin v. Duvall*, 43 Md. 372; *Taft v. Morse*, 4 Metc. (Mass.) 523; *Amherst College v. Smith*, 134 Mass. 543; *Peebles v. Acker*, 70 Miss. 356, 12 So. 248; *Perry v. Hale*, 44 N. H. 363; *Sinking Fund Com'rs v. Woodward*, 40 N. J. Eq. 23; *Dodge v. Manning*, 1 N. Y. 298; *Phillips v. Humphrey*, 7 Ired. Eq. (42 N. Car.), 206; *In re Walters' Estate*, 197 Pa. St. 555, 47 Atl. 862; *Bur-*

as against a *bona fide* purchaser for value.<sup>21</sup> A purchaser from a devisee under a will is ordinarily, however, not a *bona fide* purchaser, that is, he is affected with notice of the terms of the will under which his vendor claims.<sup>22</sup> Quite frequently, particularly in the English cases, the right to enforce a charge of legacies against the land in the hands of a purchaser from the devisee is in terms based on the theory that such purchaser is in the position of a purchaser from a trustee, who is obliged to see to the application of the purchase money.<sup>23-25</sup>

In case the devisee of a parcel or parcels of land subject to a charge of this character disposes of parts thereof at different times, the parts so disposed of may be subject in the inverse order of alienation,<sup>26</sup> in accordance with considerations before discussed.<sup>27</sup> But this doctrine has no application as between purchasers from two or more distinct devisees, the land being in that case liable to contribute ratably.<sup>28</sup>

— **Mode of enforcement.** A charge of a legacy or some other specific sum upon land is usu-

well v. Fauber, 21 Gratt. (Va.) 446.

21. Wigg v. Wigg, 1 Atk. 382; Ripple v. Ripple, 1 Rawle. (Pa.) 386; Patterson v. Patterson, 63 N. C. 322; Scott v. Patchin, 54 Vt. 253; Warner's Adm'r v. Bronson, 81 Vt. 121, 69 Atl. 655.

22. Morancy v. Quarles, 1 McLean (U. S.) 194; Manifold v. Jones, 117 Ind. 212, 20 N. E. 124; Henry v. Griffiths, 89 Iowa, 543, 56 N. W. 670; Coleman's Ex'rs v. Howell (N. J. Eq.), 16 Atl. 202; Conkling v. Weatherwax, 173 N. Y. 43, 65 N. E. 855; Nellons v. Truax, 6 Ohio St. 97; Scott v. Patchin, 54 Vt. 253; Burwell v. Fauber, 21 Gratt. (Va.) 446.

23-25. Horn v. Horn, 2 Sim. & St. 448; Bennett v. Rebbeck, 71 Law Times Rep. 74; Storey v. Walsh, 18 Beav. 559; *In re Henson* (1908), 2 Ch. 356; Clyde v. Simpson, 4 Ohio St. 445; Curd v. Field, 103 Ky. 293, 45 S. W. 92; Amherst College v. Smith, 134 Mass. 543.

26. Jenkins v. Freyer, 4 Paige (N. Y.) 47; Nellons v. Truax, 6 Ohio St. 97; Cowden's Estate, 1 Pa. 267; Scott v. Patchin, 54 Vt. 253; Fessenden's Estate, 170 Pa. St. 631, 33 Atl. 135.

27. *Ante*, § 625.

28. Sinking Fund Commissioners v. Woodward, 40 N. J. Eq. 23.

ally enforceable in equity alone,<sup>29</sup> unless a statute provides otherwise.<sup>30</sup> And the mode of enforcement is ordinarily by means of a decree for the sale of the land, and payment of the amount of the charge from the proceeds of the sale.<sup>31</sup> If, however, a sale is not necessary for this purpose, the court would presumably not order it, but would have the rents and profits collected and applied in satisfaction of the charge.<sup>32</sup> Or it might authorize the execution of a mortgage on the land in order to raise funds for this purpose.<sup>33</sup>

As regards the mode of enforcing a charge of testator's debts, the English cases usually regard such a charge as creating by implication a power in either the executor or devisee to make sale for the purpose of paying debts.<sup>34</sup> But in this country the courts do not ordinarily infer such a power from language creating a charge, the statutory provisions for the sale of land to pay the decedent's debts rendering such a power unnecessary.<sup>35</sup>

In case the language of the will not only charges land devised with debts or legacies, but also in terms

29. *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Merritt v. Buckman*, 78 Me. 504, 7 Atl. 383; *Brown v. Knapp*, 79 N. Y. 136. See *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228. But in *Dodge v. Dodge*, 1 Root (Conn.) 233, 1 Am. Dec. 40, it was held that one in favor of whom, land was charged for his support, could enter on the land, and that consequently no relief would be given in equity.

30. *Eyre's Appeal*, 106 Pa. St. 184; *Luckenbach's Estate*, 170 Pa. St. 586, 33 Atl. 121.

31. *Freeman v. Simpson*, 6 Sim. 75; *O'Brien v. Dougherty*, 1 App. Cas. (D. C.) 148; *Daly v. Wilkie*, 111 Ill. 382; *Merritt v. Buckman*, 78 Me. 504, 7 Atl. 383; *Chase v.*

*Warner*, 106 Mich. 695, 64 N. W. 730; *Peebles v. Acker*, 70 Miss. 356, 12 So. 248; *Warner's Adm'r v. Bronson*, 81 Vt. 121, 69 Atl. 655; *Will of Root*, 81 Wis. 263, 51 N. W. 435.

32. *Barfield v. Barfield*, 113 N. C. 230, 18 S. E. 505.

33. *In re Tucker* (1893), 2 Ch. 323. See *Walker v. Follett's Estate*, 105 Me. 201, 73 Atl. 1092.

34. *Lewin, Trusts* (12th Ed.) 539, 547; *Colyer v. Finch*, 5 H. L. Cas. 905.

35. *Snedeker v. Allen*, 2 N. J. L. 35. *In re Fox*, 52 N. Y. 530, 11 Am. Rep. 751; *Owen v. Ellis*, 64 Mo. 77; *Worley v. Taylor*, 21 Ore. 589, 28 Am. St. Rep. 771, 28 Pac. 903.

imposes a personal obligation upon the devisee to pay them, as when he is directed to pay them, or when the devise is conditional upon their payment, the devisee, by accepting the devise, becomes personally liable therefor.<sup>36</sup> If the language of the will, on the other hand, does not indicate an intention to impose any personal obligation, the devisee is not liable for the debts or legacies charged.<sup>37</sup> Though in one case a disposition has been indicated to restrict the devisee's personal liability to cases in which a legacy or a specific sum is charged on the land, and not to extend it to the case of a charge of debts generally,<sup>38</sup> in other cases the devisee has been regarded as personally liable, by reason of the language of the devise and his acceptance thereof, for all or a portion of the testator's debts.<sup>39</sup>

36. *King v. Ackerman*, 2 Black (U. S.) 408, 17 L. Ed. 292; *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Lavalle v. Droit*, 179 Ill. App. 484; *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 704; *Huston v. Huston*, 29 Iowa, 347, 37 Iowa, 668; *Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998; *Glenn v. Spry*, 5 Md. 110; *Parker v. Parker*, 5 Metc. (Mass.) 134; *Amherst College v. Smith*, 134 Mass. 543; *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228; *Perry v. Hale*, 44 N. H. 363; *Jackson v. Bull*, 10 Johns. (N. Y.) 148, 6 Am. Dec. 321; *Brown v. Knapp*, 79 N. Y. 136; *Case v. Hall*, 52 Ohio St. 24, 25 L. R. A. 766, 38 N. E. 618; *Headley v. Renner*, 129 Pa. St. 542, 18 Atl. 549; *Pickwell v. Spencer*, L. R. 7 Exch. 105. See *Wald's Pollock on Contracts* (Williston's Ed.), 252.

37. *McRee v. Means*, 34 Ala.

349; *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004; *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080; *Funk v. Eggleston*, 92 Ill. 515, 534; *Jackson v. Bull*, 10 Johns. (N. Y.) 148, 6 Am. Dec. 321; *In re Semple's Estate*, 189 Pa. St. 385, 42 Atl. 28; *Newman v. Kent*, 1 Mer. 240; *Jillard v. Edge*, 3 De G. & Sm. 502. Compare *Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 1152; *Willis v. Roberts*, 48 Me. 257; *Merton v. O'Brien*, 117 Wis. 437, 94 N. W. 340, in which the devisee was regarded as personally liable, without reference to any language indicative of an intention to that effect.

38. *Clift v. Moses*, 16 N. Y. 144, 22 N. E. 393.

39. *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Huston v. Huston*, 29 Iowa, 347; *Baylor v. DeJarnette*, 13 Gratt. (Va.) 152; *Fuller v. McEwen*, 17 Ohio St. 288.

§ 661. **Agreements for security (equitable mortgages).** In equity, any agreement in writing, however informal, made by the owner of land, upon a valid consideration, by which an intention is shown that the land shall be security for the payment of money by him, creates an equitable lien upon the land.<sup>49</sup> Such an informal instrument or contract, by which the owner of land agrees or undertakes to secure his creditor upon the land, is ordinarily referred to as an "equitable mortgage," an expression which originated in the consideration that a transaction of this character, while absolutely ineffective at law, as not involving a transfer of the legal title, was effective in equity for the purpose for which a legal mortgage was ordinarily utilized, to secure the payment of money. And the view that an instrument of an informal character, such as is above referred to, if intended as security, is effective for this purpose, not as a mortgage properly so called, but as an "equitable mortgage," is readily comprehensible in jurisdictions in which the normal mortgage involves a transfer of the legal title. It is, however, somewhat difficult to understand what constitutes an equitable mortgage in states in which the lien theory of a mortgage prevails. In those states, an instrument, however informal in character, which indicates an intention, on the part of the person executing it, to make land belonging to him security for the payment of his debt, may well be regarded as a

40. *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999; *Walker v. Brown*, 165 U. S. 654, 41 L. Ed. 865; *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Bell v. Pelt*, 51 Ark. 433, 4 L. R. A. 247, 14 Am. St. Rep. 57, 11 S. W. 684; *Berard v. Fitzpatrick*, 134 Ark. 190, 203 S. W. 1039; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal.

639, 91 Am. Dec. 602; *Earle v. Sunyside Land Co.*, 150 Cal. 214, 88 Pac. 920; *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Standorf v. Shockley*, 16 N. D. 73, 11 L. R. A. (N. S.) 869, 14 Ann. Cas. 1099, 111 N. W. 622; *Cotterell v. Long*, 20 Ohio, 464; *Wayt v. Carwithen*, 21 W. Va. 516.

legal mortgage, if properly executed for that purpose. It may not be in such form, or so acknowledged, as to be available for record, but as between the immediate parties it is as effective as would be a mortgage of the most formal character. The presence of a greater or less degree than is usual of informality in the language used cannot, one would suppose, change the character of the mortgage. In such jurisdictions it would seem that the only place for the doctrine of equitable mortgages is in connection with instruments which, while signed, are not otherwise executed as the statute requires a mortgage to be executed, a case which can but seldom occur, and also instruments which do not indicate an intention to create an immediate lien on the land, but merely involve an agreement to create a lien in the future, in which class of instruments may be included a mortgage on property subsequently to be acquired. The courts of these states, however, appear to use the expression "equitable mortgage" with considerable freedom, as applicable to all instruments intended for purposes of security, which assume an unusual form.

Applying the theory of equitable mortgages or liens, or at least using that nomenclature, it has been held that one may create a lien on land by an agreement in terms pledging or giving a lien on the land,<sup>41</sup> and may, by a mere indorsement on a note to the effect that it is a charge on land, make it such in effect.<sup>42</sup> So, a power of attorney authorizing one to collect the rents of land belonging to the donor of the power, and to apply them on a debt, or for other specific purposes,

41. *Chase v. Peck*, 21 N. Y. 581; *Pinch v. Anthony*, 8 Allen (Mass.) 526; *Davis v. Clay*, 2 Mo. 130; *Cummings v. Jackson*, 55 N. J. Eq. 805, 38 Atl. 763; *Ward v. Stark Bros.*, 91 Ark. 268, 121 S. W. 282.

42. *Peckham v. Haddock*, 36 Ill. 38. So a note for the purchase price of land may be charged on the land by a recital in the note to that effect. *Post*, § 665, note 21.

has been regarded as creating an equitable lien on the land;<sup>43</sup> as has an agreement that a certain debt shall be paid out of the price which may be received for certain land.<sup>44</sup> And it has even been decided that a recital, in a note given for lumber purchased for the erection of a house, that the ownership of the lumber is to remain in the seller until the note is paid, gives a lien on the house and the land on which it is built.<sup>45</sup>

An assignment, for purposes of security, by a vendee of land, of his contract rights in the land, has been regarded as creating a lien on the land, or, rather, on his equitable interest in the land.<sup>46</sup>

A mortgage instrument which is lacking in some respect as regards its form or execution will usually be effective as imposing an equitable lien or charge to the extent of the obligation which it was intended to secure.<sup>47</sup> For instance, if an instrument intended as a

43. *Joseph Smith Co. v. McGuinness*, 14 R. I. 59; *Spooner v. Sandilands*, 1 Younge & C. 390; *Cradock v. Scottish Provident Institution*, 63 Law J. Ch. 15; *Abbott v. Stratten*, 3 Jones & L. 603. A power to sell land and apply the proceeds on a debt has also been regarded as creating such a lien. *American Loan & Trust Co. v. Billings*, 58 Minn. 187; *Pember ton v. Simmons*, 100 N. C. 316, 6 S. E. 122.

44. *Brown v. Brown*, 103 Ind. 23, 2 N. E. 233; *Johnson v. Johnson*, 40 Md. 189; *Kretzer v. Lorshbaugh*, 117 Md. 562, 83 Atl. 1027 (*semble*); *Pinch v. Anthony*, 8 Allen (Mass.) 536; *Connolly v. Bouck*, 174 Fed. 312, 98 C. C. A. 184.

45. *Ross v. Perry*, 105 Ala. 533, 16 So. 915.

46. *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530; *Tumlin v.*

*Tumlin*, 195 Ala. 457, 70 So. 254; *Jones v. Lapham*, 15 Kan. 540; *Gamble v. Ross*, 88 Mich. 315, 50 N. W. 379; *Hackett v. Watts*, 138 Mo. 502, 40 S. W. 113; *Burrows v. Hovland*, 40 Neb. 464, 58 N. W. 947; *Lovejoy v. Chapman*, 23 Ore. 571, 32 Pac. 687; *Russell's Appeal*, 15 Pa. St. 319.

47. *Burgh v. Francis, Finch*, 28; *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306, 26 Pac. 119; *Price v. McDonald*, 1 Md. 414, 54 Am. Dec. 657; *McQuie v. Peay*, 58 Mo. 56; *Gale v. Morris*, 30 N. J. Eq. 285; *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21, 28 Am. Dec. 616; *Delaire v. Keenan*, 3 Desaus. (S. C.) 74, 4 Am. Dec. 604.

formal mortgage is ineffective as such by reason of the lack of a seal,<sup>48</sup> or of witnesses,<sup>49</sup> it may take effect by way of equitable charge. And so it has been decided that an instrument which purports to create a mortgage in favor of a copartnership, which cannot take effect as a legal mortgage by reason of the fact that the legal title to land cannot be vested in a copartnership,<sup>50</sup> will take effect as an equitable charge.<sup>51</sup> A like view has been adopted with reference to a mortgage instrument which omitted words of inheritance,<sup>52</sup> and a deed of trust made to secure a debt, which omitted to name a trustee.<sup>53</sup> The doctrine has occasionally been applied in the case of the defective execution of a mortgage instrument by an agent in his own name instead of in that of the principal.<sup>54</sup>

An agreement for value to give a mortgage on land, to secure a particular debt, has been regarded in equity as creating a lien on the land, on the principle, it has been said, that equity regards that as done

48. *Peckham v. Haddock*, 36 Ill. 38; *Sanders v. McDonald*, 63 Md. 503; *McChurg v. Phillips*, 49 Mo. 315; *Bullock v. Whipp*, 15 R. I. 195, 2 Atl. 309.

49. *Margarum v. J. S. Christie Orange Co.*, 37 Fla. 165, 19 So. 637; *Moore v. Thomas*, 1 Oreg. 201; *Pryce v. Massey*, 35 S. C. 127, 14 S. E. 768; *Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659.

50. *Ante*, § 196.

51. *New Vienna Bank v. Johnson*, 47 Ohio St. 306, 8 L. R. A. 614, 24 N. E. 503; *Stark v. Kirkley*, 129 Mo. App. 353, 108 S. W. 625.

52. *Gale v. Morris*, 29 N. J. Eq. 222. In *Dietrich v. Hutchinson*, 81 Vt. 160, 69 Atl. 661, it was held that when a mortgage was

partially invalid because the husband of the owner of the land, though he signed the instrument, was not named as a party thereto, it was good as an equitable mortgage on the husband's interest, he having in effect indicated in writing his intention to secure the debt thereby.

53. *McQuie v. Peay*, 58 Mo. 56; *Dulaney v. Willis*, 95 Va. 606, 63 Am. St. Rep. 815, 29 S. E. 324.

54. *Love v. Sierra Nevada Lake Water & Min. Co.*, 32 Cal. 639, 91 Am. Dec. 602; *Peers v. McLaughlin*, 88 Cal. 294, 22 Am. St. Rep. 306, 26 Pac. 119; *Bundy v. Ophir, Iron Co.*, 38 Ohio St. 300. Compare *Brown v. Farmers' Supply Depot Co.*, 23 Ore. 541, 32 Pac. 548.



which ought to have been done,<sup>55</sup> in other words, that since equity recognizes an obligation to give the mortgage as agreed, it will regard the mortgage as already given. And on a like theory a mortgage on property to be acquired in the future is given effect in equity, although ordinarily ineffectual as a mortgage strictly legal in character.<sup>56</sup>

The theory of a lien thus arising, in the view of a court of equity, as a result of an agreement that a lien shall be created, or shall exist, appears to be that the court regards such an agreement as a valid contract, to which it will give effect, on principles analogous to those underlying the doctrine of specific performance, as against not only the promisor himself, but also as against third persons acquiring an interest in the land as volunteers or with notice of the agreement.<sup>57</sup> That the lien is based on contract<sup>58</sup> is necessarily involved in *dicta* or decisions that the transaction must be supported by a valuable consideration,<sup>59</sup> as

55. *Richardson v. Wren*, 11 Ariz. 395, 16 L. R. A. (N. S.) 190, 95 Pac. 124; *King v. Williams*, 66 Ark. 323, 50 S. W. 695; *Remington v. Higgins*, 54 Cal. 620; *Woarms v. Hammond*, 5 App. Cas. (D. C.) 338; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535; *Hughes v. Mullaney*, 92 Minn. 485, 100 N. W. 217; *Carter v. Holman*, 60 Mo. 498; *In re* Petition of Howe, 1 Paige (N. Y.) 125, 19 Am. Dec. 395; *Sprague v. Cochran*, 144 N. Y. 104, 38 N. E. 1000; *Carter v. Sapulpa & I. R. Co.*, 49 Okla. 471, 153 Pac. 853; *Smith v. Patten*, 12 W. Va. 541; *Bridgeport Electric & Ice Co. v. Meader*, 18 C. C. A. 451, 72 Fed. 115; *Baltimore & Ohio R. Co. v. Berkley Springs & P. R. Co.*, 168 Fed. 770.

56. See 3 Pomeroy, Eq. Jur. §

1236, and *ante*, § 602.

57. See *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. Ed. 999; *Tallafarro v. Barnett*, 37 Ark. 511; *Jones v. Lapham*, 15 Kan. 540; *Punch v. Anthony*, 8 Allen (Mass.) 536; *Martin v. Bowen*, 51 N. J. Eq. 452, 26 Atl. 823; *Lake v. Doud*, 10 Ohio, 415; *De Arusmant v. De Lagerty*, 8 Lea (Tenn.) 188; *Cox v. Romine*, 9 Gratt. (Va.) 27.

58. That it is so based, see *In re* Lucan, 45 Ch. D. 470; and the remarks thereon in 7 Law Quart. Rev. 103; also Fisher, Mortgages (6th Ed.) §§ 24-27.

59. See *In re* Lucan, 45 Ch. D. 470; *Tailby v. Official Receiver*, 13 App. Cas. at 546, 549, per Lord Macnaghten; *Eaton v. Patterson*, 2 Stew. & P. 9; *Patrick v. Mor-*

well as in decisions that it must be evidenced by an instrument in writing which satisfies the fourth section of the Statute of Frauds.<sup>60</sup> It would seem to follow that, except in jurisdictions where a past consideration is effectual to support a contract, such an instrument by which it is sought to secure an indebtedness will not be given effect as an equitable lien or mortgage unless the indebtedness is created at the time of the delivery of the instrument, or some other valuable consideration passes at that time. The cases however make no suggestion to that effect, and presumably such a lien has occasionally been recognized as valid and effective although created merely to secure a past indebtedness without any new consideration.

While the applicability of the Statute of Frauds to the creation of such a lien appears to be generally recognized,<sup>61</sup> there are quite a number of decisions that the transaction is taken out of the statute on the theory of part performance, in case, on the faith of the verbal agreement, money was advanced by the person claiming the lien.<sup>62</sup>

In order that an equitable lien be thus created on land by agreement, it is necessary that the land itself

row, 33 Colo. 509, 108 Am. St. Rep. 107, 81 Pac. 242; *Tiernan v. Poor*, 1 Gill. & J. (Md.) 216; *Davis v. Clay*, 2 Mo. 130; *Dwight v. Newell*, 3 N. Y. 185; *Lanning v. Thompson*, 45 Barb. (N. Y.) 308.

60. *Ex parte Hall*, 10 Ch. Div. 615; *Jarvis v. Jarvis*, 63 L. J. Ch. 10; *Driver v. Broad* (1893), 1 Q. B. 539. *In re Beetham*, 18 Q. B. Div. 380, 766; *Edwards v. Scruggs*, 155 Ala. 568, 46 So. 850; *Lane v. Lloyd*, 33 Ky. L. Rep. 570, 110 S. W. 401; *Clabaugh v. Byerly*, 7 Gill (Md.) 354, 48 Am. Dec. 575; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; *Marquat v. Mar-*

*quat*, 7 How. Pr. (N. Y.) 417; *Meixell v. Meixell*, 161 App. Div. 518, 146 N. Y. Supp. 587. And see *Goodman v. Randall*, 44 Conn. 321; *Bowers v. Oyster*, 3 Pen. & W. (Pa.) 239.

61. See last preceding note.

62. *King v. Williams*, 66 Ark. 333, 50 S. W. 595; *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 114 Am. St. Rep. 470, 86 Pac. 49; *Cole v. Cole*, 41 Md. 301; *Irvine v. Armstrong*, 31 Minn. 216, 17 N. W. 343; *Putnam v. Summerlin*, 129 Mo. App. 353, 108 S. W. 625; *Dean v. Anderson*, 34 N. J. Eq. 496; *Sprague*

be specified in the instrument,<sup>63</sup> and that the intention clearly appear that the land is to be security for the performance of the obligation.<sup>64</sup>

— **Deposit of title deeds.** In England it is a well-established doctrine that, if the title deeds to land are deposited by a debtor with his creditor, such deposit is evidence of an agreement to create a mortgage or charge on the land, which equity will enforce.<sup>64a</sup> The deposit of the deeds does not itself create a charge, but is merely evidence, with other circumstances, of an agreement to create one,<sup>65</sup> and is regarded as a part performance taking the agreement out of the Statute of Frauds.<sup>66</sup>

A lien or charge of this character has been recognized in a number of judicial opinions in this country, usually, however, in cases not directly involving the validity of such a lien.<sup>67</sup> In others, such a deposit is

v. Cochran, 144 N. Y. 625, 38 N. E. 1001; Baker v. Baker, 2 S. D. 261, 49 N. W. 1064.

63. *Mornington v. Keane*, 2 De Gex & J. 292; *Borden v. Croak*, 131 Ill. 68, 19 Am. St. Rep. 23, 22 N. E. 793; *Carmichael v. Arms*, 51 Ind. App. 689, 100 N. E. 302; *Adams v. Johnson*, 41 Miss. 258; *Lee v. Cole*, 17 Ore. 559, 21 Pac. 819; *Boehl v. Wadgymer*, 54 Tex. 589. Compare *Payne v. Wilson*, 74 N. Y. 348, in which case an agreement to give a mortgage on one of several houses was regarded as effective.

64. *Mornington v. Keane*, 2 De Gex & J. 292; *Bowen v. McCarthy*, 127 Ill. 17, 18 N. E. 757; *Carmichael v. Arms*, 51 Ind. App. 689, 100 N. E. 302; *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, 44 N. E. 617; *Hos-sack v. Graham*, 20 Wash. 184, 55

Pac. 36; *Knott v. Shepherdstown Mfg. Co.*, 30 W. Va. 790, 5 S. E. 266.

64a. 1 Coote, *Mortgages* (8th Ed.) 67 *et seq.*; *Story, Equity Jur.* § 1020; *Russel v. Russel*, 1 Brown Ch. 269, 1 White & Tud. Lead Cas. Eq. 931.

65. *Norris v. Wilkinson*, 12 Ves. 192; *Chapman v. Chapman*, 13 Beav. 308; *Ashburner, Mortgages*, 26. Consequently, a deposit merely to enable the lender to prepare a regular mortgage is not sufficient to create a lien. *Norris v. Wilkinson*, 12 Ves. 192; *Lloyd v. Attwood*, 3 De Gex & J. 614, 651; *Hutzler v. Philips*, 26 S. C. 126, 4 Am. St. Rep. 687, 1 S. E. 502.

66. *Russel v. Russel*, 1 Brown Ch. 269; 1 Coote, *Mortgages*, 68.

67. *Jennings v. Augir*, 215 Fed. 658; *Richards v. Leaming*, 27 Ill. 431; *Hall v. McDuff*, 24 Me. 311;

regarded as not creating a lien, on the ground that the contrary view is inconsistent with the system of conveyancing and registration in force in this country, and also involves a violation of the Statute of Frauds.<sup>68</sup>

It would seem that, as between the original parties, and as against purchasers with notice, the only objection to the efficacy of the charge in such a case lies in the fact that it is not evidenced by a writing complying with the Statute of Frauds. If an agreement for a charge or mortgage is so evidenced, the fact that there is a simultaneous deposit of title deeds cannot affect the validity of the agreement as creating a lien; and the English cases take the further step of regarding the deposit of the deeds with the lender as sufficient performance to take the agreement out of the statute. In this country, where the title deeds are, by reason of the recording system, of but little importance as evidence of title, it does not seem that their deposit with the lender can well be regarded as part performance of the agreement.

**§ 662. Lien for improvements.** As before stated, one who makes improvements on land in the mistaken belief that he is the owner thereof is given, by equity, a right to compensation for such improvements as against the true owner coming into equity to assert his

Cary v. Robinson, 8 Mass. 159; Gale's Ex'rs v. Morris, 29 N. J. Eq. 224; Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9; Chase v. Peck, 21 N. Y. 584; Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 43, 51; Hackett v. Reynolds, 4 R. I. 512; Hutzler v. Phillips, 26 S. C. 137, 4 Am. St. Rep. 687, 1 S. E. 502; Jarvis v. Dutcher, 16 Wis. 307.

68. Lehman v. Collins, 69 Ala. 127; Davis v. Davis, 88 Ga. 191, 14 S. E. 194 (statute); Vanmeter

v. McFaddin, 8 B. Mon. (Ky.) 437; *In re Snyder*, 138 Iowa, 553, 19 L. R. A. (N. S.) 206, 114 N. W. 615; Gardner v. McClure, 6 Minn. 250; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; Gorhard v. Flynn, 25 Miss. 58; Bloomfield State Bank v. Miller, 55 Neb. 243, 44 L. R. A. 387, 70 Am. St. Rep. 381, 75 N. W. 569; Shitz v. Dffenbach, 3 Pa. 233; Meador v. Meador, 3 Heisk. (Tenn.) 562; Parker v. Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S.

rights,<sup>69</sup> and this right to compensation has been regarded as enforceable as against the land itself.<sup>70</sup>

An owner of an undivided interest in land who is entitled to contribution from his cotenants on account of repairs or improvements made by him is given by equity a lien on their interests to secure such contribution.<sup>71</sup> Likewise, a life tenant under a will who completes improvements begun by his testator is entitled to compensation therefor, and is given a lien to secure such compensation.<sup>72</sup>

According to some decisions, a tenant under a lease providing that he shall be compensated, at the end of the term, for any improvements made by him, has a lien on the land for the value of such improvements.<sup>73</sup> By other decisions, his right to a lien is denied.<sup>74</sup>

**§ 663. Lien for owelty of partition.** When, by a decree for the partition of land, one of the parties is

E. 673; *Bicknell v. Bicknell*, 31 Vt. 498. See editorial note, 14 *Columbia Law Rev.* 642.

69. *Ante*, § 274.

70. *Union Hall Ass'n v. Morrison*, 39 Md. 281; *Dehn v. Dehn*, 170 Mich. 407, 136 N. W. 453; *Hughes v. Stallings*, 52 Miss. 375; *Hannibal & St. J. R. Co. v. Shortridge*, 86 Mo. 662; *Field v. Moody*, 111 N. C. 353, 16 S. E. 239; *Preston v. Brown*, 35 Ohio St. 18; *Hatcher v. Briggs*, 6 Ore. 31; *Green v. McDonald*, 75 Vt. 93, 53 Atl. 332; 2 Story, Eq. Jur. § 1237; 3 *Pomeroy*, Eq. Jur. § 124.

71. *Baird v. Jackson*, 98 Ill. 78; *Prentice v. Janssen*, 79 N. Y. 478; *Alexander v. Ellison*, 79 Ky. 148; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580; 3 *Pomroy*, Eq. Jur. § 1240. See *Houston v. McCluney*, 8 W. Va. 135.

72. *Hibbert v. Cooke*, 1 Sim. & S. 552; *Sohier v. Eldredge*, 103 Mass. 345, 351; *Broyles v. Wad-del*, 11 Heisk. (Tenn.) 32; *Gavin v. Carling*, 55 Md. 530; 2 Story, Eq. Jur. § 1237.

73. *Franklin Land, Mill & Water Co. v. Card*, 84 Me. 528, 24 Atl. 960; *Gray v. Cornwall's Assignee*, 95 Ky. 566, 26 S. W. 1018; *Con-over v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266.

74. *Gardner v. Samuels*, 116 Cal. 84, 58 Am. St. Rep. 135, 47 Pac. 935; *Beck v. Birdsall*, 19 Kan. 550; *Watson v. Gardner*, 119 Ill. 312, 10 N. E. 192; *Coffin v. Talman*, 8 N. Y. 465; *Hlte v. Parks*, 2 Tenn. Ch. 373; *Speers v. Flack*, 34 Mo. 101, 84 Am. Dec. 74. See 2 *Tiffany*, *Landlord & Ten.* § 2711.

directed to pay to another a certain sum for "owelty of partition,"<sup>75</sup> the property received by him on the partition is regarded as subject to a lien for such sum until paid.<sup>76</sup>

### § 664. Implied lien of grantor (vendor's lien).

Upon the conveyance of land, a lien on the land is, in England and a number of states, recognized in equity as arising by implication of law in favor of the vendor for the purchase price, so far as this remains unpaid.<sup>77</sup> In other jurisdictions, however, the existence of such a lien is denied.<sup>78</sup> In the United States courts

75. See *ante*, § 204.

76. *Freeman, Cotenancy*, § 507; *Baltimore & O. R. Co. v. Trimble*, 51 Md. 99; *Dobbin v. Rex*, 106 N. C. 444, 11 S. E. 260; *McCandless' Appeal*, 98 Pa. St. 489; *Dunshee v. Dunshee*, 243 Pa. 599, 90 Atl. 362; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861.

77. *Mackreth v. Symmons*, 15 Ves. 329, 1 White & T. Lead Cas. Eq. 447; *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. Rep. 718, 3 So. 519; *Shall v. Biscoe*, 18 Ark. 142; *Salmon v. Hoffman*, 2 Cal. 138, 56 Am. Dec. 322; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Trustees of Schools v. Wright*, 11 Ill. 603; *Fouch v. Wilson*, 60 Ind. 64, 28 Am. Rep. 651; *Kendrick v. Eggleston*, 56 Iowa, 128, 41 Am. Rep. 90, 8 N. W. 786; *Magruder v. Peter*, 11 Gill. & J. (Md.) 217; *Carr v. Hobbs*, 11 Md. 285; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; *Marsh v. Turner*, 4 Mo. 253; *Corlies v. Howland*, 26 N. J. Eq. 311; *Seymour v. McKinstry*, 106 N. Y. 230,

12 N. E. 348, 14 N. E. 94; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Craggs v. Earls*, 8 Okla. 462, 58 Pac. 637; *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Rep. 612; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199; *Howe v. Harding*, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41; *Madden v. Barnes*, 45 Wis. 135, 30 Am. Rep. 703.

78. *Atwood v. Vincent*, 17 Conn. 575; *Simpson v. Mundee*, 3 Kan. 172; *Philbrook v. Delano*, 29 Me. 410; *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Ansley v. Pasahro*, 22 Neb. 662, 35 N. W. 885; *Womble v. Battle*, 38 N. C. 182; *Frame v. Sliter*, 29 Ore. 121, 34 L. R. A. 690, 54 Am. St. Rep. 781, 45 Pac. 290; *Kauffelt v. Bowser*, 7 Serg. & R. (Pa.) 64, 10 Am. Dec. 428; *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569; *Wragg's Representatives v. Comptroller-General*, 2 Desaus. (S. C.) 520. See *Arlin v. Brown*, 44 N. H. 102.

In Georgia, Vermont, Virginia and West Virginia it has been abolished by statute. 1 *Stimson's Am. St. Law*, § 1950.

the lien is regarded as existing in a particular state only when it is recognized by the laws or courts of such state.<sup>79</sup> Even in those states where the lien is recognized, it is not favored by the courts, it being regarded as inconsistent with the policy of the registration laws, which is adverse to secret equities, and the vendor being in a position, by a mortgage or express reservation of a lien, to protect his interests otherwise.<sup>80</sup>

The lien does not exist if the price which is to be paid for the land is not exactly ascertained, as when there is a sale of land and personalty together, and it does not appear what part of the consideration is to be paid for each.<sup>81</sup> And so it does not arise in the

79. Bayley v. Greenleaf, 7 Wheat. (U. S.) 46, 5 L. Ed. 393; Chilton v. Braiden's Adm'x, 2 Black (U. S.) 458, 17 L. Ed. 304; Cordova v. Hood, 17 Wall. (U. S.) 1, 21 L. Ed. 587; Rice v. Rice (C. C.) 36 Fed. 860.

80. Various explanations of the origin and basis of the doctrine of the lien are given. Thus, it is said to rest on "natural equity" (4 Kent's Comm. 152), an implied trust in favor of the vendor (Mackreth v. Symmons, 15 Ves. 329; 2 Story, Eq. Jur. § 1217; Blackburn v. Gregson, 1 Brown Ch. 420. *Contra*, 3 Pomeroy, Eq. Jur. § 1250, note; Ahrend v. Odiorne, 118 Mass. 264, 19 Am. Rep. 449), and the desire of chancery, in the time when land could not be subjected to a simple contract debt, to evolve some device by which land could be made liable in the hands of the purchaser for the unpaid price (notes to Mackreth v. Symmons, 1 White & T. Lead. Cas. Eq. 500; Gray, C. J., in Ahrend v. Odiorne, 118 Mass.

261, 19 Am. Rep. 449; Editorial note, 9 Columbia Law Rev. 261. *Contra*, 3 Pomeroy, Eq. Jur. § 1250). Mr. Pomeroy considers that it is merely the application of a general judicial conception that the thing sold constitutes, to some extent at least, a fund for the payment of the price, a conception which was not applied to chattels because they were of less importance than land, and, furthermore, were articles of commerce, the transfer of which it was undesirable in any way to hamper. See 3 Pomeroy, Eq. Jur. § 1250. Another suggestion is, that the doctrine involves the application of "a broad and somewhat indefinite principle, that one who has parted with money or property expecting a specified return should be assured either that return or the redelivery of what he parted with." Prof. Samuel Williston in 19 Harv. Law. Rev. at p. 557.

81. Stringfellow v. Ivie, 73 Ala. 209; Hanvey v. Gaines, 181 Ala.

case of an unliquidated claim,<sup>82</sup> as when the purchaser agrees to support the vendor during his life,<sup>83</sup> or to pay off incumbrances or erect buildings,<sup>84</sup> or to convey certain land or deliver certain chattels to the vendor.<sup>85</sup> But if the price to be paid is specified, it is immaterial that it may be or is to be paid by the delivery of particular articles or class of articles, or by the rendition of services.<sup>86</sup> And even without any specification of the price in terms of money, if the consideration for a conveyance is the conveyance of other land and also the payment of money, there is, it seems, a lien for the amount of such payment.<sup>87</sup>

288, 61 So. 883; *Gard v. Gard*, 108 Cal. 19, 40 Pac. 1059; *Warner v. Bliven*, 127 Mich. 665, 87 N. W. 49; *Griffin v. Byrd*, 74 Miss. 32, 19 So. 717; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; *Snyder v. Snyder*, 115 N. Y. Supp. 993; *Sutton v. Sutton*, 39 Tex. 549; *McCandlish v. Keen*, 13 Gratt. (Va.) 615, 629. In Kentucky there is, in such case, a lien upon the land for the entire purchase price. *Doty v. Deposit Building & Loan Ass'n*, 103 Ky. 710, 43 L. R. A. 551, 46 S. W. 219, 47 S. W. 423. And see *Nesbitt v. Chesebro*, 89 Kan. 863, 133 Pac. 585; Editorial note 13 Columbia Law Rev. 150.

82. *Parrish v. Hastings*, 102 Ala. 414, 48 Am. St. Rep. 50, 14 So. 783; *Harris v. Hanie*, 37 Ark. 348; *Chapman v. Beardsley*, 31 Conn. 115; *Ross v. Clark*, 225 Ill. 226, 80 N. E. 275; *Hiscock v. Norton*, 42 Mich. 320, 3 N. W. 868; *Burroughs v. Gilliland*, 90 Miss. 127, 43 So. 301; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*,

8 Leigh (Va.) 522.

83. *Arlin v. Brown*, 44 N. H. 102; *Burroughs v. Burroughs*, 164 Ala. 329, 28 L. R. A. (N. S.) 607, 137 Am. St. Rep. 59, 50 So. 1025; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 217; *Salyers v. Smith*, 67 Ark. 526, 55 S. W. 936; *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252, 45 N. W. 867; *Brawley v. Catron*, 8 Leigh (Va.) 522.

84. *McDonald v. Elyton Land Co.*, 78 Ala. 382; *Cox v. Smith*, 93 Ark. 371, 137 Am. St. Rep. 89, 125 S. W. 437; *Womble v. Womble*, 14 Cal. App. 739, 113 Pac. 353; *Patterson v. Edwards*, 29 Miss. 67; *Welch v. Farmers' Loan & Trust Co.*, 165 Fed. 561, 91 C. C. A. 399.

85. *Harris v. Haine*, 37 Ark. 348; *Coit v. Fougere*, 36 Barb. (N. Y.) 195. *Contra*, *Neel v. Clay*, 48 Ala. 252; *Cordova Coal Co. v. Long*, 91 Ala. 538, 8 So. 765.

86. *Young v. Harris*, 36 Ark. 162; *Winters v. Fain*, 47 Ark. 493, 1 S. W. 711; *Cox v. Smith*, 93 Ark. 371, 137 Am. St. Rep. 89, 125 S. W. 437; *Harvey v. Kelley*, 41 Miss. 490, 93 Am. Dec. 267.

87. *Bryant v. Stephens*, 58 Ala.



If the consideration for the conveyance of land consists, in whole or in part, of the transfer to the vendor of a specific thing or things, taken at a valuation based on the representations of the purchaser, and these representations are subsequently found to be fraudulent, the vendor, it has been decided, is entitled to a lien on the land for the difference between their actual value and the fictitious value placed thereon.<sup>88</sup>

If the purchaser, as a part of the consideration for the land purchased, agrees to assume and pay a particular debt of the vendor to a third person, the vendor has been regarded as having a vendor's lien on the land for the amount of such debt, on the theory that it is in effect an agreement to pay that amount to the vendor himself.<sup>89</sup> And it has been decided, on a like theory, that where there is an exchange of lands, an agreement by one of the parties to pay off an incumbrance on the land transferred by him, as part of the consideration, entitles the other to a vendor's lien to the amount of the incumbrance in case it is not paid off as agreed.<sup>90</sup>

One who advances money to the purchaser of land in order to enable the latter to pay therefor has no lien on the land analogous to that which would exist

636; *Pratt v. Clark*, 57 Mo. 189.

88. *Williamson v. Woten*, 132 Ind. 202, 31 N. E. 791; *McDole v. Purdy*, 23 Iowa, 277; *Brown v. Byam*, 65 Iowa, 374, 21 N. W. 684; *Bradley v. Bosley*, 1 Barb. Ch. (N. Y.) 125; *Gee v. McMillan*, 14 Ore. 268, 58 Am. Rep. 315, 12 Pac. 417; *White v. Street*, 67 Tex. 177, 2 S. W. 529. *Contra*, *Ross v. Clark*, 126 Ill. App. 460; *Graham v. Moffett*, 119 Mich. 303, 17 Am. St. Rep. 393, 78 N. W. 132.

89. *Koch v. Roth*, 150 Ill. 212, 37 N. E. 717; *Strohm v. Good*, 113 Ind. 93, 14 N. E. 901; *Henson v.*

*Reed*, 71 Tex. 726, 10 S. W. 522. In *Pleasants v. Fay*, 13 App. Cas. (D. C.) 237, it was decided that, where the purchaser agreed to pay a supposed incumbrance on the property, and after the conveyance it was discovered that the vendor had paid it, a fact which he had overlooked, he was entitled to a lien for the amount so paid by him.

90. *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 485; *Pratt v. Clark*, 57 Mo. 189; *Elliott v. Plator*, 43 Ohio St. 198, 1 N. E. 222.

in favor of the vendor for the unpaid purchase money.<sup>91</sup> But if it is agreed between the vendor and purchaser of land that the consideration, or a part thereof, shall be paid to a third person, as when the purchase money note is made payable to such third person, the latter is regarded as having a lien to enforce such payment.<sup>92</sup>

The lien exists independently of whether the land is conveyed by the vendor to the vendee himself, or to a third person to whom the vendee requests that it be conveyed by the vendor.<sup>93</sup>

— **Persons affected by the lien.** The lien binds the land in the hands of the heirs and devisees of the purchaser,<sup>94</sup> and is ordinarily effective as against all persons<sup>95</sup> other than *bona fide* purchasers for

91. Chapman v. Abrahams, 61 Ala. 168; Hardin v. Hooks, 72 Ark. 433, 81 S. W. 386; Gilman v. Dingeman, 49 Iowa, 308; Pearl v. Hervey, 70 Mo. 160; McKay v. Green, 13 Ohio, 148, 42 Am. Dec. 193; Gray v. Baird, 4 Lea (Tenn.) 212; Ruhl v. Kauffman, 65 Tex. 723. *Contra*, Carey v. Boyle, 53 Wis. 574, 11 N. W. 47.

92. Zirkle v. Hendon, 180 Ala. 209, 60 So. 834; Wilkinson v. May, 69 Ala. 33; Francis v. Wells, 2 Colo. 660; Pruitt v. Pruitt, 91 Ind. 595; Mize v. Barnes, 78 Ky. 596; Kilbourne v. Wiley, 124 Mich. 370, 83 N. W. 99; Zeiser v. Cohn, 207 N. Y. 407, 101 N. E. 184; Whetsel v. Roberts, 31 Ohio St. 503; Simily v. Adams, 88 Mo. App. 621; Zwingle v. Wilkinson, 94 Tenn. 246, 28 S. W. 1096; Joiner v. Perkins, 59 Tex. 300; Neese v. Riley, 77 Tex. 348, 14 S. W. 65; *Contra*, in view of statute, Bray v. Booker, 6 N. D. 526, 72 N. W. 933.

93. Crampton v. Prince, 83 Ala.

246, 3 Am. St. Rep. 718, 3 So. 519; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Strohm v. Good, 113 Ind. 93, 14 N. E. 901; Campbell v. Henry, 45 Miss. 326; De Long v. Marshall, 66 Fla. 410, 63 So. 723.

94. Edmonson v. Phillips, 73 Mo. 57; Solomon v. Skinner, 82 Tex. 345, 18 S. W. 698; Pintard v. Goodloe, Hempst. 502 Fed. Cas. No. 11,171.

95. Pylant v. Reeves, 53 Ala. 132, 25 Am. Rep. 605; Miller v. Mattison, 105 Ark. 201, 150 S. W. 710; Finnell v. Finnell, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740; Bowen v. Grace, 64 Fla. 28, 59 So. 563; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Higgins v. Kendall, 73 Ind. 522; Lamka v. Donnelly, 163 Iowa, 255, 143 N. W. 869; Finnell v. Finnell, 156 Cal. 589, 134 Am. St. Rep. 143, 105 Pac. 740; Rewis v. Williamson, 51 Fla. 529, 41 So. 449; Christopher v. Christopher, 64 Md. 583, 3 Atl. 296; Parker v. Foy, 43 Miss.

value<sup>96</sup> and, in some states, subsequent *bona fide* judgment creditors of the purchaser.<sup>97</sup> It takes priority over the dower claim of the widow of the purchaser.<sup>98</sup>

A subsequent purchaser is regarded as having notice of the lien, so as to take subject thereto, if he knows, or has reason to know, that the purchase price is still unpaid, this being sufficient to put him on inquiry.<sup>99</sup> And he is charged with such notice by the

260, 5 Am. Rep. 484; *Thomas v. Bridges*, 73 Mo. 530; *Bates v. Childers*, 4 N. Mex. 347, 20 Pac. 164; *Knickerbocker Trust Co. v. Carteret*, 79 N. J. Eq. 501, 82 Atl. 146; *Texas Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12.

96. *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. Ed. 393; *Munn v. Achey*, 110 Ala. 628, 18 So. 299; *Neff v. Elder*, 84 Ark. 277, 120 Am. St. Rep. 67, 105 S. W. 260; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Hawes v. Chaille*, 129 Ind. 435, 28 N. E. 848; *Dance v. Dance*, 56 Md. 433; *Bang v. Brett*, 62 Minn. 4, 63 N. W. 1067; *Walton v. Hargroves*, 42 Miss. 124, 97 Am. Dec. 429; *Traphagen v. Hand*, 36 N. J. Eq. 384; *Seymour v. McKinstry*, 106 N. Y. 230, 12 N. E. 348, 14 N. E. 94; *Campbell v. Sidwell*, 61 Ohio St. 179, 55 N. E. 609; *Craggs v. Earls*, 8 Okla. 462, 58 Pac. 637; *Lewis v. Henderson*, 22 Ore. 548, 30 Pac. 324; *Twohig v. Brown*, 85 Tex. 51, 19 S. W. 768; *Poe v. Paxton's Heirs*, 26 W. Va. 607.

97. *Webb v. Robinson*, 14 Ga. 216; *Cutler v. Ammon*, 65 Iowa, 281, 21 N. W. 604; *Dawson v. Gerard Life Ins. Annuity & Trust Co.*, 27 Minn. 411, 8 N. W. 142; *Hulett v. Whipple*, 58 Barb. (N. Y.) 224; *Johnson v. Cawthorn*, 21

N. C. 32, 27 Am. Dec. 250; *Gann v. Chester*, 5 Yerg. (Tenn.) 205; *Hood v. Hogue*, 131 Tenn. 421, Ann. Cas. 1916D, 383, 175 S. W. 531 (attachment lien); see *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. Ed. 393. *Contra*, *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249, 41 Am. Dec. 224; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Lamberton v. Von Voorhis*, 15 Hun (N. Y.) 336; *Miller v. Albright*, 60 Ohio St. 48, 53 N. E. 490. See *Poe v. Paxton*, 26 W. Va. 607.

98. *Thorn v. Ingram*, 25 Ark. 52; *Noyes v. Kramer*, 54 Iowa, 22, 6 N. W. 123; *McClure v. Harris*, 12 B. Mon. (Ky.) 261; *Miller v. Stump*, 3 Gill (Md.) 304; *Warner v. Van Alstyne*, 3 Paige (N. Y.) 513; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Martin v. Smith*, 25 W. Va. 579.

99. *Swan v. Benson*, 31 Ark. 728; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57, 5 So. 164; *Combination Land Co. v. Morgan*, 95 Cal. 548, 30 Pac. 1102; *Smith v. Schultz*, 23 Idaho, 144, 129 Pac. 640; *Eisman v. Whalen*, 39 Ind. App. 350, 79 N. E. 514, 1072; *Jordan v. Wimer*, 45 Iowa, 65; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60.

fact that the original conveyance contains recitals showing the non payment of the purchase price or any part thereof. That is, a recital in any conveyance in the chain of title showing the non payment of purchase money is sufficient to put a purchaser upon notice of the possibility that it still remains unpaid.<sup>1</sup> And while ordinarily such conveyance will appear of record, so that the subsequent purchaser may actually see the recitals, he is, it seems, charged with notice of their purport even though the conveyance is not of record,<sup>2</sup> on the theory that a purchaser is chargeable with notice of the recitals in any conveyance in his chain of title.<sup>3</sup>

— **Transfer of the lien.** In some jurisdictions the benefit of the lien is regarded as transferable by the vendor along with the claim for purchase money,<sup>4</sup> and there an assignment of the claim for purchase money is regarded as transferring the lien, as merely accessory thereto.<sup>5</sup> And in such states the principle of subrogation or "equitable assignment" may be applied, as in the case of mortgages, in favor of one who is forced to pay off the lien to protect himself, he being thereupon

1. *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. Ed. 587; *Thompson v. Sheppard*, 85 Ala. 611, 5 So. 334; *Stephens v. Anthony*, 37 Ark. 571; *Sample v. Cochran*, 84 Ind. 594; *Kilpatrick v. Kilpatrick*, 23 Miss. 124, 55 Am. Dec. 79; *Tydings v. Pitcher*, 82 Mo. 379; *Ledos v. Kupfrian*, 28 N. J. Eq. 161; *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328.

2. *Wiseman v. Hutchinson*, 20 Ind. 40; *Masich v. Shearer*, 49 Ala. 226; *Jackson v. Elliott*, 49 Tex. 62.

3. *Ante*, § 572.

4. *Lagow v. Badollet*, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258;

*Plowman v. Riddle*, 14 Ala. 169, 48 Am. Dec. 92; *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317, 14 Am. Dec. 135; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493.

5. *Chapman v. Liggett*, 41 Ark. 292; *Upland Land Co. v. Ginn*, 144 Ind. 434, 55 Am. St. Rep. 181, 43 N. E. 443; *State Bank of Iowa Falls v. Brown*, 142 Iowa, 190, 134 Am. St. Rep. 412, 119 N. W. 81; *Hicks' Committee v. Smith*, 158 Ky. 752, 166 S. W. 248; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *White v. Downs*, 40 Tex. 225. *Contra*, *Watson v. Bane*, 7 Md. 117; *Smith v. Smith*, 9 Abb. Pr. N. S. (N. Y.) 420.

substituted in the place of the vendor as regards the lien rights.<sup>6</sup> In a majority of the states, however, in which the lien is recognized, it is regarded as personal to the vendor, and not capable of transfer.<sup>7</sup>

On the death of the person entitled to enforce the lien, the right passes, with the claim for the purchase price, to his personal representatives.<sup>8</sup>

— **Waiver.** The vendor's lien may be "waived," either expressly or by implication,<sup>9</sup> such waiver by implication occurring when the vendor indicates by his conduct an election not to assert the lien. What constitutes proof of such a waiver has been the subject of frequent discussion, and it has been generally agreed that a waiver is not shown by the fact that the vendor takes the personal obligation of the vendee, such as his bond or note, for the unpaid purchase price, this being considered as merely intended to countervail the acknowledgment in the deed of the payment of the purchase money, or to show the time and manner in which the payment is to be made.<sup>10</sup> But the taking of

6. *Rodman v. Saunders*, 44 Ark. 504; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39; *Thomas v. Bridges*, 72 Mo. 530; *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39; *Oury v. Saunders*, 77 Tex. 278, 13 S. W. 1030; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47.

7. *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427; *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Hammons v. Peyton*, 34 Minn. 529, 9 L. R. A. 56; *Pitts v. Parker*, 44 Miss. 247; *White v. Williams*, 1 Paige (N. Y.) 502; *Horton v. Horner*, 14 Ohio, 437; *Cate v. Cate*, 87 Tenn. 41, 9 S. W. 231.

8. 2 Story, Eq. Jur. § 1227; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761; *Evans v. Enloe*, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22; *Hurst v. Hensley*, 7 Blackf. (Ind.) 373; *Edwards v. Edwards*, 24 Ohio St. 402. See *Leeper v. Lyon*, 68 Mo. 216.

9. 4 Kent's Comm. 152; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46, 5 L. Ed. 393; *Wilson v. Lyon*, 51 Ill. 166; *Schnebly v. Ragan*, 7 Gill & J. (Md.) 125, 28 Am. Dec. 195; *Dickason v. Fisher*, 137 Mo. 342, 37 S. W. 1114.

10. 4 Kent's Comm. 153; *Winter v. Anson*, 3 Russ. 488; *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Zook v. Thompson*, 111 Iowa, 463, 82 N. W. 930;

the personal obligation of a person other than the vendee, by way of indorsement, guaranty, or otherwise, is usually regarded as a waiver,<sup>11</sup> and the same effect is ordinarily given to the taking of security, such as a mortgage, on the land itself or on other property.<sup>12</sup> Taking independent security, however, merely raises a presumption of waiver, which may ordinarily be rebutted by evidence of an agreement or intention that the lien shall still exist.<sup>13</sup> A receipt or acknowledgment

*Honore's Ex'r v. Blakewell*, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; *Fish v. Howland*, 1 Paige (N. Y.) 20; *Christian v. Austin*, 36 Tex. 540; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60; *Madden v. Barnes*, 45 Wis. 135, 30 Am. Rep. 703. But the lien is waived if the note or bond of the purchaser is taken as payment of the purchase money. *Walton v. Young*, 132 Ala. 150, 31 So. 448; *Keith v. Wolf*, 5 Bush. (Ky.) 646; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317; *Acton v. Waddington*, 46 N. J. Eq. 16, 18 Atl. 356; *Buckland v. Pocknell*, 13 Sim. 406; *Dixon v. Gayfere*, 17 Beav. 421.

11. 4 Kent's Comm. 153; *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. Ed. 587; *Gardner v. Knight*, 124 Ala. 273, 27 So. 298; *Andrus v. Coleman*, 82 Ill. 26, 25 Am. Rep. 289; *Kendrick v. Eggleston*, 56 Iowa, 128, 41 Am. Rep. 90, 8 N. W. 786; *Carrico v. Farmers' & Merchants' Nat. Bank of Baltimore*, 33 Md. 235; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Durette v. Briggs*, 47 Mo. 356; *Knickerbocker Trust Co. v. Carteret Steel Co.*, 79 N. J. Eq. 501, 82 Atl. 146; *Maroney v. Boyle*, 141 N. Y. 462, 38 Am. St. Rep.

821, 36 N. E. 511; *Follett v. Reese*, 20 Ohio, 546, 55 Am. Dec. 472; *Marshall v. Christmas*, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199.

12. 4 Kent's Comm. 153; *Kinney v. Ensminger*, 94 Ala. 536, 10 So. 143; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *McKeown v. Collins*, 38 Fla. 276, 21 So. 103; *Baker v. Updike*, 155 Ill. 54, 39 N. E. 587; *Robbins v. Masteller*, 147 Ind. 122, 46 N. E. 330; *Gnash v. George*, 58 Iowa, 492, 12 N. W. 546; *Young v. Wood*, 11 B. Mon. (Ky.) 123; *Fonda v. Jones*, 42 Miss. 792, 2 Am. Rep. 669; *Orrick v. Durham*, 79 Mo. 174; *Jensen v. Wilslef*, 36 Nev. 37, Ann. Cas. 1914D, 1220, 132 Pac. 16; *Schurtz v. Colvin*, 55 Ohio St. 274, 45 N. E. 527; *Pease v. Kelly*, 3 Ore. 417. But that the lien is not waived by taking a mortgage on the land. see *Boos v. Ewing*, 17 Ohio, 521, 49 Am. Dec. 478; *Wasson v. Davis*, 34 Tex. 159.

13. *Cordova v. Hood*, 17 Wall. (U. S.) 1, 21 L. Ed. 587; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57, 5 So. 164; *Stroud v. Allison*, 35 Ark. 100; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Sanders v. Mc-*

of payment of the price does not involve a waiver of the lien if the price has not actually all been paid.<sup>14</sup>

§ 665. **Express lien of grantor.** In all jurisdictions, including those in which there is no vendor's lien by implication of law, it is recognized that the vendor may, by an express provision in the instrument of conveyance, create a lien in his own favor for a part or the whole of the purchase price.<sup>15</sup> A lien so created has been referred to by the courts as closely approximating to a mortgage in character and effect,<sup>16</sup> and it has been said to be "a mode of realizing the purely equitable conception of a mortgage, stripped of all its legal forms and features."<sup>17</sup> But there seems a difficulty in this view, that the language creating the lien is in effect a purchase money mortgage inserted in the instrument of conveyance, as applied to cases in which the conveyance is not executed by the purchaser, the grantee, since for the purpose of a mort-

Affee, 41 Ga. 684; Lord v. Wilcox, 99 Ind. 491; Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90, 8 N. W. 786; McGonigal v. Plummer, 30 Md. 422; Fonda v. Jones, 42 Miss. 792, 2 Am. Rep. 669; Hunt v. Marsh, 80 Mo. 396; Boies v. Benham, 127 N. Y. 620, 14 L. R. A. 55, 28 N. E. 657; Marshall v. Christmas, 3 Humph. (Tenn.) 616, 39 Am. Dec. 199.

14. Mackreth v. Symmons, 15 Ves. 329; Cook v. Atkins, 173 Ala. 363, 56 So. 224; Holman v. Patterson's Heirs, 29 Ark. 357; Thompson v. Corrie, 57 Md. 197; Walton v. Hargroves, 42 Miss. 18, 97 Am. Dec. 429; Ogden v. Thornton, 30 N. J. Eq. 569; Kent v. Gerhard, 12 R. I. 92, 34 Am. Rep. 612; Zwingle v. Wilkinson, 94 Tenn. 246, 28 S. W. 1096.

15. 3 Pomeroy, Eq. Jur. § 1257; Bell v. Pelt, 51 Ark. 433, 4 L. R. A. 247, 14 Am. St. Rep. 57, 11 S. W. 684; Greeno v. Barnard, 18 Kan. 518; Morrison v. Brown, 83 Ill. 562; Carr v. Thompson, 67 Mo. 472; Jackson v. Rutledge, 3 Lea (Tenn.) 626, 31 Am. Rep. 655; Helm v. Weaver, 69 Tex. 143, 6 S. W. 420; Kern v. Coffin, 203 Fed. 238, 121 C. C. A. 480. See Hiester v. Green, 48 Pa. St. 96, 86 Am. Dec. 569.

16. Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; King v. Young Men's Ass'n, 1 Woods, 386, Fed. Cas. No. 7,811; Markoe v. Andras, 67 Ill. 34; Dingley v. Bank of Ventura, 57 Cal. 467; Ufford v. Wells, 52 Tex. 612.

17. 3 Pomeroy, Eq. Jur. § 1257.

gage, even an equitable mortgage,<sup>18</sup> the signature of the mortgagor is ordinarily necessary.<sup>18a</sup> It would consequently appear that the lien created in favor of the grantor in such a case may be more satisfactorily compared to a charge created on the conveyance of land.<sup>19</sup> As one may, in conveying land, charge it with a payment in favor of a third person, so he may charge it with a payment in favor of himself, whether to satisfy the claim for purchase money, or for other purposes, and it is immaterial in this regard whether the instrument of conveyance is executed by the grantee, he taking the land in any case subject to the specified charge.

No particular language is necessary to give rise to this lien, provided an intention to that effect is clearly expressed,<sup>20</sup> and such declaration of intention may, it has been held, be incorporated in notes given for the price,<sup>21</sup> though a mere recital that the purchase money or a part thereof is unpaid is insufficient for the purpose.<sup>22</sup>

The lien may be asserted against the land in the hands of all persons other than subsequent *bona fide* purchasers for value.<sup>23</sup> Although in some cases subse-

18. *Ante* § 661, note 60.

18a. In *Stringfellow v. Ivie* 73 Ala. 269, it is said that a vendor's lien cannot arise otherwise than by operation of law without an agreement manifested by writing. But in *Putman v. Summerlin*, 168 Ala. 390, 53 So. 101, it is explicitly decided that a vendor's lien may be expressly reserved without the execution of the instrument by the grantee.

19. *Ante* § 660.

20. *Moore v. Lackey*, 53 Miss. 85; 3 *Pomeroy*, Eq. Jur. § 1256, note.

21. *Smith v. Hiles-Carver Co.*,

107 Ala. 272, 18 So. 37; *Bell v. Pelt*, 51 Ark. 433, 4 L. R. A. 247, 14 Am. St. Rep. 571, 11 S. W. 684; *Shanefelter v. Kenworthy*, 42 Ind. 501; *Hobson v. Edwards*, 57 Miss. 128; *Osbourne v. Royer*, 1 Lea (Tenn.) 217; *Buckley v. Runge*, — Tex. Civ. App. —, 136 S. W. 533.

22. *Hiester v. Green*, 48 Pa. St. 96, 86 Am. Dec. 569.

23. *Cooper v. Green*, 28 Ark. 48; *Eichelberger v. Gitt*, 104 Pa. St. 64; *Bevins v. Ryland*, 23 Ky. L. Rep. 1061, 64 S. W. 752; *Sitz v. Diehl*, 55 Mo. 17; *Lincoln v. Purcell*, 2 Head (Tenn.) 143, 73 Am. Dec. 196.



quent purchasers are said to be charged with notice of the lien by reason of the record of the conveyance in which the lien is reserved,<sup>24</sup> the proper view appears to be that one is so chargeable by reason of the fact that the conveyance is in his chain of title, so that the record *vel non* of such conveyance is, at least in the ordinary case, immaterial.<sup>25</sup>

The benefit of the lien, which arises by reason of an express declaration of intention to that effect, passes as an incident of the claim for the purchase money upon an assignment of such claim.<sup>26</sup>

**§ 666. Vendor's lien before conveyance.** Upon the making of a contract, capable of specific enforcement, for the sale of land, the purchaser is ordinarily regarded as acquiring an interest or estate of an equitable character, which is however subject to the right of the vendor to payment of the purchase price in accordance with the terms of the contract.<sup>27</sup> This right to payment the vendor may, if necessary, enforce by a proceeding in equity analagous to the foreclosure of a mortgage, with the result that the purchaser loses his contract rights in the land;<sup>28</sup> and the

24. *Dingley v. Bank of Ventura*, 57 Cal. 467; *Sidwell v. Wheaton*, 114 Ill. 267, 2 N. E. 183; *Talbot v. Roe*, 171 Mo. 421, 71 S. W. 682; *Roosevelt v. Davis*, 49 Tex. 463.

25. *Wiseman v. Hutchinson*, 20 Ind. 46; *Burrus v. Rouihac*, 2 Bush. (Ky.) 39; *Deason v. Taylor*, 53 Miss. 697; *Gilbough v. Runge*, 99 Tex. 539, 122 Am. St. Rep. 659, 91 S. W. 566.

26. *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829; *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88, 6 S. W. 897; *Dingley v. Bank of Ventura*, 57 Cal. 467; *Markoe*

*v. Andras*, 67 Ill. 34; *Duncan v. Louisville*, 13 Bush (Ky.) 378; *Moore v. Lackey*, 53 Miss. 85; *Powell v. Powell*, 217 Mo. 571, 117 S. W. 1113; *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 27 L. R. A. 663, 45 Am. St. Rep. 748, 29 S. W. 903; *McCamly v. Waterhouse*, 80 Tex. 340, 16 S. W. 19; *Briggs v. Enslow*, 44 W. Va. 499, 29 S. E. 1008.

27. *Ante* § 125.

28. *Micou v. Ashurst*, 55 Ala. 607; *Sparks v. Hess*, 15 Cal. 86, 194; *Moore v. Anders*, 14 Ark. 628, 60 Am. Dec. 551; *Edmons v. Gracy*, 61 Fla. 593, 54 So. 899; *Gaston v.*

courts, in referring to this right of the vendor to enforce his claim for the purchase price, frequently assimilate the relation of the parties to that of mortgagor and mortgagee, they standing to some extent in the same position as if the vendor had made a conveyance to the purchaser and the latter had executed a mortgage back to the vendor.<sup>29</sup> In recognizing the right of the vendor to assert his claim to payment as against the purchaser's equitable interest, the courts not infrequently refer to it as a vendor's lien, a use of the latter term which is to be carefully distinguished from its use to describe what we have above discussed under the name of "the implied lien of the grantor." It differs from the latter, as it does from all other cases of equitable liens, which we have here considered, in that the person having the lien has also the legal title.<sup>30</sup>

Since the retention of the legal title shows a clear intention to rely on such title as security for payment of the price, a waiver of this right of the vendor will not be implied from the taking of other security for the price.<sup>31</sup>

White, 46 Mo. 486; *Taylor v. Capehart*, 128 N. C. 292, 38 S. E. 890.

29. *Hardin v. Boyd*, 113 U. S. 756, 28 L. Ed. 1141; *Moses v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 So. 146; *Higgs v. Smith*, 100 Ark. 543, 140 S. W. 990; *Merritt v. Judd*, 14 Cal. 59; *Hutchinson v. Crane*, 100 Ill. 269; *Amory v. Reidly*, 9 Ind. 490; *Strickland v. Kirk*, 51 Miss. 795; *First Nat. Bank of Falls City v. Edgar*, 65 Neb. 340, 91 N. W. 404; *Graham v. McCampbell*, Meigs, (Tenn.) 56, 33 Am. Dec. 126; *Taylor v. Interstate Investment Co.*, 75 Wash. 490, 135 Pac. 240; *Church v. Smith*, 39 Wis. 492.

30. The confusion arising from these different uses of the term "vendor's lien," and the essential distinctions between these various equitable rights, are admirably discussed in 3 Pomeroy, Eq. Jur. §§ 1260, 1261.

31. *Boeman v. Ivey*, 49 Ala. 75; *Kent v. Williams*, 114 Cal. 537, 46 Pac. 462; *Robinson v. Appleton*, 124 Ill. 276, 15 N. E. 761; *Henley v. Stemmons*, 4 B. Mon. (Ky.) 131; *McCaslin v. State*, 44 Ind. 151; *Hurley v. Hollyday*, 35 Md. 469; *Clower v. Rawlings*, 9 Sm. & M. (Miss.) 122, 47 Am. Dec. 108; *Strickland v. Summerville*, 55 Mo. 164.

The benefit of this lien, so called, in favor of the vendor, passes to one to whom he transfers the right of action for the purchase money, as by an assignment of a note given therefor,<sup>32</sup> just as the benefit of a mortgage transferring the legal title passes to one to whom the debt secured thereby, or a part thereof, is assigned.

§ 667. **Vendee's lien.** The vendee under a contract for the sale of land has, in equity, before he receives a conveyance of the land, a lien thereon for any payments which he has made upon the purchase price in case the contract fails of consummation owing to the fault of the vendor.<sup>33</sup> This lien appears to be recognized by equity merely for the purpose of aiding the vendee in the assertion of his *quasi* contractual right to a return of the purchase money upon a rescission of the contract of sale for the fault of the vendor.<sup>34</sup>

32. *McConnell v. Beattie*, 34 Ark. 113; *Gessner v. Palmateer*, 89 Cal. 89, 13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789; *Hutchinson v. Crane*, 100 Ill. 269; *Lewis v. Shearer*, 189 Ill. 184, 59 N. E. 580; *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 348; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501; *First Nat. Bank of Fall City v. Edgar*, 65 Neb. 340, 91 N. W. 404; *McClintic v. Wise's Adm'rs*, 25 Gratt. (Va.) 448, 18 Am. Rep. 694.

33. *Rose v. Watson*, 10 H. L. Cas. 672; *Gerstell v. Shirk*, 210 Fed. 223; *Cooper v. Merritt*, 30 Ark. 686; *Stults v. Brown*, 112

Ind. 370, 2 Am. St. Rep. 190, 14 N. E. 230; *Griffith v. Depew*, 3 A. K. Marsh. (Ky.) 177, 13 Am. Dec. 141; *Davis v. Heard*, 44 Miss. 50; *Craft v. Latourette*, 62 N. J. Eq. 206, 49 Atl. 711; *Elterman v. Hyman*, 192 N. Y. 113, 127 Am. St. Rep. 862, 15 Ann. Cas. 819, 84 N. E. 937; *Costen v. McDowell*, 107 N. C. 546, 12 S. E. 432; *Tyler v. Cate*, 29 Ore. 515, 45 Pac. 800; *Galbraith v. Reeves*, 82 Tex. 357, 18 S. W. 696; *Wickman v. Robinson*, 14 Wis. 493, 80 Am. Dec. 789; 2 Story, Eq. Jur. § 1217; 3 Pomeroy, Eq. Jur. § 1263.

34. See editorial note, 8 Columbia Law Rev. 571.

## CHAPTER XXXVII.

### STATUTORY LIENS.

- § 668. General Considerations.
- 669. Mechanics' liens.
- 670. Judgment liens.
- 671. Attachment liens.
- 672. Execution liens.
- 673. Liens for taxes and assessments.
- 674. The lien of decedent's debts.
- 675. Liens on crops.
- 676. Lien for improvements.
- 677. Widow's allowance.

§ 668. **General considerations.** Since, at common law, no lien upon land was recognized, the only liens which can at the present day be imposed thereon, apart from equitable liens, and mortgages, the lien idea of which is the creation of equity, are those authorized by statute, known as "statutory liens." The legislatures of the various states, in providing for such liens, have followed the same general lines of policy, and there are, it is believed, in but few states liens of a character not referred to in the following sections.

If the statute provides a method of enforcing such a lien, of a reasonably adequate character, equity will not ordinarily assume jurisdiction for the purpose.<sup>1</sup>

§ 669. **Mechanics' liens.** A mechanic's lien is a lien on land, and on the fixtures and improvements thereon, created by statute, to secure the compensation of persons who, under contract with the owner, or some person authorized in his behalf, contribute labor or materials to the improvement of the land.

1. 1 Jones, Liens, § 94.

— **Persons entitled to lien.** The statute usually provides that any person furnishing labor or materials for the erection or repair of a building shall have a lien on the land and the building, and it sometimes specifically names certain classes of persons so entitled, such as “mechanics,” “laborers,” “material-men,” “builders,” or the like.<sup>2</sup> A lien of this same general character is also sometimes given for work not in connection with the erection or repair of buildings, as for work upon bridges, canals, railroads, mines, fences, or machinery.<sup>3</sup>

The earlier mechanic’s lien statutes sometimes protected only those who furnished labor or materials otherwise than by direct contract with the owner of the land, and did not give a lien to a person contracting directly with the owner.<sup>4</sup> The present statutes, however, always give a lien to a person furnishing labor or materials by direct contract with the owner, who is usually known as the “contractor.”<sup>5</sup>

A “subcontractor” that is, a person furnishing labor, not by contract with the owner, but by contract with the contractor, is in most states entitled to a lien.<sup>6</sup>

In undertaking to give to a subcontractor a lien for his labor, two different theories or systems have been adopted in the statutes of the different states. By one system, sometimes known as the “New York” system, a subcontractor is given a lien by way of “subrogation,” as it is expressed, to the rights of the contractor, that is, he stands in the place of the contractor, and cannot claim a lien for a sum greater than that due to the contractor at such time as the subcon-

2. 1 Stimson’s Am. St. Law, §§ 205.  
1961, 1962.

3. See, as to the statutes creating liens for work done in and about mines, Barringer & Adams, Mines, 771; for work done upon railroads, 2 Jones, Liens, §§ 1618-1625; Boiscot, Mech. Liens, §§ 188-

4. Phillips, Mech. Liens, §§ 41, 42.

5. Phillips, Mech. Liens, §§ 36, 40; Boiscot, Mech. Liens, § 218.

6. 1 Stimson’s Am. St. Law, § 1966; Phillip’s Mech. Liens, §§ 44, 45.

tractor may give notice of his claim to the owner, who is thus enabled to withhold from the principal contractor sufficient to satisfy the claim of the subcontractor.<sup>7</sup> Under the other system, sometimes termed the "Pennsylvania" system, the subcontractor is given a direct lien, without reference to the rights of the contractor, and consequently the owner ordinarily acts at his peril if he makes any payments to the contractor, unless he has first satisfied himself that the subcontractor's claims are paid.<sup>7a</sup> So, while under the New York system the subcontractor has no lien if the contractor's default in his contract leaves nothing owing to the latter,<sup>8</sup> such default does not, under the Pennsylvania system, affect the subcontractor's lien for the full amount of his claim.<sup>9</sup> But even where the

7. See *Greene v. Robinson*, 110 Ala. 503, 20 So. 65; *Renton v. Conley*, 49 Cal. 185; *McIntire v. Barnes*, 4 Colo. 288; *Hathorne v. Panama Park Co.*, 44 Fla. 194, 103 Am. St. Rep. 138, 32 So. 812; *Culver v. Elwell*, 73 Ill. 536; *Wickham v. Monroe*, 89 Iowa, 666, 57 N. W. 354; *Henry & Coatsworth v. Horton Hardware Co.*, 56 Kan. 448, 43 Pac. 769; *Cudworth v. Bostwick*, 69 N. H. 536, 45 Atl. 468; *Larkin v. McMullin*, 120 N. Y. 206, 24 N. E. 447; *St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78, 56 Atl. 103; *Copeland v. Manton*, 22 Ohio St. 398; *Berry v. McAdams*, 93 Tex. 431, 55 S. W. 1112.

7a. *Andis v. Davis*, 63 Ind. 17; *Eowen v. Phinney*, 162 Mass. 593, 44 Am. St. Rep. 391, 39 N. E. 283; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868; *Merrigan v. English*, 9 Mont. 113, 5 L. R. A.

837, 22 Pac. 454; *Hunter v. Truckee Lodge*, 14 Nev. 24; *Robertson Lumber Co. v. State Bank of Edinburg*, 14 N. D. 511, 105 N. W. 719; *White v. Miller*, 18 Pa. St. 52; *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238, 27 Atl. 895; *Green v. Williams*, 92 Tenn. 220, 19 L. R. A. 478, 21 S. W. 520; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071.

8. *Wiggins v. Bridge*, 70 Cal. 437, 11 Pac. 754; *Hunnicut, etc., Co. v. Van Hoose*, 111 Ga. 518, 36 S. E. 669; *Epeneter v. Montgomery, County*, 98 Iowa, 159, 67 N. W. 93; *Jewell v. Peron*, 94 Mich. 83, 53 N. W. 951; *Mayer v. Mutchler*, 50 N. J. L. 162, 13 Atl. 620; *Kelly v. Bloomingdale*, 139 N. Y. 343, 34 N. E. 919; *Smith v. Sheltering Arms*, 89 Hun. (N. Y.) 70, 35 N. Y. Supp. 62; *Fullenwider v. Longmoor*, 73 Tex. 480, 11 S. W. 500.

9. *Bowen v. Phinney*, 162 Mass.

latter system prevails, the subcontractor's right to a lien arises from the original contract between the owner and the contractor, and he cannot claim for work not authorized by such contract, nor demand payment in a mode other than that named therein.<sup>10</sup>

"Materialmen," that is, persons furnishing, not labor, but materials, have liens only when the statute so provides, and are not usually regarded as within the scope of provisions for the benefit of "contractors," "mechanics," or the like.<sup>11</sup> Materialmen may be those furnishing materials under contract either with the owner, with the contractor, or even with a subcontractor, and the phraseology of the statute may be such as to give a lien to a materialman of one of such classes, and not to others. The distinct systems of legislation referred to in connection with subcontractors exist also in the case of persons furnishing materials to the contractor, their rights being dependent on the state of accounts between the contractor and the owner in those states in which New York rule is followed,<sup>12</sup> while their rights are unaffected by this consideration in states where the Pennsylvania rule is adopted.<sup>13</sup>

— **Contract or consent of owner.** The statute

593, 44 Am. St. Rep. 391, 39 N. E. 283; *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238, 27 Atl. 895; *Shenandoah Valley R. Co. v. Miller*, 80 Va. 821; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490.

10. *Boisot, Mech. Liens*, §§ 228-231; *Phillips, Mech. Liens*, §§ 58, 62g; 2 *Jones, Liens*, § 1289; *Schroeder v. Galland*, 134 Pa. St. 277, 7 L. R. A. 711, 19 Am. St. Rep. 691, 19 Atl. 632; *Taylor v. Murphy*, 148 Pa. St. 337, 33 Am. St. Rep. 825, 23 Atl. 1134; *Siebrecht v. Hogan*, 99 Wis. 437, 75 N. W. 71.

3 R. P.—32

11. See *Davis v. Batz*, 66 Ala. 206; *Hinckley v. Field's Biscuit & Cracker Co.*, 91 Cal. 136, 27 Pac. 594; *Duff v. Hoffman*, 63 Pa. St. 191; *Arnold v. Budlong*, 11 R. I. 561; *Boisot, Mech. Liens*, § 241; *Phillips, Mech. Liens*, § 47.

12. *Shelton v. Merrill*, 63 Ala. 343; *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389; *Carman v. McInerow*, 13 N. Y. 70; *Berry v. McAdams*, 93 Tex. 431, 55 S. W. 1112.

13. *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 16 S. W. 868; *White v. Miller*, 18 Pa. St. 52.

usually provides that the labor or materials must have been furnished by agreement with, or sometimes by the "consent" of, the "owner."<sup>14</sup> The term "owner" includes not only those who have an estate in fee in the land, but also those having an estate less than freehold. One having such limited estate can, however, as a rule, not create a lien more extensive than his own interest, that is, on others' interests in the land.<sup>15</sup> Labor or materials furnished under a contract with one having a mere leasehold estate in the land may, however, support a lien upon the reversion, if the owner of the latter expressly or impliedly authorizes or adopts such contract,<sup>16</sup> and, where the statute creates a lien for labor or materials furnished with the consent or permission of the owner, the reversion may become subject to a lien for work or labor furnished under a contract with the lessee, by reason of consent, expressed or implied, on the part of the reversioner, to the making of the improvements.<sup>17</sup>

A vendee under an executory contract for the sale of land is sometimes regarded as the "owner," within the meaning of the mechanic's lien acts, he having, as before explained, an equitable interest in the land. On this theory, one furnishing labor or materials under

14. 1 Stimson's Am. St. Law, § 1966.

15. See *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; *Williams v. Vanderbilt*, 145 Ill. 238, 21 L. R. A. 489, 36 Am. St. Rep. 486, 34 N. E. 476; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Hoffman v. McColgan*, 81 Md. 390, 32 Atl. 179; *Francis v. Sayles*, 101 Mass. 435; *Currier v. Cummings*, 40 N. J. Eq. 145, 3 Atl. 174; *Cornell v. Barney*, 94 N. Y. 394; *Choteau v. Thompson*, 2 Ohio St. 114; *Long v. McLanahan*, 103 Pa. St. 537;

*Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 75 Am. St. Rep. 862, 59 Pac. 507; 2 *Jones, Liens*, §§ 1272-1276; *Phillips, Mech. Liens*, §§ 83-89.

16. *Scroggin v. National Lumber Co.*, 41 Neb. 195, 59 N. W. 548; *Hall v. Parker*, 94 Pa. St. 109; *Kremer v. Walton*, 11 Wash. 120, 48 Am. St. Rep. 870, 39 Pac. 374.

17. *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 221; *Gay v. Hervey*, 41 N. J. L. 39; *Burkitt v. Harper*, 79 N. Y. 273; *Bentley v. Adams*, 92 Wis. 386, 66 N. W. 505.



contract with such vendee has a lien on his interest in the land, which extends to the legal title when acquired by the latter, and which is, on the other hand, terminated if the vendee loses all rights under his contract by a failure to comply therewith.<sup>18</sup> A lien has been sustained in favor of one furnishing labor or materials under a contract with a vendee, in some cases, on the theory that he was, under the particular circumstances, the agent of the vendor,<sup>19</sup> and, in other cases, on the ground that the improvements on the land were with the vendor's consent, and so within the statutory requirement of the owner's consent, as when it was stipulated in the contract of sale that such improvements were to be made.<sup>20</sup>

— **Priorities.** A mechanic's lien is valid, in most, if not all, jurisdictions, as against purchasers of the land, the purchaser being affected with notice of the lien either by the fact that improvements are being made on the land, or by the presence upon the court records of proceedings to obtain or enforce the lien.<sup>21</sup>

18. *Paulsen v. Manske*, 126 Ill. 72, 9 Am. St. Rep. 532, 18 N. E. 275; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Chicago Lumber Co. v. Osborn*, 40 Kan. 168, 19 Pac. 656; *Colman v. Goodnow*, 36 Minn. 9, 1 Am. St. Rep. 632, 29 N. W. 238; *Fullmer v. Poust*, 155 Pa. St. 275, 35 Am. St. Rep. 881, 26 Atl. 543; *Kerrick v. Ruggles*, 78 Wis. 274, 47 N. W. 437. *Contra*, to the effect that the vendee is not an "owner," see *Brown v. Morison*, 5 Ark. 217; *Hayes v. Fessenden*, 106 Mass. 228.

19. *Moore v. Jackson*, 49 Cal. 109; *Henderson v. Connelly*, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1; *Althen v. Tarbox*, 48 Minn. 18, 31 Am. St. Rep. 616, 50 N. W.

1018; *Sheehy v. Fulton*, 38 Neb. 691, 41 Am. St. Rep. 767, 57 N. W. 395.

20. *Henderson v. Connolly*, 123 Ill. 98, 5 Am. St. Rep. 490, 14 N. E. 1; *Shearer v. Wilder*, 56 Kan. 252, 43 Pac. 224; *Baker v. Waldron*, 92 Me. 17, 69 Am. St. Rep. 483, 42 Atl. 225; *Davis v. Humphrey*, 112 Mass. 309; *Brown v. Jones*, 52 Minn. 484, 55 N. W. 54; *Hackett v. Badeau*, 63 N. Y. 476; *Edwards & McCulloch Lumber Co. v. Mosher*, 88 Wis. 672, 60 N. W. 264.

21. *See Work v. Hall*, 79 Ill. 196; *Fleming v. Bumgarner*, 29 Ind. 424; *Miller v. Barroll*, 14 Md. 173; *Williams v. Chicago, S. F. & C. Ry. Co.*, 112 Mo. 463, 34

Likewise, a mortgage of the land or other lien thereon, taking effect after the inception of the mechanic's lien, is subject thereto.<sup>22</sup> A mortgage executed and recorded before the attaching of the lien will take precedence thereof,<sup>23</sup> and, in some states, it is sufficient that it be executed, though not recorded.<sup>24</sup> Under the statutes of some states, a mechanic's lien, while subject to a prior mortgage or other incumbrance as regards the land and pre-existing improvements thereon, takes precedence as to improvements for the creation or repair of which the lien is claimed.<sup>25</sup>

The time at which the mechanic's lien attaches to the land is of primary importance in determining priorities as between the lien and the claims of purchasers or other incumbrancers. In some states the lien attaches when the contract under which the labor or materials are furnished was made,<sup>26</sup> in some, when the

Am. St. Rep. 403, 20 S. W. 631; *Blauvelt v. Woodworth*, 31 N. Y. 285; *Burr v. Maultsby*, 99 N. C. 263, 6 Am. St. Rep. 517, 6 S. E. 108; *Ambrose v. Woodmansee*, 27 Ohio St. 147.

22. *Jones, Liens*, §§ 1457-1486; *Soule v. Hurlbut*, 58 Conn. 511, 20 Atl. 610; *Thielman v. Carr*, 75 Ill. 385; *Dunklee v. Crane*, 103 Mass. 470; *Hahn's Appeal*, 39 Pa. St. 409.

23. *Folsom v. Cragen*, 11 Colo. 205, 17 Pac. 515; *National Bank of Athens v. Danforth*, 80 Ga. 55, 7 S. E. 546; *Thielman v. Carr*, 75 Ill. 385; *Jean v. Wilson*, 38 Md. 288; *Batchelder v. Hutchinson*, 161 Mass. 462, 37 N. E. 452; *Ortonville v. Geer*, 93 Minn. 501, 106 Am. St. Rep. 445, 101 N. W. 963; 2 *Jones, Liens*, § 1460.

24. *Root v. Bryant*, 57 Cal. 48; *Ryder v. Cobb*, 68 Iowa, 235, 26 N. W. 91; *Oliver v. Davy*, 34

Minn. 292, 25 N. W. 629; *Mathewig v. Mann*, 96 Wis. 213, 65 Am. St. Rep. 47, 71 N. W. 105.

25. See *Wimberly v. Mayberry*, 94 Ala. 240, 14 L. R. A. 305, 10 So. 157; *Preston v. Sonora Lodge*, No. 10, 39 Cal. 116; *Jarvis v. State Bank*, 22 Colo. 309, 55 Am. St. Rep. 129, 45 Pac. 505; *Bradley v. Simpson*, 93 Ill. 93; *Tower v. Moore*, 104 Iowa, 345, 73 N. W. 823; *Ivey v. White*, 50 Miss. 142; *Russell v. Grant*, 122 Mo. 161, 43 Am. St. Rep. 563, 26 S. W. 958; *Smith v. Wilkins*, 38 Ore. 583, 64 Pac. 760; *Land Mortgage Bank v. Quannah Hotel Co.*, 89 Tex. 332, 34 S. W. 730; 2 *Jones, Liens*, § 1462; *Boisot, Mech. Liens*, § 149.

26. *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Farnham v. Richardson*, 91 Me. 559, 40 Atl. 553; *Dunklee v. Crane*, 103 Mass. 470.

building or improvement was commenced,<sup>27</sup> in some, when the person asserting the lien first began to furnish the labor or materials for which the lien is claimed,<sup>28</sup> and in others, when a claim or statement of the lien is filed, or notice of the claim is given to the owner.<sup>29</sup>

— **Assertion and enforcement of lien.** The statutes quite frequently provide that one seeking to enforce a mechanic's lien shall so notify the owner of the land, this requirement existing especially in the case of liens in favor of persons not contracting directly with such owner, such as subcontractors, and persons furnishing materials to contractors.<sup>30</sup>

In most states there is a statutory requirement that the person claiming the lien file, within a certain time, a verified statement of the character of the contract, the work done thereunder, the amount due, the property on which the lien is claimed, and, frequently, other matters concerning the claim. This statement is called by different names, such as "claim," "notice," or "account," and the statutory requirements in regard thereto must be strictly complied with.<sup>31</sup> The effect of

27. *Apperson v. Farrell*, 56 Ark. 640, 20 S. W. 514; *Neilson v. Iowa Eastern Ry. Co.*, 44 Iowa, 71; *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153; *Milner v. Norris*, 13 Minn. 455; *Henry v. Hand*, 36 Ore. 492, 59 Pac. 330; *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 30 L. R. A. 765, 53 Am. St. Rep. 790, 33 S. W. 652; *Sanford v. Kunkel*, 30 Utah, 379, 85 Pac. 363, 1012; *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717.

28. *Pacific Mut. Life Ins. Co. v. Fisher*, 106 Cal. 224, 39 Pac. 758; *Tritch v. Norton*, 10 Colo. 337, 15 Pac. 680; *Kellenberger v. Boyer*, 37 Ind. 188; *Jones & Magee Lumber Co. v. Murphy*, 64 Iowa, 165,

19 N. W. 898; *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; *Burr v. Maultsby*, 99 N. C. 263, 6 Am. St. Rep. 517, 6 S. E. 108; *Green v. Williams*, 92 Tenn. 220, 19 L. R. A. 478, 21 S. W. 520.

29. *Cahoon v. Levy*, 6 Cal. 295, 65 Am. Dec. 515; *McCorkle v. Herrman*, 117 N. Y. 297, 22 N. E. 948; *Ritchey v. Risley*, 3 Ore. 184; *Hinckley & Egery Iron Co. v. James*, 51 Vt. 240.

30. 1 *Stimson's Am. St. Law*, §§ 1965, 1967.

31. 1 *Stimson's Am. St. Law*, § 1968; *Phillips, Mech. Liens*, § 337 *et seq.*; *Boisot, Mech. Liens*, § 374 *et seq.*

filing such a statement is to establish the lien, since it serves as notice to all the world of the existence of the claim. After the lien is thus established, the lienor may begin a proceeding to sell the land under the lien. This proceeding is usually in equity, and is similar, in its general aspects, to an equitable suit for the sale of land under a mortgage.<sup>32</sup>

— **Release or “waiver” of lien.** The right to a mechanic’s lien may be released or “waived,” as it is usually expressed, one being regarded as having waived the right when he has taken some action which the court regards as indicative of an election not to assert a lien. In some states a waiver is *prima facie* inferred from the fact that the person furnishing labor or materials has taken collateral security,<sup>33-34</sup> or a mortgage on the specific land,<sup>35</sup> for his claim. The mere acceptance of a note, signed by the owner or other person liable for the debt, is not a waiver, in the absence of an intention to that effect.<sup>36</sup>

32. 2 Jones, Liens, § 1554 *et seq.*; Boisot, Mech. Liens, § 507 *et seq.*

33-34. Clark v. Moore, 64 Ill. 273; Bristol-Godson Electric Light & Power Co. v. Bristol Gas, Electric Light & Power Co., 99 Tenn. 371, 42 S. W. 19; Phoenix Mfg. Co. v. McCormick Harvesting Machine Co., 111 Wis. 570, 87 N. W. 458. See Grant v. Strong, 18 Wall. (U. S.) 623, 21 L. Ed. 859. By statute in several states, the lien is waived by taking collateral security, 2 Jones, Liens, § 1519. But that taking collateral security does not raise any presumption of waiver, see Ford v. Wilson, 85 Ga. 109, 11 S. E. 559; Maryland Brick Co. v. Spilman, 76 Md. 37, 17 L. R. A. 597, 25 Am. St. Rep. 43, 25 Atl. 297, (statute); Hoagland v.

Lusk, 33 Neb. 376, 29 Am. St. Rep. 485, 50 N. W. 162; Taliaferro v. Stevenson, 58 N. J. L. 165, 33 Atl. 383; Hinchman v. Lybrand, 14 Serg. & R. (Pa.) 32.

35. Grant v. Strong, 18 Wall. (U. S.) 623, 21 L. Ed. 859; Willison v. Douglas, 66 Md. 99, 6 Atl. 530; Baumhoff v. St. Louis, etc., R. Co., 171 Mo. 120, 94 Am. St. Rep. 77, 71 S. W. 156; Weaver v. Demuth, 40 N. J. L. 238; Trullinger v. Kofoed, 7 Ore. 228, 33 Am. Rep. 708. *Contra*, Parberry v. Johnson, 51 Miss. 291; Gilcrest v. Gottschalk, 39 Iowa, 311; Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320; Farmers’ & Mechanics’ Nat. Bank of Fort Worth v. Taylor, 91 Tex. 78, 40 S. W. 876, 966.

36. Montandon v. Deas, 14 Ala.

§ 670. **Judgment liens.** At common law, a creditor had no remedy against the lands of his debtor for the satisfaction of his claim, but by 13 Edw. I. c. 18<sup>37</sup> it was provided that, when a debt is recovered or damages awarded, it shall be thenceforth "in the election" of the creditor to have a writ of *fiery facias* against the goods and chattels of the debtor, or else a writ that the sheriff deliver to him all the chattels of the debtor and the one-half of his land. The writ issued to the sheriff under this statute was called a writ of *elegit*, because it stated that the creditor had elected (*elegit*) to pursue the remedy furnished by the statute. In construing this statute it was decided that the creditor could enforce his remedy against the lands even in the hands of one to whom they had been sold by the debtor after the recovery of the judgment, and this in effect made the judgment a lien or incumbrance on all the lands of the debtor.<sup>38</sup> In one or two states the lien has been regarded as existent by force of this statute, or of a colonial statute giving a right to levy an execution,<sup>39</sup> but it is usually considered that no such lien exists, in the absence of a state statutory provision therefor,<sup>40</sup> and there is, in most of the states, such a provision subjecting the judgment debtor's land, or certain interests therein, to the lien of a judgment.<sup>41</sup>

33, 48 Am. Dec. 84; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Bryant v. Grady*, 98 Me. 389, 57 Atl. 92; *McKeen v. Haseltine*, 46 Minn. 426, 49 N. W. 195; *Ehlers v. Elder*, 51 Miss. 499; *Smith & Son Co. v. Parsons*, 37 Neb. 677, 56 N. W. 326; *Shaw v. First Ass'n Reformed Church*, 39 Pa. St. 226.

37. *Stat. Westminster II.* (A. D. 1285).

38. See *Williams, Real Prop.* (21st Ed.) 269; *Massingill v. Downs*, 7 How. (U. S.) 760, 12 L. Ed. 903; *Morsell v. First Nat.*

*Bank of Washington*, 91 U. S. 357, 23 L. Ed. 436.

39. *United States v. Morrison*, 4 Pet. (U. S.) 124, 7 L. Ed. 804; *Coombs v. Jordan*, 3 Bland Ch. (Md.) 284, 22 Am. Dec. 236; *Borst v. Nalle*, 28 Grat. (Va.) 423; *Hutcheson v. Grubbs*, 80 Va. 254.

40. *Woods v. Mains*, 1 G. Greene (Iowa), 275; *Thompson v. Avery*, 11 Utah, 214, 39 Pac. 829; *Shrew v. Jones*, 2 McLean, 78, Fed. Cas. No. 12,818. See *Groves' Appeal*, 68 Pa. St. 143.

41. In the New England states,

It has been frequently remarked by the courts that the lien of a judgment does not involve any property or right in the lands subject thereto, but merely confers a right or power to levy thereon, for the purpose of satisfying the judgment, to the exclusion or destruction of rights accruing to others after the inception of the lien.<sup>42</sup> The exact significance of the statement that the lien does not involve any property or right in the land is not entirely clear. The same might, presumably, be said of any lien, distinguishing, however, the case of the common law mortgage, which, while involving, for most purposes, in the view of a court of equity, merely a lien, ordinarily vests the legal title in the mortgagee.<sup>43</sup> The lien of a judgment differs from other liens, however, in that it attaches, not to any specific land, but to all the land owned by the debtor, subject to certain qualifications, in some states, as to the character of his ownership. And it would seem that it is this general nature of the judgment lien, rather than the fact that it does not involve any proprietary right in the land, that serves to distinguish it from other liens. That the lien involves no property right in the land has in one case been referred to as ground for refusing to allow the judgment creditor to sue on account of waste,<sup>44</sup> while in another case this conclusion

the judgment creditor has no lien, but he may secure payment of such judgment as may be rendered by the previous issuance of an attachment. See post, § 671.

42. *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386, 442, 7 L. Ed. 189; *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754; *Young v. Templeton*, 4 La. Ann. 254, 50 Am. Dec. 563; *Ashton v. Slater*, 19 Minn. 347; *Fonte v. Fairman*, 48 Miss. 536; *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105; *Mansfield v. Gregory*, 11 Neb. 297, 9 N.

W. 87; *Bruce v. Nicholson*, 109 N. C. 202, 26 Am. St. Rep. 562, 13 S. E. 790; *Fetterman v. Murphy*, 4 Watts. (Pa.) 424, 28 Am. Dec. 729; *Freeman, Judgments*, § 338; 1 Black, *Judgments*, § 400.

43. The statement was first made for the purpose of distinguishing the case of a judgment lien from that of a mortgage, as regards the applicability of the doctrine of "tacking." *Brace v. Duchess of Marlborough*, 2 P. Wms. 491.

44. *Independent School Dist. of*

was based on the general, rather than specific, character of the lien.<sup>45</sup> In one case, however, without specific reference to the nature of the judgment lien in this regard, an injunction against the removal of fixtures was issued on the petition of the judgment creditor.<sup>46</sup>

— **Character of the judgment.** In order that a judgment may constitute a lien, it must be one on which execution could immediately issue,<sup>47</sup> and consequently it must be a final, and not an interlocutory, judgment,<sup>48</sup> and must be for a definite sum of money.<sup>49</sup> Subject to these requirements, the fact that the judgment is by confession,<sup>50</sup> or by default,<sup>51</sup> is immaterial.

The judgment of a justice of the peace or of any other inferior court usually, by the express provision of the statute, becomes a lien only after the filing of a transcript or record thereof in one of the superior courts.<sup>52</sup>

The judgment of a federal court is, by act of congress, made a lien on property throughout the state in which it is rendered to the same extent, and subject to

West Point v. Werner, 43 Iowa, 643.

45. Lanning v. Carpenter, 48 N. Y. 408, 412.

46. Witmer's Appeal, 45 Pa. St. 455, 84 Am. Dec. 505. And in Scottish American Mortgage Co. v. Follansbee, 14 Fed. 125, the court recognized a right in the judgment creditor to maintain a suit to remove a cloud from the title.

47. 2 Freeman, Judgments, § 340; Davidson v. Myers, 24 Md. 538; In re Boyd, 4 Sawy. 262, Fed. Cas. No. 1746; Towner v. Wells, 8 Ohio, 136.

48. Grant v. Bennett, 96 Ill. 513; Davidson v. Myers, 24 Md. 538; Eastham v. Sallis, 60 Tex.

576; 2 Freeman, Judgments, § 341.

49. Noe v. Moutray, 170 Ill. 169 177, 48 N. E. 709; Eastham v. Sallis, 60 Tex. 576; Linn v. Patton, 10 W. Va. 187.

50. Gilman v. Hovey, 26 Mo. 280; White v. Bogart, 73 N. Y. 256; Lauffer v. Cavett, 87 Pa. St. 479.

51. Sellers v. Burk, 47 Pa. St. 344.

52. See Petray v. Howell, 20 Ark. 615; Laughlin v. Hawley, 9 Colo. 170, 11 Pac. 45; American Ins. Co. v. Gibson, 104 Ind. 336; Easterling v. Chiles, 93 Ky. 315, 26 S. W. 227; Jackson v. Jones, 9 Cow. (N. Y.) 182; Adams v. Guy, 106 N. C. 275, 11 S. E. 535;

the same conditions, as in the case of a judgment rendered by a state court.<sup>53</sup>

In a number of the states there is a statutory provision making a decree in equity for the payment of money a lien on land to the same extent as a judgment at law, either by an express provision to that effect, or by a general declaration that such a decree shall have the same force and effect as a legal judgment.<sup>54</sup>

The judgment must, by the law of most of the states, be docketed or recorded, in order to constitute a lien, and there is usually a further requirement that it be indexed. The statutory requirements in these respects must be strictly followed, and a failure to comply therewith will usually render the judgment nugatory as against a subsequent *bona fide* purchaser of the land.<sup>55</sup> Such provisions have, however, been regarded as intended merely to protect persons without notice of the judgment, so that the failure to comply therewith will

White v Espey, 21 Ore. 328, 28 Pac. 71.

53. Act Aug. 1, 1888 (25 Stat. 357). See Cooke v. Avery, 147 U. S. 375, 37 L. Ed. 209.

54. Eames v. Germania Turn Verein, 74 Ill. 54; Raymond v. Blancgrass, 36 Mont. 449, 15 L. R. A. (N. S.) 976, 93 Pac. 648; Conard v. Everich, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. 58; Hohman's Appeal, 127 Pa. St. 209, 17 Atl. 902; Battle v. Bering, 7 Yerg. (Tenn.) 529, 27 Am. Dec. 526; Linn v. Patton, 10 W. Va. 187. In Blake v. Heyward, 1 Bailey, Eq. (S. C.) 208, it was held that the same result followed from a statute authorizing an execution to issue under an equity decree.

55. As to docketing, see Berry v. Reed, 73 Ind. 235; Josselyn v.

Stone, 28 Miss. 753; McMillan v. Davenport, 44 Mont. 23, 118 Pac. 756; Roll v. Rea, 57 N. J. L. 647, 32 Atl. 214; Hulbert v. Hulbert, 216 N. Y. 430, 111 N. E. 70; Sabin v. Kyniston, 81 Ore. 358, 159 Pac. 69; Wood v. Reynolds, 7 Watts. & S. (Pa.) 406; Reid v. McGowan, 28 S. C. 74, 5 S. E. 215; Flanagan v. Oberthier, 50 Tex. 379; Gurnee v. Johnson, 77 Va. 712; Duncan v. Custard, 24 W. Va. 730; Bush v. Faris, 30 U. S. App. 626, 71 Fed. 770, 18 C. C. A. 315. As to indexing, see Metz v. State Bank of Brownville, 7 Neb. 165; Ætna Life Ins. Co. v. Hesser, 77 Iowa, 381, 4 L. R. A. 122, 14 Am. St. Rep. 297, 42 N. W. 325; Hughes v. Lacock, 63 Miss. 112; Dewey v. Sugg, 109 N. C. 329, 14 L. R. A. 393, 13 S. E. 923; Crouse v. Murphy, 140 Pa. St. 335, 12 L.



not affect the lien as against subsequent purchasers or lienors with notice of the judgment.<sup>56</sup>

— **Lands and interests therein subject to the lien.** The lien of a judgment usually extends only to land within the jurisdiction of the court rendering the judgment, that is, it is ordinarily restricted to the limits of the particular county.<sup>57</sup> In most states, however, there are statutory provisions for extending the lien to land in another county by docketing or recording therein a transcript of the judgment.<sup>58</sup>

An estate for life is subject to the lien as being "real estate" or "real property," within the statutes creating the lien.<sup>59</sup> Whether a leasehold estate is subject to the lien is determined differently in different states, on a construction of the state statute.<sup>60</sup>

An equitable estate or interest in land was not subject to the lien of a judgment under the early

R. A. 53, 23 Am. St. Rep. 232, 21 Atl. 358; *Gullett Gin Co. v. Oliver*, 78 Tex. 182, 14 S. W. 451.

56. *Cushing v. Edwards*, 68 Iowa, 145, 25 N. W. 940; *York Bank's Appeal*, 36 Pa. St. 458; *Craig v. Sebrell*, 9 Gratt. (Va.) 131. *Contra*, *Glasscock v. Stringer* (Tex. Civ. App.), 32 S. W. 920.

57. *Sapp v. Wightman*, 103 Ill. 150; *Baker v. Chandler*, 51 Ind. 85; *Kerngood v. Davis*, 21 S. C. 183; *Black, Judgments*, §§ 417, 418.

58. See, *e. g.*, *Donner v. Palmer*, 23 Cal. 40; *Yackle v. Wightman*, 103 Ill. 169; *Mudge v. Livermore*, 148 Iowa, 472, 123 N. W. 199; *Hubbard v. Jones*, 61 Kan. 722, 60 Pac. 743; *Farmers' Bank of Maryland v. Heighe*, 3 Md. 357; *Bergen v. State*, 58 Miss. 623; *Lamb v. Sherman*, 19 Neb. 681, 28 N. W. 319; *Stewart v. Wheeling*

& L. E. Ry. Co., 53 Ohio St. 151, 29 L. R. A. 438, 41 N. E. 247; *Firebaugh v. Ward*, 51 Tex. 409.

59. *Verdin v. Slocum*, 71 N. Y. 345; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Lancaster County Bank v. Stauffer*, 19 Pa. St. 398; *Bridge v. Ward*, 35 Wis. 687.

60. That a leasehold estate is not subject to the lien, see *Summerville v. Stockton Milling Co.*, 142 Cal. 529, 76 Pac. 243; *Bismark Building & Loan Ass'n v. Bolster*, 92 Pa. St. 123; *Ely v. Beaumont*, 5 Serg. & R. (Pa.) 124. See, also, *Merry v. Hallet*, 2 Cow. (N. Y.) 497. *Contra*, *First Nat. Bank of Davenport v. Bennett*, 40 Iowa, 537; *Stockett v. Howard*, 34 Md. 121; *Northern Bank of Kentucky v. Roosa*, 13 Ohio, 334. The statute sometimes expressly provides for a lien on

English statute before referred to, and is not, at the present day, regarded as so subject, in the absence of a statutory provision to the contrary.<sup>60a</sup> In some states, however, a statute imposing the lien on the "real estate" or "real property" of the debtor is considered to include equitable as well as legal interests, and express provisions to the same effect are quite usual.<sup>61</sup> The judgment creditor, moreover, apart from statute, may, after return of execution unsatisfied, file a bill to obtain satisfaction of the judgment out of an equitable interest, and, upon so doing, the judgment becomes effective thereon as against any incumbrances or conveyances subsequent to the date of such filing.<sup>62</sup> Under statutes subjecting equitable interests to the lien, mortgaged land belonging to the judgment debtor, the "equity of redemption," is subjected to the lien, even where the legal view of a mortgage is adopted, and, in states where the mortgagee has merely a lien without the legal title, the mortgagor's interest in the land is so subject as a legal estate.<sup>63</sup>

all terms which have more than a certain number of years to run.

60a. *Morsell v. First Nat. Bank of Washington*, 91 U. S. 357, 361, 23 L. Ed. 436; *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 28 L. Ed. 301; *Terrell v. Prestel*, 68 Ind. 86; *Nessler v. Neher*, 18 Neb. 649, 26 N. W. 471; *Sipley v. Wass*, 49 N. J. Eq. 463, 24 Atl. 233; *Dixon v. Dixon*, 81 N. C. 323; *Smith v. Ingles*, 2 Ore. 43. In Pennsylvania a different view has been taken, for reasons growing out of the want of a court of equity. *Auwerter v. Mathiot*, 9 Serg. & R. (Pa.) 402.

61. See *Niantic Bank v. Dennis*, 37 Ill. 381; *Pease v. Frank*, 263 Ill. 500, 105 N. E. 299; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec.

354; *Maxwell v. Vaught*, 96 Ind. 141; *McKeithan v. Walker*, 66 N. C. 95.

62. *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 28 L. Ed. 301; *Lee v. Stone*, 5 Gill & J (Md.) 1, 23 Am. Dec. 589; *Roach's Ex'rs v. Bennett*, 24 Miss. 98; *Coutts v. Walker*, 2 Leigh, (Va.) 268. See *Ware v. Delahaye*, 95 Iowa, 667, 64 N. W. 640.

63. *Pahlman v. Shumway*, 24 Ill. 128; *Cook v. Dillon*, 9 Iowa, 407, 74 Am. Dec. 354; *McGuire v. Wilkinson*, 72 Mo. 199; *Macaulay v. Smith*, 132 N. Y. 524, 30 N. E. 997; *McKeithan v. Walker*, 66 N. C. 95; *Kinports v. Boynton*, 120 Pa. St. 306, 6 Am. St. Rep. 706, 14 Atl. 135; And see *Morsell v.*

When land is jointly owned by two or more persons, the undivided interest of each is subject to the lien of a judgment against him to the same extent as an interest in severalty. In case of partition, the lien attaches to the specific land allotted to the judgment debtor,<sup>64</sup> or, in case of sale for purposes of partition, to the fund obtained thereby.<sup>65</sup>

The legal title of a vendor who has not yet executed a conveyance is subject to the lien of a judgment against him, to the extent of the purchase money still unpaid, that is, the lien binds the land so far as the rights of the vendee will not be affected thereby.<sup>66</sup> If all the purchase money has been paid, the vendor has merely a bare legal title, which is not subject to the lien,<sup>67</sup> and if part only, or if none, has been paid, the vendor's title is, by the weight of authority, subject to the lien, which is, however, liable to be divested by the payment of whatever remains due by the vendee.<sup>68</sup>

First Nat Bank of Washington, 91 U. S. 357, 23 L. Ed. 436.

64. Bavington v. Clarke, 2 Pen. & W. (Pa.) 124, 21 Am. Dec. 432; *Emson v. Polhemus*, 28 N. J. Eq. 439; *Inhabitants of Argyle v. Dwinel*, 29 Me. 45.

65. *Eldridge v. Post*, 20 Fla. 579; *Garvin v. Garvin*, 1 Rich. (S. C.) 55.

66. *Ware v. Jackson*, 19 Ga. 452; *Wahn v. Fall*, 55 Neb. 547, 70 Am. St. Rep. 397, 76 N. W. 13; *Moyer v. Hinman*, 13 N. Y. 180; *Coggeshall v. Marine Bank Co.*, 63 Ohio St. 88, 57 N. E. 1086; *Chahorn v. Hollenback*, 16 Serg. & R. (Pa) 425, 16 Am. Dec. 587; *May v. Emerson*, 52 Ore. 262, 96 Pac. 454, 1065; *Reid v. Gorman*, 37 S. D. 314, 158 N. W. 780; *Searle v. Bird*, 94 Wash. 21, 161 Pac. 838.

67. *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Baker*

*v. Thompson*, 36 Minn. 314, 31 N. W. 51; *Schultz v. Selberg*, 80 Ore. 688, 157 Pac. 1114; *Floyd v. Harding*, 28 Gratt. (Va.) 401; *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670.

68. *Shinn v. Taylor*, 28 Ark. 523; *Kraner v. Chambers*, 92 Iowa, 681, 61 N. W. 373; *Hampson v. Edelen*, 2 Har. & J. (Md.) 64, 3 Am. Dec. 530; *Minneapolis & St. L. Ry. Co. v. Wilson*, 25 Minn. 382; *Moyer v. Hinman*, 13 N. Y. 180; *Minns v. Morse*, 15 Ohio, 568, 45 Am. Dec. 590; *Hurt's Adm'x v. Prillaman*, 79 Va. 257. *Contra*, *State Bank of Decatur v. Sanders*, 114 Ark. 440, 170 S. W. 86; *Chisholm v. Andrews*, 57 Miss. 636; *Jones v. Howard*, 142 Mo. 117, 43 S. W. 635; *Moore v. Byers*, 65 N. C. 240; *Snyder v. Botkin*, 37 W. Va. 355, 16 S. E. 591. The

The equitable interest of the vendee of land who has not yet received a conveyance is obviously not subject to the lien in those states in which no equitable interests are so subject.<sup>69</sup> In states where the judgment lien does exist upon equitable as well as legal interests, the vendee's interest is subject to the lien to the extent to which the purchase money has been paid, that is, the lien on his interest is subject to the prior right of the vendor to payment of whatever part of the price remains unpaid.<sup>70</sup>

Not only lands which belonged to the judgment debtor at the time of the rendition or docketing of the judgment, but also those thereafter acquired by him, are in most states subject to the lien.<sup>71</sup>

In case there are two judgments in favor of different creditors at the time of the acquisition of land by the debtor, both judgment liens accrue at the same time, and in this, as in other cases where two or more judgments have an equality of lien, the view has usually been asserted that one judgment creditor can, by the exercise of superior diligence in levying execution, acquire priority over the other or others.<sup>72</sup> This view has

doctrine of these latter cases is effectively criticized in an editorial note in 17 *Columbia Law Rev.* 47.

69. *Evans v. Feeny*, 81 Ind. 532; *Roddy v. Elam*, 13 Rich. Law (S. C.) 343; *Whittington v. Simmons*, 32 Ark. 377.

70. *Rand v. Garner*, 75 Iowa, 311, 39 N. W. 515; *Pugh v. Good*, 3 Watts & S. (Pa.) 56, 37 Am. Dec. 534; *Adams v. Harris*, 47 Miss. 144. See *Stewart v. Berry*, 84 Ga. 177, 10 S. E. 601.

71. *Jackson v. Bank of United States*, 5 Cranch, C. C. 1, Fed. Cas. No. 7,131; *Wales v. Bogue*, 31 Ill. 464; *Ware v. Delahaye*, 95 Iowa, 667, 64 N. W. 640; *Colt v. Du Bois*, 7 Neb. 391; *Hulbert v. Hulbert*,

216 N. Y. 430, 111 N. E. 70; *Moore v. Jordan*, 117 N. C. 86, 42 L. R. A. 209, 53 Am. St. Rep. 576, 23 S. E. 259; *Greenway v. Cannon*, 3 Humph. (Tenn.) 177, 39 Am. Dec. 161; *Barron v. Thompson*, 54 Tex. 235; *Muir v. Bosey*, 28 Wyo. 46, 146 Pac. 595.

In Ohio the lien does not attach to after-acquired lands (*Smith v. Hogg*, 52 Ohio St. 527, 40 N. E. 406), nor does it in Pennsylvania, except in the case of a judgement against a vendee subsequently acquiring the legal title (*Waters' Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354).

72. See 1 Black, *Judgments*, §§ 455, 456.

however lately been repudiated in one state in which previously perhaps it had been most strongly supported.<sup>73</sup>

— **Priorities.** The whole purpose and effect of a judgment lien is to render the lands of the debtor liable to execution under the judgment, without reference to any rights subsequently acquired by other persons, and that it does have such effect has never been questioned.<sup>74</sup> The question, however, whether a judgment lien can bind the land as against rights acquired by others before the rendition of the judgment is a subject as to which the law of the various states is not wholly in accord.

Apart from statute, the judgment lien attaches only to such interest as the debtor has at the time of the inception of the lien, and consequently in case he has previously executed a conveyance of or a mortgage on the land, although this is not known to the judgment creditor, the conveyance or mortgage takes precedence of the judgment. The judgment creditor is not regarded as a purchaser for value within the protection of the recording acts.<sup>75</sup> In a very considerable number

73. *Hulbert v. Hulbert*, 216 N. Y. 430, 111 N. E. 70. The doctrine of this case is well discussed in editorial notes, 16 *Columbia Law Rev.* 237, 29 *Harv. Law Rev.* 455.

74. See *Fawcetts v. Kimmey*, 33 *Ala.* 261; *Trapnall v. Richardson*, 13 *Ark.* 543, 58 *Am. Dec.* 338; *Clark v. Merriam*, 83 *Ind.* 58; *Hop-pock v. Shober*, 69 *N. C.* 153; *Loomis v. Second German Building Ass'n*, 37 *Ohio St.* 392; *Anderson v. Neff*, 11 *Serg. & R. (Pa.)* 208.

75. *Wilcoxon v. Miller*, 49 *Cal.* 194; *Donovan v. Simmons*, 96 *Ga.* 340, 22 *S. E.* 966; *Pierce v.*

*Spear*, 94 *Ind.* 127; *Seevers v. De lashmutt*, 11 *Iowa*, 174, 77 *Am. Dec.* 139; *Moorman v. Gibbs*, 75 *Iowa*, 537, 39 *N. W.* 832; *Mc-Calla v. Investment Co.*, 77 *Kan.* 770, 14 *L. R. A. (N. S.)* 128, 94 *Pac.* 126; *Knell v. Green Street Building Ass'n*, 34 *Md.* 67; *Sappington v. Oeschli*, 49 *Mo.* 244; *Hope v. Blair*, 105 *Mo.* 85, 24 *Am. St. Rep.* 366, 16 *S. W.* 595; *Vaughn v. Schmalse*, 10 *Mont.* 186, 10 *L. R. A.* 411, 25 *Pac.* 102; *Mahoney v. Salsbury*, 83 *Neb.* 488, 131 *Am. St. Rep.* 647, 120 *N. W.* 144; *Harney v. First Nat. Bank*, 52 *N. J. Eq.* 697, 29 *Atl.* 221; *Schroeder v. Gurney*, 73 *N. Y.* 430; *Okla*

of states, however, the recording acts specifically protect creditors as well as purchasers, and in such states the judgment lien will take precedence of a previous unrecorded conveyance provided, usually, the creditor did not have notice thereof at the time of the acquisition of the lien,<sup>76</sup>

Not only will the judgment, apart from statute, not take precedence over a prior conveyance of the legal title, but it will also not take precedence over pre-existing equities, the interest of the debtor, to which the lien attaches, being limited and qualified by such equities,<sup>77</sup> and this regardless of the fact that the judgment creditor had no notice thereof.<sup>78</sup> This latter view, that the creditor's lack of notice of the equity does not entitle him to priority, was adopted on the theory that, though the creditor has in a sense paid a consideration, he has not advanced money on the security of specific land, and is consequently not disappointed, in the sense that a mortgagee for value would be disappointed, if postponed to prior equities of which he is ignorant.<sup>79</sup> It is on this theory that the rights of a vendee under an executory contract of sale are regarded as superior to the lien of a judgment against the vendor,<sup>80</sup> and the rights of a *cestui que trust* are upheld

homa State Bank of Wapanucka v. Burnett, — Okla. —, 162 Pac. 1124; Hackett v. Callender, 32 Vt. 97.

76. *Ante*, § 567(m).

77. Brown v. Pierce, 7 Wall. (U. S.) 205, 19 L. Ed. 134; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976; Apple v. Robb, 54 Ind. App. 359, 103 N. E. 12; Mansfield v. Gregory, 11 Neb. 297, 9 N. W. 87; White v. Denman, 1 Ohio St. 110; Miller v. Baker, 166 Pa. St. 414, 45 Am. St. Rep. 680, 31 Atl. 121; Blaha

v. Borgman, 142 Wis. 43, 124 N. W. 1047. See Black, Judgments, § 445; 2 Freeman, Judgments, § 357; 2 Pomeroy, Eq. Jur., § 721.

78. Rodgers v. Bonner, 45 N. Y. 379; Doswell v. Adler, 28 Ark. 82; Wharton v. Wilson, 60 Ind. 591; Valentine v. Seiss, 79 Md. 187. And see cases cited in the preceding note.

79. Finch v. Winchelsea, 1 P. Wms. 277; Burgh v. Francis, 1 Eq. Cas. Abr. 320, pl. 1; Whitworth v. Gaugain, 3 Hare, 416.

80. See *ante*, note 68.

as against a lien under a judgment against the trustee.<sup>81</sup> So, an equitable lien in favor of a grantor for a part of the price has in some states been held to be superior to a lien subsequently attaching under a judgment against the grantee;<sup>82</sup> and the same principle might apply in the case of any other equitable lien.<sup>83</sup> In states, however, in which a creditor is regarded as within the protection of the recording acts, the judgment will take priority over a pre-existing equity which does not appear of record,<sup>84</sup> provided at least such equity is susceptible of record,<sup>85</sup> and provided, ordinarily, the judgment creditor was without notice of the equity at the time of obtaining the judgment.

In the case of a mortgage given for the price of land as a part of the transaction of purchase, no beneficial interest to which the judgment lien can attach is considered to vest in the mortgagor, as against the mortgagee, and it is immaterial that the mortgage is given, not to the vendor, but to a third person, who advances the purchase money.<sup>86</sup>

81. *Withnell v. Courtland Wagon Co.* (C. C.) 25 Fed. 372; *Hays v. Regar*, 102 Ind. 524, 1 N. E. 386; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

82. *Ante*, § 664, note 97.

83. *Wharton v. Wilson*, 60 Ind. 591; *Blankenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Galway v. Mulchow*, 7 Neb. 285; *Dwight v. Newell*, 3 N. Y. 185; 2 *Pomeroy*, Eq. Jur. § 721.

84. *Humphrey v. Copeland*, 54 Ga. 543; *Massey v. Westcott*, 40 Ill. 160; *Thorpe v. Helmer*, 275 Ill. 86, 113 N. E. 954; *Cutler v. Ammon*, 65 Iowa, 281, 21 N. W. 604; *Wilcox v. Leominster Nat.*

*Bank*, 43 Minn. 541, 19 Am. St. Reu. 259, 45 N. W. 1136; *Buchanan v. Kimes*, 2 Baxt. (Tenn.) 275; 2 *Pomeroy*, Eq. Jur. §§ 722, 723.

85. *Luke v. Smith*, 13 Ariz. 155, 108 Pac. 494, 227 U. S. 739, 57 L. Ed. 558; *Waterman v. Buckingham*, 79 Conn. 286, 64 Atl. 212; *Hunter v. State Bank*, 65 Fla. 202, 61 So. 497, (*semble*); *School District No. 10 v. Peterson*, 74 Minn. 122, 73 Am. St. Rep. 337, 76 N. W. 1126; *Calvert v. Roche*, 59 Tex. 463; *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622; *Cetti v. Wilson*, — Tex. Civ. App. —, 168 S. W. 996. But see *Yarnell v. Brown*, 170 Ill. 362, 62 Am. St. Rep. 380, 48 N. E. 909.

86. *Curtis v. Root*, 20 Ill. 53;

At common law, a judgment related back to, and was regarded as rendered upon, the first day of the term. This rule still applies in some states, so as to give the lien of the judgment precedence over a prior conveyance made during the term.<sup>87</sup> More generally, however, the lien attaches either at the time of the rendition of the judgment<sup>88</sup> or at the time of its docketing or record.<sup>89</sup>

§ 671. **Attachment liens.** In most, if not all, of the states, there are provisions for the issuance of a writ of "attachment" as auxiliary to an action for the recovery of money, and in advance of the trial thereof, the effect of such process being to give the plaintiff a lien upon such property of the defendant as may be levied on under the writ. In most jurisdictions this writ can be obtained only for certain causes, specifically named in the statute, usually these being such as render it probable that property of the defendant sufficient to satisfy the judgment may not be legally accessible for the satisfaction of the judgment unless immediately seized. Thus it is frequently provided that an attachment may issue when the defendant has absconded, or is a nonresident, when he has made, or intends to make, a fraudulent conveyance of his property, or when he is

Laidley v. Aiken, 80 Iowa, 112, 20 Am. St. Rep. 408, 45 N. W. 384; Ransom v. Sargent, 22 Kan. 516; Stewart v. Smith, 36 Minn. 32, 1 Am. St. Rep. 651, 30 N. W. 430; Bradley v. Bryan, 43 N. J. Eq. 396, 13 Atl. 806; Haywood v. Nooney, 3 Barb. (N. Y.) 643; Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328. *Ante*, § 636.

87. Clements v. Berry, 11 How. (U. S.) 398, 13 L. Ed. 745; Kellerman v. Aultman (C. C.) 30 Fed. 888; Davis v. Messenger, 17 Ohio St. 231; Jackson v. Luce,

14 Ohio, 514; Norfolk State Bank v. Murphy, 40 Neb. 735, 38 L. R. A. 243, 59 N. W. 706.

88. Lawson v. Jordan, 19 Ark. 297, 70 Am. Dec. 596; Bailey v. Mizell, 4 Ga. 123; Smith v. Lind, 29 Ill. 24; see 1 Black, Judgments, § 443, and note in 38 L. R. A. 243.

89. Elwell v. Hitchcock, 41 Kan. 130, 21 Pac. 109; Reeves v. Johnson, 12 N. J. Law, 29; Firebaugh v. Ward, 51 Tex. 409; Bailey v. Bailey, 93 Ga. 763, 21 S. E. 77.



about to remove property from the state.<sup>90</sup> In the New England states, however, there are no such restrictions upon the issuance of an attachment, and as a rule it issues as of course upon the direction of the plaintiff. The result is that a creditor may, in these states, usually establish a lien upon the defendant's property from the time of the commencement of the suit, and this has apparently been regarded as sufficient for his protection, without the enactment of any laws providing that his judgment, when obtained, shall be a lien on the debtor's land.

In the absence of a statute otherwise providing, the lien of an attachment does not exist until the officer actually levies under the writ upon property of the defendant, and it extends only to the property so levied on.<sup>91</sup> This levy does not, in the case of land, involve an actual seizure thereof, nor any interference with the possession, it being usually sufficient that the officer indorse on the writ that he has attached the land,<sup>92</sup> describing it with such certainty as is necessary in the case of a conveyance.<sup>93</sup> In some states, moreover, the return of the officer must be filed or recorded in a particular office in order that the attachment may bind the land as against adverse rights subsequently accruing.<sup>94</sup>

90. *Drake, Attachment*, § 38 *et seq.*; *Kneeland, Attachment*, cc. 8-11.

91. See *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. Ed. 931; *Shacklett's Appeal*, 14 Pa. St. 326; *Gray's Adm'r v. Patton's Adm'r*, 13 Bush (Ky.) 625; *Riordan v. Britton*, 69 Tex. 198, 5 Am. St. Rep. 37, 7 So. 50; *Taffits v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610.

92. *Wood v. Weir*, 5 B. Mon. (Ky.) 544; *Boyle v. Ferry*, 12 La. Ann. 425; *Perrin v. Leverett*, 13 Mass. 130; *Burkhardt v. McClel-*

*lan*, 1 Abb. Dec. (N. Y.) 263; *Lackey v. Seibert*, 23 Mo. 85; *Hancock v. Henderson*, 45 Tex. 479.

93. *Biggs v. Blue*, 5 McLean, 148, Fed. Cas. No. 1,403; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Henry v. Mitchell*, 32 Mo. 512; *Howard v. Daniels*, 2 N. H. 137; *Grier v. Rhyne*, 67 N. C. 338.

94. See *Wheaton v. Neville*, 19 Cal. 41; *Raynolds v. Ray*, 12 Colo. 108, 20 Pac. 4; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Coffin v. Ray*, 1 Metc. (Mass.) 212;

An attachment may usually be levied upon estates in land of almost every character,—both those of freehold and those less than freehold.<sup>95</sup> The right to subject equitable interests to attachment differs in different states.<sup>96</sup> Mortgaged land is subject to attachment in many states, either as constituting a legal interest, or by force of a special statute.<sup>97</sup> The interest of a mortgagee before foreclosure, being a mere chose in action, is usually not attachable.<sup>98</sup>

As a general rule, the attachment lien binds only such interest as the debtor has at the time of the levy, and is subject to all rights or equities which may have accrued in favor of other persons before the date of the levy.<sup>99</sup> Accordingly, apart from statute, an attach-

Bryant v. Duffy, 128 Mo. 18, 30 S. W. 317.

95. Waples, Attachment (2d Ed.) § 246; Drake, Attachment, § 232 *et seq.*; Kneeland, Attachment, § 361.

96. That an equitable interest is not subject to attachment, see Lowry v. Wright, 15 Ill. 95; Shoemaker v. Harvey, 43 Neb. 75, 61 N. W. 109; Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505. That equitable interests are so subject, see Fish v. Fowlie, 58 Cal. 373; Davenport v. Lacon, 17 Conn. 278; Bullene v. Hiatt, 12 Kan. 98; Bailey v. Warner, 28 Vt. 87; McCamant v. Batsell, 59 Tex. 363. So, in some states, the interest of the vendee under a contract of sale is attachable. Johnson v. Bell, 58 N. H. 395; Higgins v. McConnell, 130 N. Y. 482, 39 N. E. 978; Whittier v. Vaughan, 27 Me. 301.

97. Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761; Hawes' Appeal, 50 Conn. 317; Reed v. Bigelow, 5

Pick. (Mass.) 281; Eastman v. Knight, 35 N. H. 551; De Wolf v. Murphy, 11 R. I. 630.

98. McGurran v. Garrity, 68 Cal. 566, 9 Pac. 839; McLaughlin v. Shepherd, 32 Me. 143, 52 Am. Dec. 646; Marsh v. Austin, 1 Allen (Mass.) 235; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Barrett v. Sargeant, 18 Vt. 365.

99. Tennant v. Watson, 58 Ark. 252, 24 S. W. 495; Hoag v. Howard, 55 Cal. 564; Waterman v. Buckingham, 79 Conn. 286, 64 Atl. 212; Bateman v. Backus, 4 Dak. 433, 34 N. W. 66, 68; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. 976; Columbia Bank v. Jacobs, 10 Mich. 349, 81 Am. Dec. 792; Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366, 16 S. W. 595; Mahoney v. Salsbury, 83 Neb. 488, 131 Am. St. Rep. 647, 120 N. W. 144; Depeyster v. Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723; Jamison v. Miller, 27 N. J. Eq. 586; Leonard v. Flem-

ment against a trustee cannot affect the rights of a *cestui que trust*,<sup>1</sup> and a conveyance or mortgage takes precedence of an attachment subsequently levied.<sup>2</sup> In some states, however, attaching creditors, like judgment creditors,<sup>3</sup> are within the protection of the recording acts, and are consequently not affected by prior equities, incumbrances, or conveyances, which do not appear of record, and of which they have no notice.<sup>4</sup>

The attachment lien is perfected by a judgment for plaintiff in the action to which the attachment is auxiliary, he then having a lien on the property attached, which he may enforce by a sale under execution or, in some states, by a special proceeding under the order of the court. The judgment should specifically recognize the attachment lien, and in some states its failure so to do involves a loss of the lien.<sup>5</sup>

A subsequent sale under execution upon a judgment rendered in favor of plaintiff in the suit in which the attachment was issued passes to the purchaser the interest of the judgment debtor as it existed at the time of the levy of the attachment, free from any adverse rights or claims which may have accrued since such levy.<sup>6</sup>

ing, 13 N. D. 629, 102 N. W. 308; *Furman v. McMillan*, 2 Lea (Tenn.) 121.

1. *Tucker v. Vandermark*, 21 Kan. 263; *Houghton v. Davenport*, 74 Me. 590; *Haynes v. Jones*, 5 Metc. (Mass.) 292; *Dow v. Sayward*, 14 N. H. 9; *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

2. See cases cited *ante*, note, 99.

3. *Ante*, § 678.

4. *Campbell v. First Nat. Bank*, 22 Colo. 177, 43 Pac. 1007; *Carr v. Thomas*, 18 Fla. 736; *Ray v. Keith*, 218 Ill. 182, 75 N. E. 921;

*Parker v. Prescott*, 86 Me. 241, 29 Atl. 1007; *Woodward v. Sartwell*, 129 Mass. 210; *Ildverson v. First State Bank of Bowbells*, 24 N. D. 227, 139 N. W. 105; *Wright v. Franklin Bank*, 59 Ohio St. 80, 51 N. E. 876; *Security Sav. & Trust Co. v. Lowenberg*, 38 Ore. 159, 62 Pac. 647; *Paris Grover Co. v. Burks*, 101 Tex. 106, 105 S. W. 174; *Bigelow v. Topliff*, 25 Vt. 273, 60 Am. Dec. 264; *Houston v. McCluney*, 8 W. Va. 135.

5. See *Waples, Attachment*, § 893 *et seq.*; 6 *Corpus Juris*. pp. 485, 486.

6. *McClellan v. Solomon*, 23

§ 672. **Execution liens.** In some states, the delivery to the sheriff of a writ of execution under a judgment creates a lien on such property of the judgment defendant as is subject to levy under the execution.<sup>7</sup> In most states, however, the mere delivery of the writ to the sheriff does not create any lien, and a levy under the writ is necessary to make the claim of the creditor effective as against adverse claims to and equities in the debtor's property.<sup>8</sup>

So far as a lien already exists by force of the judgment, any additional lien by virtue of the execution is usually of no value,<sup>9</sup> and, in view of the fact that the former lien is recognized in most of the states, there seems to be but slight occasion for the consideration of an execution lien in connection with the law of land.<sup>10</sup>

The lien of an execution, whether arising from the issue or the levy of an execution, is superior to all rights subsequently arising, as when the land is sold or incumbered by the execution defendant after the in-

Fla. 437, 11 Am. St. Rep. 381, 2 So. 825; Cockey v. Milne, 16 Md. 200; Nason v. Grant, 21 Me. 160; Lackey v. Seibert, 23 Mo. 85; Westevelt v. Hagge, 61 Neb. 647, 54 L. R. A. 333, 85 N. W. 852; Van Camp v. Searle, 79 Hun. (N. Y.) 134, 29 N. Y. Supp. 757; Mattocks v. Farrington, 2 Hask. 331, Fed. Cas. No. 9,298.

7. Dailey v. Burke, 28 Ala. 328; Whitehead v. Woodruff, 11 Bush (Ky.) 209; Williams v. Mellor, 12 Colo. 1, 19 Pac. 839; Doe d. McLean v. Upchurch, 6 N. C. 353; 2 Freeman, Executions, § 200.

8. See Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441; Reeves v. Sebern, 16 Iowa, 234, 85 Am. Dec. 513; Albrecht v. Long, 25 Minn. 163; Millsbaugh v. Mitchell, 8

Barb. (N. Y.) 333; Sawyers v. Sawyers, 93 N. C. 321; Smith v. Hogg, 52 Ohio St. 527, 40 N. E. 406; Wilson's Appeal, 90 Pa. St. 370; Anderson v. Taylor, 6 Lea (Tenn.) 382; 2 Freeman, Executions, § 202.

9. See Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Riland v. Eckert, 23 Pa. St. 215; McIntyre v. Sanford, 9 Daly (N. Y.) 21; Farrior v. Houston, 100 N. C. 363, 6 Am. St. Rep. 597, 6 S. E. 72.

10. In states where an execution may be issued to another county without first docketing or recording the judgment therein, the effect of the execution, when so issued, as creating a priority or "lien," may be important.

ception of the lien.<sup>11</sup> As a general rule, it takes effect only upon the actual title of the judgment defendant, and is postponed to all rights and equities which may have accrued before its inception.<sup>12</sup> This is not, however, the case in that class of states, before referred to, in which a judgment creditor is regarded as within the protection of the recording acts, and there the lien of an execution takes precedence of unrecorded conveyances, mortgages, or other incumbrances existing at the inception of the lien, but of which the creditor has no notice.<sup>13</sup>

§ 673. **Liens for taxes and assessments.** In most of the states it is provided by statute that taxes on a particular piece of land shall constitute a lien thereon. In the absence of such an express provision, there is, it is sometimes said, no such lien.<sup>14</sup> But the effect of a statute authorizing a sale of the land for taxes is undoubtedly to make, in effect, the taxes a lien on the land, since any purchaser or incumbrancer acquires his interest subject to the possibility of such sale unless the taxes are paid.<sup>15</sup> Occasionally, taxes due on per-

11. *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Castleberry v. Weaver*, 30 Ga. 534; *French v. Allen*, 50 Me. 437; *Hall v. Crocker*, 3 Metc. (Mass.) 245; *Doe d. Huggins v. Ketchum*, 20 N. C. 414; *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497; 2 Freeman, Executions, § 195.

12. *O'Rourke v. O'Connor*, 39 Cal. 442; *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855; *Holden v. Garrett*, 23 Kan. 98; *Righter v. Forrester*, 1 Bush (Ky.) 278; *Sappington v. Oeschli*, 49 Mo. 244; *Davis v. Owenby*, 14 Mo. 170, 55 Am. Dec. 105.

13. *Hawkins v. Files*, 51 Ark.

417, 11 S. W. 681; *O'Hara v. Booth*, 29 La. Ann. 817; *Davidson v. Beard*, 9 N. C. 520; *Stephens v. Keating* (Tex.) 17 S. W. 37; *Stevenson v. Texas & P. Ry. Co.*, 105 U. S. 703, 26 L. Ed. 1215.

14. *Miller v. Anderson*, 1 S. D. 539, 11 L. R. A. 317, 47 N. W. 957; *Morrow v. Dows*, 28 N. J. Eq. 463; *City of Philadelphia v. Greble*, 38 Pa. St. 339; *Cooley, Taxation*, 447.

15. See *Dunlap v. County of Gallatin*, 15 Ill. 7; *Dougherty v. Miller*, 36 Cal. 83; *Hoglen v. Cohan*, 30 Ohio St. 436; *Stokes v. State*, 46 Ga. 412; *Lyon v. Al-ley*, 130 U. S. 177, 32 L. Ed. 899.

sonalty are made a lien on the land of the owner.<sup>16</sup>

Usually the lien for taxes on the land is, by the statute, imposed upon the land as a whole, and not upon any particular estates or interests therein, so that all equities, interests, and incumbrances, whether they accrued before or after the levy or assessment of the tax, are subordinate to the lien, and liable to be divested by a sale for taxes.<sup>17</sup>

In the absence of any statutory provision determining the time of the inception of the lien, it commences at the time when, "by an extension of the tax upon the roll, a particular sum has become a charge upon a particular parcel of land."<sup>18</sup> This is a matter of importance only for the purpose of determining which of two private individuals shall pay the tax, when, as is ordinarily the case, the tax is a lien on the land as a whole, and not on a particular interest therein.

Assessments for local improvements also may be, and usually are, liens on the land assessed for benefits from the improvement.<sup>19</sup> The assessment may even

16. See *New England Loan & Trust Co. v. Young*, 81 Iowa, 732, 10 L. R. A. 478, 39 N. W. 116, 46 N. W. 1103; *Union Trust Co. v. Weber*, 96 Ill. 346; *State v. City of Newark*, 42 N. J. L. 38; *Albany Brewing Co. v. Town of Meriden*, 48 Conn. 243; *Miller v. Anderson*, 1 S. D. 539, 11 L. R. A. 317, 47 N. W. 957; *Cooley, Taxation*, 445.

17. *Osterberg v. Union Trust Co.*, 93 U. S. 424, 23 L. Ed. 964; *Dunlap v. County of Gallatin*, 15 Ill. 7; *Keating v. Craig*, 73 Mo. 507; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711. But the statute is sometimes construed as giving a lien only on the interest of the person

primarily bound to pay the tax. See *Rhein Bldg. Ass'n v. Lea*, 100 Pa. St. 210; *O'Neill v. Dringer*, 31 N. J. Eq. 507; *Shaw v. City of Allegheny*, 115 Pa. St. 46, 7 Atl. 770; *Morrow v. Dows*, 28 N. J. Eq. 459. And a tax on personalty is generally construed as intended to be a lien only on the interest in the land of the person owing taxes, *State v. City of Newark*, 42 N. J. L. 38; *Miller v. Anderson*, 1 S. D. 539, 11 L. R. A. 317, 47 N. W. 957; *Carter v. Rodewald*, 108 Ill. 351. *Contra*, *New England Loan & Trust Co. v. Young*, 81 Iowa, 732, 10 L. R. A. 478, 39 N. W. 116, 46 N. W. 1103.

18. *Cooley, Taxation* (2d Ed.) 448; *Black, Tax Titles*, § 189.

19. *Lyon v. Alley*, 130 U. S.

take precedence of liens and incumbrances placed on the land before the commencement, or even the ordering, of the improvement.<sup>20</sup>

United States internal revenue taxes are, by express statutory provision, made liens upon the property of the persons liable therefor, subject to the qualification that the lien shall not be valid as against any mortgagee, purchaser, or judgment creditor, until notice thereof is filed by the collector in the office of the clerk of the United States court for that district or, when authorized by the state, in the office of the recorder of deeds.<sup>21</sup>

**§ 674. The lien of decedent's debts.** The liability of the land of a deceased person to be sold in payment of his debts may be, in most jurisdictions, enforced against not only the heirs or devisees of the land, but against persons claiming by purchase, mortgage, or otherwise, under such heirs and devisees.<sup>22</sup> Conse-

177, 32 L. Ed. 899; Allegheny City's Appeal, 41 Pa. St. 60; Borough of McKeesport v. Fidler, 147 Pa. St. 532, 23 Atl. 799; Mix v. Ross, 57 Ill. 121; Hawthorne v. City of East Portland, 13 Ore. 271, 10 Pac. 432; Dillon, Mun. Corp. (4th Ed.) § 821.

20. Dale v. McEvers, 2 Cow. (N. Y.) 118; Wabash Eastern Ry. Co. of Illinois v. East Lake Fork Special Drainage Dist. Com'rs, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781; Keating v. Cralg, 73 Mo. 507; Chaney v. State, 118 Ind. 494, 21 N. E. 45; Provident Institution for Savings v. Mayor, etc., of Jersey City, 113 U. S. 506, 28 L. Ed. 1102.

21. Rev. St. U. S. § 3186, as amended by Act March 1, 1879, § 3, and Act March 4, 1913, c. 166; Id. § 3207.

22. See Nelson v. Murfee, 69 Ala. 598; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Davis v. Vansands, 45 Con. 600; Myers v. Pierce, 86 Ga. 786, 12 S. E. 978; McCoy v. Morrow, 18 Ill. 519; Smith v. Gorham, 119 Ind. 436, 21 N. E. 1096; Flood v. Strong, 108 Mich. 561, 66 N. W. 473; Den d Warwick v. Hunt, 11 N. J. L. 1; Hyde v. Tanner, 1 Barb. (N. Y.) 75; Faran v. Robinson, 17 Ohio St. 242, 93 Am. Dec. 617. And cases cited in reporter's note, 43 N. J. Eq. 207.

The court will, however, in particular cases, consider the fact that the land has passed into the hands of a *bona fide* purchaser, in determining whether the application for sale has been unreasonably delayed. Ferguson v. Scott, 49 Miss. 500; Rosenthal v.

quently, this liability of the land to sale constitutes, in effect, a lien on the land. In England, however, and in at least one state, the liability is enforceable against the land only so long as it remains in the hands of the heirs or devisees, and consequently there it cannot be regarded as a lien.<sup>23</sup>

**§ 675. Liens on crops.** In many states the landlord has a lien for rent on crops raised on the demised premises,<sup>24</sup> and in some states has likewise a lien thereon for any supplies furnished by him to the tenant for the purpose of raising such crops.<sup>25</sup> This lien frequently takes priority of all other liens.<sup>26</sup>

In some states, moreover, a person not the landlord, who makes advances or furnishes supplies for the purpose of enabling the owner of land to raise a crop, may obtain, by agreement made at the time of making the advances or furnishing the supplies, a lien on the crops to be raised.<sup>27</sup> In some states, a lien on crops is

Renick, 44 Ill. 202; Creswell v. Slack, 68 Iowa, 110, 26 N. W. 42. In New York, the statute requiring the sale to be made in three years applies expressly only in favor of a *bona fide* purchaser of the land. Dodge v. Stevens, 105 N. Y. 585, 12 N. E. 759.

23. Kindersley v. Jervis, 22 Beav. 1; British Mut. Inv. Co. v. Smart, L. R. 10 Ch. App. 567; Smith v. Thomas' Heirs, 14 Lea (Tenn.) 324.

24. See Nelson v. Webb, 54 Ala. 436; Lemay v. Johnson, 35 Ark. 225; Jones v. Fox, 23 Fla. 454, 2 So. 700; Miles v. James, 36 Ill. 399; Rotzler v. Rotzler, 46 Iowa, 189; Knowles v. Sell, 41 Kan. 171, 21 Pac. 102; Love v. Law, 57 Miss. 596; 2 Tiffany, Landlord & Ten. § 321.

25. See Bell v. Hurst, 75 Ala. 44; Stewart v. Hollins, 47 Miss. 708; Whitmore v. Polndexter, 7 Baxt. (Tenn.) 248; Jones v. Eubanks, 86 Ga. 616, 12 S. E. 1065; Stafford v. Pearson, 26 La. Ann. 658.

26. Saloy v. Bloch, 136 U. S. 338, 34 L. Ed. 468; Lake v. Gaines, 75 Ala. 143; Brown v. Hamil, 76 Ala. 506; Smith v. Fouche, 55 Ga. 120; Carroll v. Bancker, 43 La. Ann. 1078; Brewer v. Chappell, 101 N. C. 251, 7 S. E. 670; 2 Tiffany, Landlord & Ten., p. 1925 *et seq.*

27. See Boyett v. Potter, 80 Ala. 476, 2 So. 534; Bank of America v. Fortier, 27 La. Ann. 243; Airey v. Weinstein, 54 Ark. 443, 16 S. W. 123; Herman v. Perkins, 52 Miss. 813; Warder-Bush-



given by statute to laborers employed in making them.<sup>28</sup>

§ 676. **The statutory lien for improvements.** The equitable right of a *bona fide* occupant of land to an allowance for improvements made by him is, as has been stated, secured by courts of equity by the establishment of an equitable lien on the land for the amount thereof.<sup>29</sup> The statutes likewise, in providing for compensation for improvements made by an occupying claimant,<sup>30</sup> sometimes provide expressly or by implication that he shall have a lien for the amount thereof.<sup>31</sup>

§ 677. **Widow's allowance.** In some states, the statute provides for a pecuniary allowance to the widow of decedent. Occasionally, these statutes have been construed as making the land liable for the payment of such allowance in case of a deficiency of personalty, and in that case the amount thereof may be regarded as a lien on the land until other satisfaction of the claim.<sup>32</sup>

nell & Glessner Co. v. Minnesota & Dakota Elevator Co., 44 Minn. 390, 46 N. W. 773; Rawlings v. Hunt, 90 N. C. 270.

28. Wilson v. Taylor, 89 Ala. 368, 8 So. 149; Saloy v. Dragon, 37 La. Ann. 71; Buck v. Paine, 50 Miss. 648; Emerson v. Hedrick, 42 Ark. 263. Compare Schilling v. Carter, 35 Minn. 287, 28 N. W. 658.

A statute giving a lien to one who bestows labor on personal property has been held not to give an agricultural laborer a lien on

crops. McDearmid v. Foster, 14 Ore. 417, 12 Pac. 813. *Contra*, Hogue v. Sheriff, 1 Wash. T. 172.

29. *Ante*, § 662.

30. *Ante*, § 274.

31. Barker v. Owen, 93 N. C. 198; Whitcomb v. Provost, 102 Wis. 278, 78 N. W. 432.

32. See Detweller's Appeal, 44 Pa. St. 243; Rector v. Reavill, 3 Ill. App. 232; Blakeman v. Blakeman, 64 Minn. 315, 67 N. W. 69; Allen v. Allen's Adm'r, 18 Ohio St. 234; 1 Woerner, Administration, § 85.



# TABLE OF CASES

[REFERENCES ARE TO PAGES.]

- Aaron v. Bayne, 28 Ga. 107-774.  
 Abbe v. Goodwin, 7 Conn. 377-2589.  
 Abbett v. Page, 92 Ala. 57-2128.  
 Abbey v. Wheeler, 170 N. Y. 122-991.  
 Abbey Homestead Ass'n v. Willard, 48 Cal. 614-1964.  
 Abbiss v. Burney, 17 Ch. Div. 211-505, 594, 606.  
 Abbot v. Holway, 72 Me. 298-547.  
 Abbot of Sherbourne's Case, Y. B. 12 Hen. 4, 5-977.  
 Abbott v. Abbott (N. H.), 97 Atl. 976-688.  
     v. Abbott, 189 Ill. 488-1603, 1641, 1760.  
     v. Abbott, 51 Me. 575-1651.  
     v. Abbott, 97 Mass. 137-856, 857, 2292.  
     v. Butler, 59 N. H. 317-1328, 1332, 1345.  
     v. Cottage City, 143 Mass. 521-1873.  
     v. Cromartie, 72 N. C. 292-192.  
     v. Curran, 98 N. Y. 665-2609.  
     v. Doyle, 90 Kan. 45-2314.  
     v. Flint's Adm'r, 78 Vt. 274-1634.  
     v. Godfroy's Heirs, 1 Mich. 178-2702.  
     v. Hanson, 24 N. J. L. (4 Zab.) 493-152, 158, 2381.  
     v. Holway, 72 Me. 298-1815.  
     v. Jenkins, 10 Serg. & R. (Pa.) 296-506.  
     v. Kansas City, St. J. & C. B. R. Co., 83 Mo. 271-1169, 1171.  
 Abbott v. Kasson, 72 Pa. St. 183-2668.  
     v. Parker, 103 Ark. 425-2186.  
     v. Pond, 142 Cal. 393-2052.  
     v. Powell, 6 Sawy. 91-2675.  
     v. Rowan, 33 Ark. 593-1681.  
     v. Sanders, 80 Vt. 179-330.  
     v. Stratten, 3 Jones & L. 603-2745.  
     v. Upton, 19 Pick. (Mass.) 434-2585.  
     v. Weekly, 1 Lev. 176-1543.  
     v. Wetherby, 6 Wash. 507-658.  
     v. Williams, 74 W. Va. 652-696, 697.  
 Abbott's Petition, In re, 55 Me. 580-422.  
 Abbott & Medcalf, Re, 20 Ont. Rep. 299-2731.  
 Abby v. Goodrich, 3 Day (Conn.) 433-1722.  
 Abeel & Abeel v. Radcliff, 13 Johns. (N. Y.) 297-252.  
 Abel v. Weresten, 143 Ky. 513-962.  
 Abele v. McGuigan, 78 Mich. 415-2542.  
 Abel's Case, Y. B. 18 Edw. 2-533.  
 Abells v. Coons, 7 Cal. 105-2500.  
 Abercrombie v. Baldwin, 15 Ala. 363-671.  
     v. Riddle, 3 Md. Ch. 320-812.  
     v. Simmons, 71 Kan. 538-1260.  
 Abergavenny's Case, 6 Co. Rep. 78-639.  
 Abernathie v. Rich, 256 Ill. 166-1626, 1788.  
 Abernathy v. Phillips, 82 Va. 769-1713.

## [REFERENCES ARE TO PAGES.]

- Abernathy v. South & W. R. Co., 150 N. C. 97-2251.
- Abernethy v. Orton, 42 Ore. 437-952.
- Abney v. Moore, 106 Ala. 131-1812, 1813, 1815.  
v. Twombly, 39 R. I. 304-1338, 1351.
- Aborn v. Searles, 18 R. I. 357-401.  
v. Smith, 12 R. I. 370-1034.
- Abraham v. Bubb, 2 Freeman 53-953, 979.
- Abrahams v. Tappe, 60 Mo. 317-308, 319, 322.
- Abrams v. Rhoner, 44 Hun 511-1733.  
v. Sheehan, 40 Md. 446-154.  
v. State, 45 Wash. 327-2352.  
v. Watson, 59 Ala. 524-321.
- A. C. Conn Co. v. Little Suamico Lumber Mfg. Co., 74 Wis. 652-1547.
- Account of Welles, 191 Pa. 239-666.
- Acer v. Westcott, 46 N. Y. 384-2244.
- Acherley v. Vernon, Willes 153-275.
- Achilles v. Achilles, 151 Ill. 136-792.
- Achoon v. Jackson, 86 Me. 215-552.
- Acker v. Priest, 92 Iowa 610-394, 399, 1626.
- Ackerman v. Ellis, 81 N. J. L. 1-896.  
v. Fichter, 179 Ind. 392-434.  
v. Gorton, 67 N. Y. 63-455.  
v. Hartley, 8 N. J. Eq. 476-984.  
v. Hunsicker, 85 N. Y. 43-2568, 2570.  
v. Shelp, 8 N. J. Law 125-1544.  
v. Williamsport, 227 Pa. 591-1876.
- Ackers v. Phipps, 3 Clark & F. 667-553.
- Ackley v. Dygert, 33 Barb. (N. Y.) 176-715.
- Ackman v. Harsell, 98 N. Y. 186-803.
- Ackroyd v. Smith, 10 C. B. 188-1221, 1223, 1228, 1256, 1398, 1415.  
v. Smithson, 1 Brown Ch. 503, 1 White & T. Lead. Cas. Eq. 1171-395, 448, 449, 450, 451, 452.
- Acme Ground Rent Co. v. Werner, 151 Wis. 417-1500.
- Acme Oil & Min. Co. v. Williams, 140 Cal. 681-875.
- Acocks v. Phillips, 5 Hurl. & N. 183-293.
- Acord v. Beaty, 244 Mo. 126-703, 722.
- Acree v. Dabney, 113 Ala. 437-524.
- Acruman v. Barnes, 66 Ark. 442-2300.
- Acton v. Blundell, 12 Mees. & W. 324-1133, 1176.  
v. Culbertson, 38 Okla. 280-1931.  
v. Waddington, 46 N. J. Eq. 16-2760.
- Adair v. Bogle, 20 Iowa 238-136.  
v. Brummer, 74 N. Y. 539-1065.  
v. Carden, (1892) 29 L. R. Ir. 469-2483.  
v. Craig, 135 Ala. 332-1810.  
v. Davis, 71 Ga. 769-2195.  
v. Lott, 3 Hill (N. Y.) 182-829, 847.
- Adams, In re, 32 R. I. 41-443, 1072, 1073.
- Adams v. Adams, 51 Conn. 544-2476.  
v. Adams, 21 Ky. L. Rep. 1756-357.  
v. Adams, 21 Wall. (U. S.) 185-386, 388, 1794.  
v. Akerlund, 168 Ill. 632-2353.  
v. Anderson, 23 Miss. 705-1905.

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- Adams v. Angell, 5 Ch. Div. 634-2610.
- v. Baker, 50 W. Va. 249-1752.
- v. Beadle, 47 Iowa 439-878. 2435, 2437.
- v. Betz, 167 Ind. 161-1000.
- v. Bigelow, 128 Mass. 365-1479.
- v. Brackett, 5 Mete. (Mass.) 280-377.
- v. Bradley, 12 Mich. 346-2228.
- v. Briggs Iron Co., 7 Cush. (Mass.) 361-679, 685, 866.
- v. Brown, 7 Cush. (Mass.) 220-2650.
- v. Buford, 6 Dana (Ky.) 413-2290.
- v. Burke, 21 R. I. 126-1583.
- v. Carpenter, 187 Mo. 613-2716, 2717, 2730.
- v. Chaplin, 1 Hill Eq. 265-473, 475.
- v. Church, 42 Ore. 270-661, 669.
- v. City of Cohoes, 127 N. Y. 175-259.
- v. Clover Hills Farms, 86 Ore. 140-1175.
- v. Conover, 87 N. Y. 422-1681, 1700, 1718.
- v. Corriston, 7 Minn. 456 (Gil. 365)-2362.
- v. Couch, 1 Okla. 17-1562.
- v. Dunklee, 19 Vt. 382-1594.
- v. Essex, 1 Bibb. (Ky.) 149-2676, 2687.
- v. First Baptist Church of St. Charles, 148 Mich. 140-272.
- v. Fletcher, 17 R. I. 137-146.
- v. Frothingham, 3 Mass. 352-2106.
- v. Fullam, 43 Vt. 592-2010.
- v. Gordon, 265 Ill. 87-1275, 1286.
- v. Gossom, 228 Mo. 566-2242.
- v. Guerard, 29 Ga. 651-347, 532, 1932.
- v. Guy, 106 N. C. 275-2777.
- Adams v. Harris, 47 Miss. 144-461, 2782.
- v. Hill, 29 N. H. 202-739, 741.
- v. Hodgkins, 109 Me. 361-1297, 1378, 1379.
- v. Holden, 111 Iowa 54-2659.
- v. Hopkins, 144 Cal. 19-718, 1616, 2536, 2635.
- v. Howell, 58 Misc. 435-1455.
- v. Iron Cliffs Co., 78 Mich. 278-1863.
- v. Johnson, 41 Miss. 258-2376, 2749.
- v. Laugel, 144 Ind. 608-2402.
- v. Leavens, 20 Conn. 73-641.
- v. Legroo, 111 Me. 302-522.
- v. Logan County, 11 Ill. 339-270.
- v. Manning, 48 Conn. 477-1160.
- v. Marshall, 138 Mass. 228-1294.
- v. Medsker, 25 W. Va. 127-1723.
- v. Merrill, 45 Ind. App. 315-527.
- v. Noble, 120 Mich. 545-1418, 1421.
- v. Odom, 74 Tex. 206-2689.
- v. Ore Knob Copper Co., 7 Fed. 634-292, 297.
- v. Palmer, 51 Me. 480-775.
- v. Parker, 12 Gray (Mass.) 53-2530, 2533.
- v. Peabody Coal Co., 230 Ill. 469-464.
- v. Pease, 2 Conn. 481-1036, 1038, 1547.
- v. Roberson, 97 Kan. 198-2106.
- v. Ross, 30 N. J. L. 505-834, 1693.
- v. Savage, 2 Ld. Raym. 854-585.
- v. Sayre, 76 Ala. 509-2440.
- v. Schiffer, 11 Colo. 15-1683.
- v. Smith, 1 Breeze (Ill.) 283-881.
- v. Symon, 22 Abb. N. Cas. 469-2800.

[REFERENCES ARE TO PAGES.]

- Adams v. Tertenants of Savage, 2 Salk. 679-354.
- v. Thorton, 1 Cal. App. xviii-899.
- v. Valentine, 33 Fed. 1-289.
- v. Van Alstyne, 25 N. Y. 232-1003, 1247, 2037.
- v. Vanderback, 148 Ind. 92-2250.
- v. Walker, 34 Conn. 466-1164.
- v. Warner, 23 Vt. 395-1614.
- v. Watkins, 103 Mich. 431-1631.
- v. Weir & Flagg (Tex. Civ. App.), 99 S. W. 726-1213.
- Adams-Booth Co. v. Reid, 112 Fed. 106-2231.
- Adams Female Academy v. Adams, 65 N. H. 225-437.
- Adams Machine Co. v. Interstate Building & Loan Ass'n, 119 Ala. 97-923.
- Adams Oil & Gas Co. v. Hudson, 55 Okla. 386-2266.
- Adamson v. Hartman, 40 Ark. 58-1598.
- v. Lamb, 3 Blackf. (Ind.) 446-2141.
- v. Souder, 205 Pa. 498-2248.
- Addison v. Hack, 2 Gill. (Md.) 221-1195, 1382.
- Addlington v. Cann, 3 Atk. 141-389.
- Adee v. Campbell, 79 N. Y. 52-1900.
- Aden v. Vallejo, 139 Cal. 165-2225, 2247.
- Aderholt v. Henry, 87 Ala. 415-2510.
- Ades v. Caplin, 132 Md. 66-655.
- Adkins v. Adkins, 171 Ky. 762-326.
- v. Adkins, 117 Va. 445-676.
- v. Gillespie (Tex.), 189 S. W. 275-1980.
- v. Huff, 58 W. Va. 645-884.
- v. Lewis, 5 Ore. 292-2449.
- v. Tomlinson, 121 Mo. 487-1707.
- Adler v. Mendelson, 74 Wis. 464-250.
- Adler v. Sargent, 109 Cal. 42-2549, 2695.
- Adler-Goldman Commission Co. v. Herren, 65 Ark. 229-2662.
- Adley v. Pletcher, 55 Wash. 82-405.
- Adlington v. Viroqua, 155 Wis. 472-1164.
- Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448-783, 784.
- Advance Thresher Co. v. Esteb, 41 Ore. 469-2187, 2264.
- Adye v. Smith, 44 Conn. 60-372, 436.
- Aetna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385-2455.
- Aetna Ins. Co. v. Baker, 71 Ind. 102-2458.
- v. Thompson, 68 N. H. 20-2456.
- Aetna Life Ins. Co. v. Broeker, 166 Ind. 576-2442, 2443, 2444.
- v. Corn, 89 Ill. 170-2610.
- v. Hesser, 77 Iowa 381-2778.
- v. Hoppin, 249 Ill. 406-488, 539, 540.
- v. Hoppin, 214 Fed. 928-540.
- Agar v. Winslow, 123 Cal. 587-200.
- Agate v. Agate, 11 N. Y. St. 579-2694.
- v. Lowenbeim, 57 N. Y. 604-950, 952, 962, 964, 989.
- Agnew v. Charlotte, C. & A. R. Co., 24 S. C. 18-2609.
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 Aldritt v. Fleischauer, 74 Neb. 66-1163, 1165.  
 Alexander, In re, 53 N. J. Eq. 96-799, 802.  
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     v. Alexander, 156 Mo. 413-275, 277, 295, 297.  
     v. Alexander, 2 Ves. Sr. 640-1090.  
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 Alexander v. De Kermel, 81 Ky. 345-471, 1752, 1755, 1788.  
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     v. Fountain, 195 Ala. 3-2216.  
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     v. Greenwood, 24 Cal. 506-2704.  
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     v. Hodges, 41 Mich. 691-297, 309.  
     v. Jackson, 92 Cal. 514-2298.  
     v. Kimbro, 49 Miss. 529-663, 664.  
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 Allcock v. Moorhouse, 9 Q. B. Div. 366-159, 176.  
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     v. Allen, 112 Ill. 323-797.  
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     v. Allen, 19 R. I. 114-1027, 1039, 1545.  
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     v. Allen, 58 Wis. 202-2025.  
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     v. Allen's Adm'r, 18 Ohio St. 234-2795.  
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     v. Ayer, 26 Ore. 589-1743, 1744.  
     v. Barrett, 213 Mass. 36-1428, 1447, 1449, 1450.  
     v. Bartlett, 20 W. Va. 46-257, 259.  
     v. Boston & Maine R. R., 87 Me. 326-1006.  
     v. Brown, 60 Barb. (N. Y.) 39-210, 1589.  
     v. Bryan, 5 Barn. & C. 512-159, 1510.  
     v. Caldwell, 55 Mich. 8-2223, 2233.  
     v. City of Chicago, 176 Ill. 113-1376.  
     v. Craft, 109 Ind. 476-536.  
     v. Culver, 3 Denio (N. Y.) 284-140, 179.  
     v. Dayton Hotel Co., 95 Tenn. 480-2454.  
 Allen v. Dent & Cordes, 4 Lea (Tenn.) 676-303.  
     v. Detroit, 167 Mich. 464-1132, 1134, 1417, 1450, 2162.  
     v. Elderkin, 62 Wis. 627-2436.  
     v. Evans, 161 Mass. 485-1246, 1340, 1341.  
     v. Everly, 24 Ohio St. 97-2680, 2682.  
     v. Hall, 66 Neb. 84-186, 188.  
     v. Hawley, 66 Ill. 164-2564.  
     v. Higgins, 9 Wash. 446-700.  
     v. Hill, Cro. Eliz. 238, pl. 5-242.  
     v. Hooper, 50 Me. 371-728.  
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     v. Kersey, 104 Ind. 1-1653, 1654, 1655.  
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     v. Lenoir, 53 Miss. 321-1734.  
     v. Leominster Sav. Bank, 134 Mass. 580-2633.  
     v. Libbey, 140 Mass. 82-715.  
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     v. Pray, 12 Me. 138-788.  
     v. Ransom, 44 Mo. 263-2426, 2721.  
     v. Rees, 136 Iowa 423-1627.  
     v. Roanoke R. & Lumber Co., 171 N. C. 339-1635, 2214.  
     v. Ruddell, 51 S. C. 366-1065, 2738.  
     v. St. Louis, I. M. & S. R. Co., 137 Mo. 205-2108.  
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     v. Sayward, 5 Me. 227-1683, 2127.  
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     v. Shepherd, 162 Ky. 756-2621.  
     v. South Boston R. Co., 150 Mass. 200-2220.  
     v. Stevens, 161 N. Y. 122-436.  
     v. Sullivan R. Co., 32 N. H. 446-1725.  
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     v. Taylor, 16 Ch. D. 355-1288.  
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     v. Van Houton, 19 N. J. Law (4 Harr.) 47-1479.  
     v. Watts, 98 Ala. 384-442, 447.  
     v. Weber, 80 Wis. 531-1017, 1030, 1656, 1658, 1659.  
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- v. Pollard, 132 Ala. 155-2349, 2439, 2650.
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- v. Hilton, 70 Me. 36-1666.
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- v. Miller, 65 Neb. 204-2619.
- v. Moore, 54 Ore. 274-1625.
- v. Norman, 4 Sneed (Tenn.) 683-645, 652, 654.
- v. Richardson, 29 Minn. 330-2456, 2457.
- v. Robert, 17 N. M. 609-2180, 2210.
- v. Shaw, 82 Me. 179-1354, 1356.
- Ametrano v. Downs, 170 N. Y. 388-456.
- Amherst College v. Smith, 134 Mass. 543-2739, 2740, 2742.
- Amick v. Brubaker, 101 Mo. 473-217, 224.
- v. Woodsworth, 58 Ohio St. 86-1730, 2671, 2674.
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     v. Reidly, 9 Ind. 490-2764.  
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     v. Cosby, 74 Ga. 793-1711.  
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     v. Livingston, 26 Kan. 106-2473.  
     v. Parker, 88 Ga. 754-995.  
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 Amphlett v. Hibbard, 29 Mich. 298-852, 853, 2564.  
 Amsden v. Atwood, 69 Vt. 527-257.  
     v. Blaisdell, 60 Vt. 386-223, 228.  
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     v. Brown, 84 Md. 261-582.  
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 v. Pilgram, 30 S. C. 449-2677, 2732.  
 v. Prindle, 23 Wend. (N. Y.) 616-236, 240.  
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 v. Rhodes, 12 Rich. Eq. 104-1985.  
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 v. Graebner, 126 Mich. 116-1579.  
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 Andrew v. Andrew, 114 Iowa 524-405.  
 Andrews, In re, 162 N. Y. 1-1820.  
 Andrews v. Andrews, 8 Conn. 79-790, 791, 793.  
 v. Bassett, 92 Mich. 449-786.  
 v. Brumfield, 32 Miss. 107-1083.  
 v. Cohen, 221 N. Y. 148-1353, 1379.  
 v. Day Button Co., 132 N. Y. 348-928.  
 v. Farnham, 29 Minn. 246-1767.  
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 v. Lincoln, 95 Me. 541-596, 601, 619.  
 v. Lowthrop, 17 R. I. 60-540.  
 v. Meredith, 131 Iowa 716-1001.  
 v. Needham, Noy, 75 Cro. Eliz. 656-207.  
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 v. Senter, 32 Me. 394-300, 305.  
 v. Stelle, 22 N. J. Eq. 478-2702.  
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     Agency Co. v. Bush, 84 Iowa 272-  
     2636.  
 Anglo-Californian Bank v. Cerf, 147  
     Cal. 384-2411.  
     v. Field, 146 Cal. 644-2609,  
     2610.  
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     2645.  
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     Moore, 53a-973.  
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     Mos. 237-989.  
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     3 Salk. 157-1572.  
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     2705.  
 Anstays v. Anderson, 194 Mich.  
     681-962, 980.  
 Anstell v. Swann, 74 Ga. 278-820,  
     823.
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 Anthony v. Anthony, 23 Ark. 479-  
     2653, 2654.  
     v. City of Providence, 18 R. I.  
     699-1663, 1665.  
     v. Gifford, 2 Allen (Mass.)  
     549-1012.  
     v. Kennard Bldg. Co., 188 Mo.  
     704-2048.  
     v. Lapham, 5 Pick. (Mass.)  
     175-1133.  
     v. Wheeler, 130 Ill. 128-2263.  
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     son, 138 Ga. 460-228.  
 Anthracite Sav. Bank v. Lees, 176  
     Pa. St. 402-499.  
 Antice v. Brown, 6 Paige (N. Y.)  
     448-442.  
 Antisdell v. Williamson, 165 N. Y.  
     372-2504.  
 Antomarchis Ex'rs v. Russell, 63  
     Ala. 356-1246, 1350, 1366.  
 Antone v. Miles, 47 Tex. Civ. App.  
     289-903.  
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     633.  
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     2635.  
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     2773.  
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     737.  
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     1112.  
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     1161, 1175.  
     v. Wilson, 13 Ind. 75-2622.  
 Appleton v. Ames, 150 Mass. 34-  
     211, 224, 225.  
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     v. Southern Ry. Co., 114 Miss. 403-2115.  
 Archer's Case, 1 Coke, 66b-502, 505, 536.  
 Arden v. Pullem, 10 Mees. & W. 321-140.  
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     v. Green, 116 N. Y. 566-2666, 2669, 2673.  
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 Atkins v. Boardman, 2 Mete. (Mass.) 457-1291, 1329, 1353, 2058.  
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     v. Chilson, 11 Mete. (Mass.) 112-321.  
     v. Huston, 106 Ill. 492-995.  
     v. Kron, 2 Ired. Eq. (N. C.) 58-1915.  
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     v. Sawyer, 1 Pick. (Mass.) 351-2467.  
     v. Wilcox, 105 Fed. 595-1461.  
     v. Yeomans, 6 Mete. (Mass.) 438-821, 822.  
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     v. Brady, 114 Mo. 200-713.  
     v. Dowling, 33 S. C. 414-1052, 1099, 1105.  
     v. Greaves, 70 Miss. 42-2266.  
     v. Hewett, 63 Wis. 396-2461.  
     v. Miller, 34 W. Va. 115-2373.  
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     v. Walton, 162 Pa. St. 219-2077, 2676.  
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G. 206-1009, 1010.
- v. City of Grand Rapids, 175  
Mich. 503-2070.
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1 Q. B. 301-1190.
- v. Copeland, L. R. (1901) 2  
K. B. 101-1226.
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603, 604.
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1122.
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Madd. 498-953.
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1953.
- v. Fletcher, 13 L. R. Eq. 128-  
642.
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995.
- v. Gill, 2 P. Wms. 369-617.
- v. Grand Rapids, 175 Mich.  
503-2031.
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- v. Hall, Fitz. 314-569.
- v. Lauderfield, 9 Mod. 286-370.
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(Mass.) 612-268.
- v. Metropolitan R. Co., 125  
Mass. 515-1528, 1533.
- v. Persee, 2 Dr. & W. 69-2736.
- v. Proprietors of Federal St.  
Meeting House, 3 Gray  
(Mass.) 1-1251.
- v. Purmort, 5 Paige (N. Y.)  
620-2368.
- v. Revere Copper Co., 152 Mass.  
444-2033.
- v. Soule, 28 Mich. 153-372.
- v. Tarr, 148 Mass. 309-1543,  
1859, 1862, 1878.
- v. Vigor, 8 Ves. Jr. 256-2704.
- v. Vineyard Grove Co., 181  
Mass. 507-1856.
- Attorney General v. Wemyss, 13  
App. Cas. 192-1024.
- v. Williams, 140 Mass. 329-  
1354.
- v. Woods, 108 Mass. 436-1007.
- Attorney General of Southern  
Nigeria v. John Holt & Co., Ltd.  
(1915), App. Cas. 599-2106.
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425-1293.
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2310.
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1630.
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150-1371, 2072, 2073.
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2644.
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1970, 1971.
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2647.
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283-737, 819.
- v. Atwood, 15 Wash. 285-1749.
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2240.
- v. Carmer, 75 N. J. Eq. 319-  
2648.
- v. Fiske, 101 Mass. 363-2419.
- v. Marshall, 52 Neb. 173-2376.
- v. Moose Head Paper & Pulp  
Co., 85 Me. 379-2464.
- v. O'Brien, 80 Me. 447-1315.
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- v. Warner, 92 Neb. 370-2439.
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1076.
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131 Minn. 186-1142.
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1907.
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1586.

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     659.  
 Augusta v. Radcliffe, 66 Ga. 469-  
     1088.  
 Augusta Mfg. Co. v. Vertrees, 4  
     Lea (Tenn.) 75-2290.  
 Augustine v. Schmitz, 145 Iowa  
     591-1600, 1602.  
 Augustus v. Seabolt, 3 Mete. (Ky.)  
     155-524.  
 Aull v. Lee, 61 Mo. 160-2414, 2415,  
     2417.  
 Aull Sav. Bank v. Aull's Adm'r, 80  
     Mo. 199-1515.  
 Ault v. Blackman, 8 Wash. 624-  
     2580.  
 Aultman & Taylor Co. v. Frasure,  
     95 Ky. 429-1734.  
     v. O'Dowd, 73 Minn. 58-2437.  
 Aumiller v. Dash, 51 Wash. 520-337,  
     1260.  
 Auriol v. Mills, 4 Term. R. 94-165,  
     166.  
 Aurora v. Fox, 78 Ind. 1-1525.  
 Aurora Agr. & Hort. Soc. v. Pad-  
     dock, 80 Ill. 264-2347.  
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     2660.  
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 Austerberry v. Corporation of Old-  
     ham, 29 Ch. Div. 750-1405, 1428.  
 Austin v. Ahearne, 61 N. Y. 6-677,  
     684.  
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     v. Brown, 37 W. Va. 634-732.  
     v. Burbank, 2 Day (Conn.)  
         474-2695.  
     v. Cambridgeport Parish, 21  
         Pick. (Mass.) 215-306,  
         315.  
     v. Detroit, Y. & A. A. Ry. Co.,  
         134 Mich. 149-1533.  
     v. Dolbee, 101 Mich. 292-1646.
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     886-2620.  
     v. Fendall, 2 MacArthur (D.  
         C.) 362-1740.  
     v. First Nat. Bank of Kala-  
         mazoo, 100 Mich. 613-  
         2398.  
     v. Hall, 13 Johns. (N. Y.) 286-  
         699.  
     v. Hall, 93 Tex. 591-1013.  
     v. Hudson River R. Co., 25 N.  
         Y. 334-974, 1192.  
     v. Huntsville Coal & Min. Co.,  
         72 Mo. 535-869.  
     v. Oakes, 117 N. Y. 577-1061,  
         1087.  
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     v. Rutland R. Co., 45 Vt. 215-  
         1018, 1025, 1027, 1970.  
     v. Sawyer, 9 Cow. (N. Y.) 39-  
         879, 880.  
     v. Southern House Building &  
         Loan Ass'n, 122 Ga. 439-  
         2222, 2233.  
     v. Sprague Mfg. Co., 14 R. I.  
         453-2397.  
     v. Steele, 68 Ark. 348-2621.  
     v. Thomas, 46 N. H. 113-170.  
     v. Thomson, 45 N. H. 117-227,  
         237.  
     v. Trustees of Charlestown Fe-  
         male Seminary, 8 Mete.  
         (Mass.) 196-2336.  
     v. Underwood, 37 Ill. 438-2300,  
         2563, 2566, 2629.  
     v. Wilson, 46 Iowa 362-1998.  
 Authors v. Bryant, 22 Nev. 242-  
     2064.  
 Autry v. Reasor, 102 Tex. 123-677.  
 Auworth v. Johnson, 5 Car. & P.  
     239-970.  
 Aveline v. Whisson, 4 Man. & G.  
     801-1722.  
 Avelyn v. Ward, 1 Ves. Sr. 420-586.  
 Avera v. Southern Mortg. Co., 147  
     Ga. 24-2182.  
 Averill v. Guthrie, 8 Dana (Ky.) 84-  
     2582.

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- v. Clark, 87 Cal. 619-2752, 2760.
- v. Dougherty, 102 Ind. 443-1799.
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- v. Everett, 110 N. Y. 317-2353, 2354.
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- v. Philadelphia, etc., Co., 159 Mass. 84-2122, 2131.
- v. Spring, 9 Mass. 7-814.
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- v. Harris, 64 Tex. 393-1655.
- v. Watson, 113 U. S. 594-1670.
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- v. Depras, 2 Speers Law (S. C.) 367-1520.
- v. Jack, 7 Utah 249-2172.
- v. Pennsylvania R. Co., 48 N. J. L. 44-1882.
- Ayres v. Probasco, 14 Kan. 175-1598, 1602.
- v. Waite, 10 Cush. (Mass.) 72-2021, 2657.
- v. Wattson, 57 Pa. St. 360-2628.
- Ayton v. Ayton, 1 Cox 327-498.
- Babb v. Clemson, 10 Serg. & R. 419-1643.
- v. Perley, 1 Me. 6-726.
- Babbitt v. Day, 41 N. J. Eq. 392-758.
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- v. Bowen, 32 Vt. 437-2697.
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- v. Heenan, 193 Mich. 229-1326.
- v. Lisk, 57 Ill. 327-2416, 2417.
- v. Seoville, 56 Ill. 461-173, 182, 1473, 1484.
- v. Wells, 25 R. I. 23-2205, 2206, 2207, 2244, 2725.
- v. Wyman, 19 How. (U. S.) 289-2385.
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- v. Henderson, 156 Mo. 566-700, 1944.
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- Backhouse v. Bonomi, 9 H. L. Cas. 503-1188, 1194, 1201.
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- v. Cowley, 162 Mich. 585-2206.
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- v. Brown, 9 Conn. 334-249, 251, 252.
- v. Brown, 19 Conn. 29-2607.
- v. Cottrell, 13 Minn. 194-2450.
- v. Hooker, 177 Mass. 335-1645.
- v. National German-American Bank of St. Paul, 191 Ill. 205-2402.
- v. Park, 19 Utah 246-293, 322, 323.
- v. Sandberg, 179 Mass. 396-1450, 1454, 1455.
- v. Smith, 1 Q. B. 345-985, 986.
- v. Thornton, 16 Utah 138-943.
- v. Van Schoonhoven, 87 N. Y. 446-2545, 2548, 2638.
- v. Walden, 186 Mich. 139-1158.
- v. Western Furniture Co., 53 Ind. 229-293, 304.
- Bacon's Appeal, 57 Pa. St. 504-429.
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- Baent v. Kennicutt, 57 Mich. 268-2681.
- Baer v. Ballingall, 37 Ore. 416-804, 806.
- Baggett v. Jackson, 160 N. C. 26-816, 2333.
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- v. Illinois Trust & Sav. Bank, 199 Ill. 76-2443, 2444.
- v. Kennedy, 81 Ga. 721-1951.
- v. Ward, 37 Cal. 121-2790.
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- Baile v. Coleman, 2 Vern. 670-541.
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- v. Boyce, 4 Strob. Eq. (S. C.) 84-785.
- v. Brown, 9 R. I. 79-1073.
- v. Burges, 10 R. I. 422-1071.
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- v. Butler, 138 Ala. 153-2680.
- v. Carleton, 12 N. H. 9-1928, 1990.
- v. Chicago, St. P., M. & O. Ry. Co., 25 S. D. 200-1165, 1166.
- v. Coffin, 115 Me. 495-457, 2183.
- v. Crim, 9 Biss. (U. S.) 95-1771.
- v. Culver, 84 Mo. 531-1375.
- v. Dunlap Mercantile Co., 138 Ala. 415-2296.
- v. Galpin, 40 Minn. 319-2185.
- v. Gray, 53 S. C. 503-1122, 1191, 1276, 1306.
- v. Hemenway, 147 Mass. 326-402, 403.
- v. Litten, 52 Ala. 282-1630.
- v. McGinnis, 57 Mo. 362-2270.
- v. Metcalf, 6 N. H. 156-2602.
- v. Mizell, 4 Ga. 123-2786.
- v. Myrick, 50 Me. 171-2183, 2476, 2505.
- v. Richardson, 66 Cal. 416-183, 211, 1492, 1588.
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 v. Stephens, 12 C. B. N. S. 91-1393, 1398.  
 v. St. Louis Union Trust Co., 188 Mo. 483-2476.  
 v. Warner, 28 Vt. 87-2788.  
 v. Wells, 8 Wis. 141-167.  
 v. White, 41 N. H. 337-1645.  
 v. Wilcox, 86 N. Y. 140-1165.  
 v. Winn, 101 Mo. 649-2523.  
 v. Wood, 211 Mass. 37-381.
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- Baillie v. Rodway, 27 Wis. 172-183.
- Baillarge v. Clarke, 145 Cal. 589-1772, 2134.
- Bails v. Davis, 241 Ill. 536-535.
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 v. Boucher, 60 Miss. 326-1084, 1097.  
 v. Jackson, 98 Ill. 78-687, 2751.
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- Baker v. Adams, 5 Cush. (Mass.) 99-1462.  
 v. Akron, 145 Iowa 485-1164.  
 v. Allen, 66 Ark. 271-146, 1171.  
 v. Atchison, T. & S. F. R. Co., 122 Mo. 396-766, 800.  
 v. Austin, 174 N. C. 433-2122.  
 v. Baker, 182 Ala. 194-579.  
 v. Baker (Cal.) 100 Pac. 892-1742.  
 v. Baker, 4 Me. 67-819.
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 v. Baker, 2 S. D. 261-2749.  
 v. Ball, 59 Mo. 265-369.  
 v. Bartlett, 18 Mont. 446-2185.  
 v. Bishop Hill Colony, 45 Ill. 264-2368.  
 v. Bourne, 127 Ind. 466-1902.  
 v. Brown, 146 Mass. 369-2323, 2324.  
 v. Central Nat. Bank, 86 Kan. 293-2587.  
 v. Chalfant, 5 Whart. 477-1899.  
 v. Chandler, 51 Ind. 85-2779.  
 v. City Nat. Bank, 94 Ga. 87-2442.  
 v. Clark, 128 Cal. 181-1994.  
 v. Clay, 101 Mo. 553-1672.  
 v. Clowser, 158 Iowa 156-1911.  
 v. Copenbarger, 15 Ill. 103-440, 453, 2147.  
 v. Collins, 9 Allen (Mass.) 253-2419.  
 v. Cunningham, 162 Mo. 134-2438.  
 v. Frick, 45 Md. 337-1329, 1354, 1355.  
 v. Gavitt, 128 Mass. 93-2590.  
 v. Griffin, 50 Miss. 158-2186.  
 v. Hale, 6 Baxt. (Tenn.) 46-1971.  
 v. Hall, 214 Ill. 364-1789.  
 v. Halligan, 75 Mo. 435-2724.  
 v. Hart, 52 Hun (N. Y.) 363-869.  
 v. Hart, 123 N. Y. 470-868, 1396.  
 v. Haskell, 47 N. H. 479-1747.  
 v. Heiskell, 1 Coldw. (Tenn.) 641-835.  
 v. Holtzapfel, 4 Taunt. 45-1497.  
 v. J. Maier & Zoberlein Brewery, 140 Cal. 530-164, 180.  
 v. Johnston, 6 Pet. (U. S.) 431-1854.  
 v. Jones, 5 Exch. 498-298.



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     v. Kennett, 54 Mo. 82-2341.  
     v. Kenney, 145 Iowa 638-1228, 1393.  
     v. Kenny, 69 N. J. L. 180-240, 258.  
     v. Leavitt, 54 Okla. 70-2267.  
     v. McAden, 118 N. C. 740-424.  
     v. McClurg, 198 Ill. 28-909, 927, 933, 938.  
     v. McGuire, 53 Ga. 245-1275.  
     v. McInturff, 49 Mo. App. 505-895.  
     v. Mobile Electric Co., 173 Ala. 28-1663.  
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     v. Oakwood, 123 N. Y. 16-1979.  
     v. Osgood, 49 Hun (N. Y.) 416-829.  
     v. Pierson, 6 Mich. 522-2650.  
     v. Pittsburg, C. & W. R. Co., 219 Pa. 398-1300.  
     v. Pyatt, 108 Ind. 61-1634.  
     v. Rice, 56 Ohio St. 463-1282, 1285, 1288.  
     v. Scott, 62 Ill. 86-531.  
     v. Snavely, 84 Kan. 179-1779, 1780.  
     v. Stewart, 40 Kan. 442-646, 650.  
     v. Terrell, 8 Minn. 195-2666.  
     v. Thomas, 172 Ky. 334-566.  
     v. Thompson, 36 Minn. 314-2781.  
     v. Trujillo DeArmijo, 17 N. M. 383-2020.  
     v. Updike, 155 Ill. 54-1752, 1753, 2760.  
     v. Varney, 129 Cal. 564-2444.  
     v. Vining, 30 Me. 121-397, 398, 404.  
     v. Waldron, 92 Me. 17-2771.  
     v. Wheeler, 8 Wend. (N. Y.) 505-686, 993.  
     v. Whiting, 3 Sumn. (U. S.) 475-686, 1570.  
     v. Wind, 1 Ves. Sr. 160-2378.
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 Bakewell v. Ogden, 2 Bush (Ky.) 265-1101, 1102.  
 Balch v. Arnold, 9 Wyo. 17-2124, 2132, 2188, 2621, 2680.  
     v. Chaffee, 73 Conn. 318-2567.  
     v. Stone, 149 Mass. 39-1901.  
 Baldrige v. McFarland, 26 Pa. 338-1953.  
 Balduff v. Griswold, 9 Okla. 438-2392.  
 Baldwin v. Allison, 4 Minn. 25-2715.  
     v. Anderson, 103 Miss. 462-2216, 2218, 2239, 2241, 2243.  
     v. Baldwin, 91 Va. 405-1827.  
     v. Boston & M. R. R., 181 Mass. 166-2069, 2073.  
     v. Brown, 16 N. Y. 259-999.  
     v. Calkins, 10 Wend. (N. Y.) 167-2063.  
     v. Crow, 86 Ky. 679-2215.  
     v. Drew (Tex. Civ. App.), 180 S. W. 614-1578.  
     v. Emery, 89 Me. 496-2487, 2500.  
     v. Hatchett, 56 Ala. 461-2423, 2521.  
     v. Herbst, 54 Iowa 168-2081.  
     v. Howell, 45 N. J. Eq. 519-2634.  
     v. Humphrey, 44 N. Y. 609-717.  
     v. Ohio Tp., 70 Kan. 102-1163.  
     v. Rogers, 3 De Gex. M. & G. 649-581.  
     v. Sager, 70 Ill. 503-2254, 2256.  
     v. Smith (Tex. Civ. App.), S. W. 1694.  
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     v. Taylor, 166 Pa. 507-1207.  
     v. Thibadeau, 28 Abb. N. Cas. 14-1494.  
     v. Timmins, 3 Gray (Mass.) 302-1683, 2521.  
     v. Trimble, 85 Md. 396-2680.  
     v. Van Vorst, 10 N. J. Eq. 577-2676.

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 Balen v. Lewis, 130 Mich. 567-2645.  
     v. Mercier, 75 Mich. 42-2188, 2368.  
 Bales v. Roberts, 189 Mo. 49-1773.  
 Balfour v. Hopkins, 93 Fed. 570-2262.  
 Balin v. Osoba, 76 Kan. 234-1758.  
 Ball v. Allen, 216 Mass. 469-1355.  
     v. Ball, 27 Gratt. (Va.) 325-1902.  
     v. Clark, 150 Ky. 383-685.  
     v. Deas, 2 Strobb. Eq. (S. C.) 24-629.  
     v. Dunsterville, 4 Term. R. 313-1727.  
     v. First Nat. Bank of Covington, 80 Ky. 501-1475.  
     v. Foreman, 37 Ohio St. 139-1747, 1749, 1773.  
     v. Herbert, 3 Term. R. 253-1547.  
     v. Lively, 1 Dana (Ky.) 60-1957.  
     v. Marske, 202 Ill. 31-2443.  
     v. Milliken, 31 R. I. 36-310, 315, 1426, 1427, 1443, 1444, 1454.  
     v. Nye, 99 Mass. 582-1182, 1183.  
     v. Sandlin, 176 Ky. 537-1742, 1750.  
     v. Setzer, 33 W. Va. 444-2675.  
     v. Stack, 2 Whart. (Pa.) 508-2106.  
     v. Stanley, 5 Yerg. (Tenn.) 199-2602.  
 Ballantine & Sons v. Public Service Corp., 76 N. J. L. 358-1182.  
 Ballard v. Alaska Theatre Co., 93 Wash. 655-928.  
     v. Butler, 30 Me. 94-1349, 1369.  
     v. Carter, 5 Pick. (Mass.) 112-1848.  
     v. Carter, 71 Tex. 161-2702.  
     v. Child, 34 Me. 355-1681.  
 Ballard v. Child, 46 Me. 152-1694.  
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     v. Dyson, 1 Taunt. 279-1332.  
     v. Hansen, 33 Neb. 861-1932, 1960.  
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     v. Titus, 157 Cal. 673-1335, 1336, 1337.  
     v. Tomlinson, 29 Ch. Div. 115-1167, 1182.  
     v. Williams, 95 N. C. 126-2472.  
 Ballenger v. Drock, 101 Ind. 172-443.  
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 Ballinger v. Bourland, 87 Ill. 513-2731.  
 Ballou v. Ballou, 78 N. Y. 325-456, 2168.  
     v. Hale, 47 N. H. 347-700.  
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     v. Foote (Mo.), 187 S. W. 67-402.  
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 v. Edlavitch, 84 Md. 95-1245, 1345, 2040, 2052, 2072, 2073.  
 v. Guild, 126 Ill. 439-1696, 2733.
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 v. Hovey, 30 Ohio St. 344-2269.  
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 v. Stover, 20 S. D. 459-2593, 2596, 2597.  
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 v. Lines, 118 Ill. 374-792.
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- v. Haviland, 92 Mich. 552-931.
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- v. Sears, 81 Conn. 34-1113.
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- v. State (Ind.), 114 N. E. 692-1402, 1406.
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- v. Watson, 3 Sneed (Tenn.) 287-461.
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- v. Learned, 26 Vt. 192-187.
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     v. Pritchard, 122 Iowa 59-2382, 2474.  
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     v. Dawson, 32 Mo. 79-1666.  
     v. Diesem, 86 Kan. 364-2268.  
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     v. Engvolsen, 64 Wash. 33-2410.  
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     v. McDuffie, 71 Ga. 264-1605.  
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     v. Ohio & P. R. Co., 25 Pa. St. 161-1399, 1400, 1541.  
     v. Pelt, 51 Ark. 433-2743, 2761, 2762.  
     3 R. P.—36
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     v. Scammon, 15 N. H. 381-549, 1574.  
     v. Smith, 171 N. C. 116 1039, 1544.  
     v. Tenny, 29 Ohio St. 240-2611.  
     v. Todd, 51 Mich. 21-1322.  
     v. Twilight, 22 N. H. 500-1084, 2122, 2123, 2231, 2712.  
     v. Watkins, 104 Ga. 345 2735.  
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     v. Smith, 10 Mete. (Mass.) 194-1703.  
     v. Wilder, 100 Mass. 446-160, 161.  
 Benavides v. Hunt, 79 Tex. 383-304.  
 Bender v. Barton, 166 Ala. 337-1743.  
     v. Fromberger, 4 Dall. (Pa.) 442-1707.  
     v. George, 92 Pa. 36-168.  
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 v. Clamp, 54 Vt. 36-844.  
 v. Clemence, 6 Allen (Mass.) 10-2017.  
 v. Comings, 11 N. H. 474-2650.  
 v. Conant, 10 Cush. (Mass.) 163-2685.  
 v. Davis, 90 Me. 457-2122, 2126, 2127.  
 v. Fuller, 29 La. Ann. 663-659.  
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 v. Jenkins, 13 Johns. (N. Y.) 50-1709, 1714.  
 v. Kechn, 67 Wis. 154-2480, 2482, 2576, 2666.  
 v. National Starch Mfg. Co., 103 Iowa 207-1014, 1015, 2100.  
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 v. Stevenson, 53 N. Y. 528-2677.  
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 v. Union Bank, 5 Humph. (Tenn.) 612-2396.  
 v. Waller, 23 Ill. 97-1721.  
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 v. Chicago & A. R. Co., 78 Mo. 514-1129, 1170.  
 v. Green, 80 Ga. 230-2194.  
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 v. Morrow, 61 Mo. 352-2105.  
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 v. Root, 19 R. I. 205-1362, 1382.  
 v. Vanderheyden, 35 N. Y. 677-2584.  
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v. Sherman, 58 Miss. 623-2779.  
v. State, 58 Miss. 623-2779.
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- Bergman v. Roberts, 61 Pa. 497-187.
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v. Ward, 10 C. B. N. S. 400-1661.
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- Berry v. Berry, 57 Kan. 691-2541.  
v. Billings, 44 Me. 416-1594, 1620.  
v. Dobson, 68 Miss. 483-860.  
v. Dunham, 202 Mass. 133-2323, 2324.  
v. Folkes, 60 Miss. 576-662.  
v. Godfrey, 198 Mass. 228-1262.  
v. Haunton, Cro. Eliz. 321-162.

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 v. Reed, 73 Ind. 235-2778.  
 v. Skinner, 30 Md. 567-2718.  
 v. Snyder, 3 Bush (Ky.) 266-1012, 1660.  
 v. St. Louis & S. F. R. Co., 124 Mo. App. 436-2087.  
 v. Van Hise (Ga.), 95 S. E. 690-2696.  
 v. Wiedman, 40 W. Va. 36-2026.  
 v. Williamson, 11 B. Mon. (Ky.) 245-537, 542.
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 v. Thiel, 79 N. Y. 15-2400.
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 v. Hagell, 38 Nova Scotia 517-148.
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- Bethlehem v. Annis, 40 N. H. 34-2405, 2406, 2520.
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 v. Betts, 159 N. Y. 547-2607.  
 v. Dick, 1 Pen. (Del.) 268-160.
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 v. Letcher, 1 S. D. 182-661, 670, 2223.  
 v. Mills, 8 Okla. 351-2293.  
 v. Mullin, 62 Ala. 365-2194.  
 v. Newcomer, 1 Pen. & W. (Pa.) 280-2524.  
 v. Rathliff, 50 Miss. 561-899, 902.  
 v. Sims, 35 Neb. 840-2671.  
 v. Ward, 196 Ala. 248-702.
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 v. Murray, 251 Ill. 603-1083.
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 v. Waller, 115 Ky. 600-1592.
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 Bickel v. Polk, 5 Har. (Del.) 325-1037, 1545.  
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     v. Parson, 5 C. B. 921-176.  
 Bicknell v. Bicknell, 31 Vt. 498-2751.  
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     v. Cady, 171 Ill. 229-609, 1071, 1074.  
     v. Cassedy, 26 N. J. Eq. 557-2648, 2674, 2708.  
     v. Devol, 62 Hun (N. Y.) 245-2704.  
     v. Finch, 11 Barb. (N. Y.) 498-2147.  
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     v. Hubbard, 97 Mass. 195-1687.  
     v. Kinney, 3 Vt. 353-2337.  
     v. Livingston, 28 Minn. 57-1799, 1802, 1803.  
     v. Morong, 103 Mass. 287-1900.  
     v. Shaw, 65 Mich. 341-1030, 1031, 1352.  
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     v. Whitcomb, 72 N. H. 473-1525.  
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     v. Hoddinott (1898), 2 Ch. 307-2367.  
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v. Watson, 98 Tenn. 358-509.
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169-653.
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1085.
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2307.
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v. McKenzie, 87 Conn. 617-  
1313, 1317.  
v. Marsh, 153 Mass. 311-2320.  
v. People, 189 Ill. 472-734, 825.  
v. Russell, 101 N. Y. 226-2282.  
v. Taylor, 10 Pick. (Mass.)  
460-743, 744, 957.  
v. Warren, 21 Tex. Civ. App.  
77-1812.
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853.  
v. Stutler, 52 W. Va. 92-2381.  
v. Tongue, 9 Md. 575-1834,  
1835.
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1838, 1842.
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Binn. (Pa.) 132-2224, 2225.
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1210, 1212, 2242.
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v. Salene, 15 Ore. 208-1036,  
1388, 1392.
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509-475, 1627.  
v. Weller, 113 Tenn. 70-839,  
840.
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1085.
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Rogers, 7 Idaho 63-917.
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913, 920, 921, 923, 925, 926.
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2328.
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1671.  
v. Linton, 78 Va. 584-2335.  
v. Wright, 1 Term R. 378-  
227, 231.
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683-987.
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676, 677.  
v. Bird, 40 Me. 398-1646.  
v. Decker, 64 Me. 550-1723.  
v. Gilliam, 121 N. C. 326-536.  
v. Hawkins, 58 N. J. Eq. 229-  
309.  
v. Higginson, 2 Adol. & E.  
696-1257, 1568.  
v. Jones, 27 Ark. 195-2169,  
2170.  
v. Morrison, 12 Wis. 138-665.  
v. Smith, 3 Watts. (Pa.) 484-  
2037.
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W. 809-487.  
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348-295.
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2610.
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Miss. 610-855, 856.

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 Bishop v. Aldrich, 48 Wis. 619-328, 331,  
     v. Banks, 33 Conn. 118-1125.  
     v. Bishop, 11 N. Y. 123-940.  
     v. Boyle, 9 Ind. 169-773.  
     v. Burke, 207 Mass. 133-1739.  
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     v. Howard, 2 Barn. & C. 100-232.  
     v. Hubbard, 23 Cal. 514-2299.  
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     v. Remple, 11 Ohio St. 277-1083, 1084.  
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     v. O'Hara, 54 Conn. 17-2059.  
     v. Reno, 59 Fed. 917-2688, 2689, 2691.  
     v. Shreve, 13 N. J. Eq. 455-1771, 1783.  
     v. Skinner Mfg. Co., 53 Fla. 1088-1669, 1670, 1673.  
     v. Thornton, 31 Ga. 641-2182.  
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- v. Henderson, 116 Iowa 578-2185.
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- v. Riley, 138 N. Y. 318-1662, 1663, 1664.
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- v. Osborne, 84 N. C. 417-1594.
- v. Security Bank, 103 Va. 762-1766.
- v. Snodgrass, 1 Sneed (Tenn.) 1-462, 463.
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         248-1685, 2050.  
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         387-1974, 2336.  
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         608.  
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     1750, 2384.  
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     672, 749.  
 Blakeslee v. Blakeslee, 265 Ill. 48-  
     662, 710.  
     v. Mobile Life Ins. Co., 57  
         Ala. 265-2126.  
 Blakey v. Morris, 89 Va. 717-1989.  
 Blalock v. Atwood, 154 Ky. 394-  
     896, 1661.  
 Blanchard v. Baker, 8 Me. 253-  
     1135.  
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         31 Mich. 43-310.  
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         1230, 1374.  
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     36-2484.  
     v. Independent Ice Co., 153  
         Iowa 241-302.  
 Blankenhorn v. Lenox, 123 Iowa  
     67-2019.  
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     225-2785.  
     v. Stout, 25 Ill. 132-2340.  
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     514-156.  
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         581.  
 Blatchley v. Coles, 6 Colo. 82-223.  
     v. Osborn, 33 Conn. 226-2217.  
 Blauvelt v. Passaie Water Co., 75  
     N. J. Eq. 351-1260, 1648.  
     v. Woodworth, 31 N. Y. 285-  
         2772.  
 Blazey v. Delius, 74 Ill. 299-2688,  
     2691.  
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     647.  
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v. Schenck, 10 Pa. St. 285-1741, 1753, 1772.
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v. Gardner, 2 Ill. App. (2 Bradw.) 422-165.  
v. Hall, 4 Bing. (N. C.) 128-1127.  
v. Johnson, 94 N. Y. 235-1959.  
v. McIntyre, 18 Vt. 466-1643.  
v. Waterbury, 27 S. D. 429-2136, 2221.  
v. West, 58 Hun (N. Y.) 71-762, 765.  
v. Whitney, 91 Mass. (9 Allen) 114-912, 927, 935.
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v. Hildreth, 103 Mass. 484-394.  
v. Hitt, 29 Wis. 169-944.  
v. McMurtry, 34 Neb. 782-2134.  
v. Perry, 97 Mo. 263-2135.  
v. Stone, 60 N. H. 167-1135.
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v. Crew Levick Co., 171 Pa. St. 328-2499.  
v. Goodrich, 9 Wend. (N. Y.) 68-1798.  
v. Light, 38 Cal. 649-2790, 2791.  
v. Millard, 172 Mass. 65-1231, 1347.  
v. Shepard, 69 Kan. 752-2684.  
v. Spaulding, 57 Vt. 422-973.  
v. Wilkins, 43 Iowa 565-1632, 1689.
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v. Strauss, 70 Ark. 483-1989.  
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v. Waldron, 3 Hill (N. Y.) 361-1064.
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- v. Walker, 31 S. C. 13-355, 359, 391.
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- v. First Baptist Church of Normal, 63 Ill. 204-307.
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 Bonaparte v. Wiseman, 89 Md. 12-1192.  
 Bonbright v. Bonbright, 123 Iowa 305-1635.  
 Bond v. Bond, 16 Lea (Tenn.) 306-781.  
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     v. Liverpool & L. & G. Ins. Co., 106 Ill. 654-2624.  
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     v. Wilson, 129 N. C. 325-1765, 2196.  
     v. Wool, 107 N. C. 139-1024, 1025.  
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v. Vincent, 24 Pick. (Mass.) 301-2032.
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- Borgess Investment Co. v. Vette, 142 Mo. 560-2539, 2542, 2639.
- Borggard v. Gale, 205 Ill. 511-140, 141.
- Bork v. Martin, 132 N. Y. 280-380, 382.
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- Borland's Lessee v. Marshall, 2 Ohio St. 308-829, 830.
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v. Empire, 5 N. Y. 33-1259, 1610.  
v. Nalle, 28 Gratt. (Va.) 423-380, 2775.  
v. Simpson, 90 Ala. 373-279, 298.
- Boscawen v. Bliss, 4 Taunt. 735-297.  
v. Canterbury, 23 N. H. 188-1016.
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v. Keizer, 4 S. S. Marsh. 597-2147.  
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 v. Cole, 74 Tex. 222-1644.  
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- Boyce v. Boyce, 16 Sim. 476-276, 278.  
 v. Cupper, 37 Ore. 256-1176.  
 v. Kalbaugh, 47 Md. 334-1857.  
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 v. Gore, 143 Wis. 531-1584.  
 v. Graves, 4 Wheat. (U. S.) 513-997.  
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 v. Hunter, 44 Ala. 705 747, 756, 768.  
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     v. Flood, 41 Conn. 68-2412, 2416.
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     v. Polk, 61 Ark. 388-645, 652, 653.
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     v. Lienkaemper, 72 Wash. 547-2060.  
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- Brande v. Grace, 154 Mass. 210-1278.
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- Brandies v. Cochran, 112 U. S. 344-1049, 1107.
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- Brant's Will, 40 Mo. 266-788.
- Brantley v. Huff, 62 Ga. 532-1664.  
     v. Wolf, 60 Miss. 420-2333, 2336.
- Branton v. Buckley, 99 Miss. 116-525.  
     v. O'Briant, 93 N. C. 99-236.
- Branyan v. Kay, 33 S. C. 283-2733.
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- Brawford v. Wolfe, 103 Mo. 391-825, 2124.
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     v. Bree, 2 Clark & F. 453-1114.  
     v. Comer, 82 Ala. 183-2401.  
     v. Conrad, 101 Mo. 331-2606.  
     v. First Avenue Coal Min. Co., 148 Ind. 599-2625.  
     v. McGinty, 94 Ga. 192-1622.  
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- Brayley's Estate, In re, 85 Vt. 351-1790.
- Brayton v. Boomer, 131 Iowa 28-1472.
- Braywaite v. Hitchcock, 10 Mees. & W. 494-217, 232, 237.
- Brazee v. Lancaster Bank, 14 Ohio 321-2582.
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- Bream v. Dickerson, 21 Tenn. (2 Humph.) 126-183.
- Brearly v. Ward, 201 N. Y. 358-2327.
- Breathwit v. Bank of Fordyce, 60 Ark. 26-2376.
- Breck v. Meeker, 68 Neb. 99-2596.
- Breckenridge v. Brooks, 2 A. K. Marsh. (Ky.) 335 2448.
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- Bredell v. Collier, 40 Mo. 287-497, 577, 578.  
     v. Kerr, 242 Mo. 317 304, 308.
- Bredeman v. Sparks, 64 N. J. Eq. 374-521.
- Bredenburg v. Bardin, 36 S. C. 197-1076.  
     v. Landrum, 32 S. C. 215-2362, 2374.
- Bree v. Wheeler, 129 Cal. 145 2064.
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- v. Clowser, 5 C. P. Div. 376-1283.
- v. Cumberland, Cro. Jac. 521-168, 169.
- v. Farr, 66 Iowa 684-1956.
- v. Rigden, Plowd. 345a-520.
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- v. Connell, 11 Humph. (Tenn.) 52-765, 767.
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- v. Kitchin, 1 Ld. Raym. 317-1405.
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- v. Linder, 60 Iowa 190-2476.
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- v. Purcell, 18 N. C. 492-1219.
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- v. Lewiston & H. R. Co., 79 Me. 363-1533.
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- v. Eveleth, 9 Mass. 538-676.
- v. Fayerweather, 144 Mass. 48-2344, 2346.
- v. Mulock Co., 74 N. J. Eq. 287-1454.
- v. Overstreet, 128 Ga. 447-947, 982.
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- v. Potter, 14 Gray (Mass.) 522-2420.
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- Bright v. Allan, 203 Pa. 394-1245, 1337, 1361, 2073.
- v. Bacon & Sons, 131 Ky. 848-1340.
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- v. Walker, 1 Crompt. Mees. & Ros. 211-2030, 2051.
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- Brignall v. Hannah, 34 N. D. 174-1019, 1020.
- Brill v. Brill, 108 N. Y. 511-1349, 1355, 1357.
- v. Stiles, 35 Ill. 305-1562.
- v. Wright, 112 N. Y. 129-2738.
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- Brinkley v. Bethel, 9 Heisk. (Tenn.) 786-1725.
- v. Hambleton, 67 Md. 169-168.
- v. Sanford, 99 Ga. 130-2270.
- v. Taylor, 111 Ark. 305-2023.
- v. Walcott, 57 Tenn. (10 Heisk.) 22-249.
- Brinkman v. Jones, 44 Wis. 498-2009, 2216, 2221, 2379, 2395, 2428, 2429.
- Brinkmeyer v. Browneller, 55 Ind. 487-2569, 2570.
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- v. McElween, 43 Miss. 556-1518.
- v. Power, 47 Ill. 447-2509.
- v. Price, 275 Ill. 63-402.
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- v. Carriger, 24 Okla. 324-892.
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     v. Desmond & Co., 154 Ala. 634-174, 213, 319.  
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 v. Collins, 11 Bush (Ky.) 622-2294.  
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 v. Marbury, 11 Wheat. (U. S.) 78-1795.  
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 v. Randall, Cro. Eliz. 502-739.  
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 v. Allen, 43 Me. 590-1605.  
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 v. Ashley, 16 Nev. 311-1135.  
 v. Austen, 35 Barb. (N. Y.) 341-1785.  
 v. Avery, 63 Fla. 376-1818.  
 v. Avery, 119 Mich. 384-2452.  
 v. Baldwin, 121 Mo. 126-922.  
 v. Banner Coal Co., 97 Ill. 214-2207, 2210.  
 v. Barber, 244 Mo. 138-2561.  
 v. Barker, 35 Okla. 498-2134.  
 v. Baron, 162 Mass. 56-2591.  
 v. Bartee, 10 Sm. & M. (Miss.) 268-2605.  
 v. Bates, 55 Me. 520-2423, 2697.  
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 v. Bryant, 17 Tex. Civ. App. 454-537, 540.  
 v. Byam, 65 Iowa 374-2755.  
 v. Cairns, 107 Iowa 727-1461, 1488, 1493, 1582, 1586.  
 v. Cairns, 63 Kan. 584-301.  
 v. Caldwell, 23 W. Va. 187-271, 273.  
 v. Cantrell, 62 Ga. 257-825.  
 v. Carey, 149 Pa. 134-2233.  
 v. Cascaden, 43 Iowa 103-2731.  
 v. Cave, 23 S. C. 251-752.  
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 v. Doherty, 185 N. Y. 383-1077.  
 v. Dunn, 135 Wis. 374-1016, 1020, 1649.  
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 v. Holyoke Water-Power Co., 152 Mass. 463-201, 204.  
 v. Honeyfield, 139 Iowa 414-1236, 2217.  
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 v. Huey, 103 Ga. 448-2012.  
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 v. Illius, 27 Conn. 84-1182, 1183.  
 v. Isaquena Co. Supr's, 54 Miss. 230-1983.  
 v. Jaquette, 94 Pa. 113-898.  
 v. Johnston, 7 Abb. N. Cas. (N. Y.) 188-2534.  
 v. Kayser, 60 Wis. 1-239, 259.  
 v. Keller, 32 Ill. 151-194.  
 v. Kennedy, 5 H. & J. 195-1008.  
 v. Kimbrough, 55 Ga. 41-732.  
 v. King, 5 Mete. (Mass.) 173-2010.  
 v. Knapp, 79 N. Y. 136-2738, 2741, 2742.  
 v. Kohout, 61 Minn. 113-1941.  
 v. Lapham, 3 Cush. (Mass.) 551-2668.  
 v. Lawrence, 3 Cush. (Mass.) 390-494.  
 v. Lawton, 87 Me. 83-2655.  
 v. Lillie, 6 Nev. 244-910.  
 v. Linn Woolen Co., 114 Me. 266-1583.  
 v. Loeb, 177 Ala. 106-2426.  
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 v. Lutheran Church, 23 Pa. 495-717.  
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 v. McKay, 151 Ill. 315-2676.  
 v. Manter, 21 N. H. 528-1605, 1729.  
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 v. Mercantile Trust & Deposit Co., 87 Md. 377-424.  
 v. Miller, 45 W. Va. 211-453.  
 v. Miner, 261 Ill. 543-444, 445.  
 v. Morisey, 126 N. C. 772-820.  
 v. Morison, 5 Ark. 217-2771.  
 v. Morris, 83 N. C. 251-867.  
 v. National Bank, 44 Ohio St. 269-2374.  
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 v. Niles, 165 Mass. 276-983, 984.  
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 v. Phillips, 16 R. I. 612-1051, 1070.  
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 v. Raindle, 3 Ves. 256-638.  
 v. Reno Elec. Light & Power Co., 55 Fed. 229-933, 935.  
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   v. Stackhouse, 155 Pa. 582-1521.  
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   v. Storey, 1 Man. & G. 117-2448.  
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   v. Thompson, 81 S. C. 380-1711.  
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   v. Trustees of M. E. Church, 37 Md. 108-1378.  
   v. Tuschoff, 235 Mo. 449-561, 2263.  
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   v. Vaulier, 7 Humph. (Tenn.) 239-2248.  
   v. Volkening, 64 N. Y. 76-2224, 2264.  
   v. Wadsworth, 168 N. Y. 225-542.  
   v. Warren, 16 Nev. 228-1646.  
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 v. Wash, 7 Ill. 557-1760.  
 v. Weems, 29 Ala. 423-368.  
 v. Whistler, 8 Barn. & C. 294-1359.  
 v. Winburn, 43 Ark. 28-193.  
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 v. Damon, 6 Gray (Mass.) 564-2551.  
 v. Duffy, 128 Mo. 18-2788.  
 v. Erskine, 55 Me. 153-2405, 2406, 2520.  
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 v. Deshon, 1 Har. & G. (Md.) 280-2351.  
 v. Duncan, 40 Pa. 82-828, 831.  
 v. Jencks, 38 R. I. 443-687, 993.  
 v. Kimes, 2 Baxt. (Tenn.) 275-2785.  
 v. King's Heirs, 22 Gratt. (Va.) 414-698.  
 v. Lloyd, 88 Md. 642-2738.  
 v. Munroe, 22 Tex. 537-2702.  
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 v. Foster, 147 Ind. 530-2257.  
 v. Garber, 261 Ill. 378-1621, 1749.  
 v. Holloway's Devisees, 25 Ky. (2 J. J. Marsh) 163-150.  
 v. Lantz, 49 Md. 439-527, 1892.  
 v. Lewis, 46 Mo. App. 227-240.  
 v. Paine, 75 Me. 582-559.  
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 v. Squiers, 22 Vt. 484-1658, 1662.  
 v. Swazey, 35 Me. 41-402.  
 v. Winn, 11 B. Mon. (Ky.) 323-2179.  
 v. Wood, 85 Me. 204-2410, 2623, 2624.  
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v. Daley, 45 Miss. 338-2423, 2424.  
v. Doig, 188 N. Y. 238-665, 666.  
v. Runge (Tex. Civ. App.), 136 S. W. 533-2762.  
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v. Taylor, 2 Term. Rep. 600-1476.  
v. Wells, 33 N. Y. 518-731.
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- v. Smith, 27 N. H. 332-780, 1592.
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v. Coffin, 22 N. H. 118-726.
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v. Mays, 189 Ala. 107-2134.  
v. Teeple, 2 G. Greene (Iowa) 542-917.
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v. Lynch, 5 Barn. & C. 589-168.  
v. Smith, 93 Miss 566-1624.
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- Burney v. Allen, 125 N. C. 314-1828.
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v. Burnham, 79 Wis. 557-276, 277.  
v. Burnham, 119 Wis. 509-2342.  
v. Chandler, 15 Tex. 441-2182.  
v. Dorr, 72 Me. 178-1632, 2667.  
v. McQuesten, 48 N. H. 446-2046, 2047, 2049.  
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v. Nevins, 144 Mass. 88-1353.
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v. Burns, 4 Serg. & R. (Pa.) 295-1838.  
v. Byrne, 45 Iowa 287-2015.  
v. Cooper, 72 C. C. A. 25-2543.  
v. Cooper, 31 Pa. 426-155.  
v. Hiatt, 149 Cal. 621-2428, 2431, 2432.  
v. Hunnewell, 217 Mass. 106-2387.  
v. Keas, 21 Iowa 257-854, 855, 2292.  
v. Kennedy, 49 Ore. 588-1743.  
v. Lynde, 6 Allen (Mass.) 305-802, 1598, 1641, 1642.  
v. Parker (Tex.), 137 S. W. 705-688.  
v. Schreiber, 43 Minn. 468-1632.  
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v. Sutherland, 7 Pa. 103-2140.  
v. Thayer, 101 Mass. 426-2628, 2629, 2730.  
v. Travis, 117 Ind. 44-1843.
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         2773.  
     v. Mills, 21 Wend. (N. Y.) 290-  
         1275.  
     v. Mueller, 65 Ill. 258-696.  
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         2424.  
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 Burr's Ex'rs v. Smith, 7 Vt. 241-  
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 Burrage's Lessee v. Beardsley, 16  
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     1695.  
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     329-329, 2754.  
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         429-1875.  
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     Mont. 571-821.  
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         1389.  
     v. Timmons, 29 W. Va. 441-  
         2283.  
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     1838.  
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 Burton v. Barclay, 7 Bing. 745-156,  
     182.  
     v. Boyd, 7 Kan. 1-1749, 1752,  
         1753.  
     v. Cowles' Adm'x, 156 Ky. 100-  
         1678.  
     v. Mill, 78 Va. 468-2301.  
     v. Mullenary, 147 Cal. 259-  
         1668.  
     v. Perry, 146 Ill. 71-2476.  
     v. Provost, 75 Vt. 199-496.  
     v. Reeds, 20 Ind. 87-1679, 1709,  
         2119.  
     v. Regan, 75 Ind. 77-2254.  
     v. Scherpf, 1 Allen (Mass.) 133-  
         1207.  
 Burwell v. Fauber, 21 Gratt. (Va.)  
     446-2739, 2740.  
     v. Hobson, 12 Gratt. (Va.) 322-  
         1147, 1289.  
 Bury v. Young, 98 Cal. 446-1786,  
     1784.  
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     App. Div. 515-711.  
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 Bush v. Bradley, 4 Day (Conn.) 298-  
     829.  
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         2586, 2717.

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     v. Hicks, 60 N. Y. 298-1635.  
     v. Lathrop, 22 N. Y. 535-2544.  
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     v. Peterson, 26 W. Va. 447-1710.  
     v. Rogers, 60 Mo. 138-2124.  
     v. Yocum, 61 Pa. St. 168-2217.  
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 Butler v. Archer, Owen 152-630.  
     v. Attorney General, 195 Mass. 79-1014.  
     v. Badger, 128 Minn. 99 424, 2368, 2371.  
     v. Bank of Mazeppa, 94 Wis. 351-2547.  
     v. Barnes, 61 Conn. 399-1715, 1716.  
     v. Butler, 133 Ala. 377-2024.  
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     v. Davis, 15 Ky. L. Rep. 273-2300.  
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     v. Duckmanton, Cro. Jac. 169-241, 244.  
     v. Farry, 68 N. J. Eq. 760-2698, 2699.  
     v. Fitzgerald, 43 Neb. 192-774, 813, 814.  
     v. Frazer (N. Y. Misc.), 57 N. Y. Supp. 90-2443.  
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 v. Reed, 160 Mass. 361-1379, 1380, 1385, 2315.  
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 v. Trice, 69 Ga. 74-778.  
 Butt's Case, 7 Coke 23a-1475.  
 Butz v. Richland Tp., 28 S. D. 442-1209.  
 Buxton v. Kroeger, 219 Mo. 224-487, 489.  
 Buzick v. Buzick, 44 Iowa 259-802.  
 Buzzell v. Gallagher, 28 Wis. 678-701, 702.  
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 v. McClanahan, 6 Gill. & J. (Md.) 250-1641, 1740.  
 v. Spencer, 101 Ill. 429-1795.  
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 v. Wackman, 16 Ohio St. 440-716.  
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 v. Lawrence, 35 Mich. 458-2521.  
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     v. Palmer, 1 Clark & F. 372-599, 600, 601.
- Cadmus v. Fagan, 47 N. J. L. 549-1684.
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- v. Day, 38 Wis. 643-2340.
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 Camp, In re, 126 N. Y. 377-833.  
 Camp v. Camp, 88 Vt. 119-1956.  
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     v. Small, 44 Ill. 37-2647.  
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     v. Michell, 103 Mich. 617-250, 251.  
 Campbell v. Beach, 60 N. Y. 218-2410.  
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     v. Birch, 60 N. Y. 214-2528, 2529.  
     v. Brackenridge, 8 Blackf. (Ind.) 471-2174.  
 Campbell v. Campbell, 30 N. J. Eq. 415-753, 760.  
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     v. Clark, 64 N. H. 328-1833.  
     v. Clough, 71 N. H. 181-431.  
     v. Dearborn, 109 Mass. 130-2380, 2386, 2388, 2389.  
     v. Dick (Okla.), 157 Pac. 1062-1974.  
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     v. Foster Home Ass'n, 163 Pa. St. 609-2670.  
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     v. French, 3 Ves. 321-1844.  
     v. Galbreath, 12 Bush. 459-377.  
     v. Harris Lithia Springs Co., 74 S. C. 282-1734.  
     v. Henry, 45 Miss. 326-2756.  
     v. Herron, 1 Conf. R. (N. C.) 291-631.  
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     v. Kerriek, 142 Ky. 279-2342, 2344.  
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     v. Kuhn, 45 Mich. 513-1793, 2346.  
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 v. Poultney, 6 Gill. & J. (Md.) 94-2426.  
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 v. Race, 7 Cush. (Mass.) 408-1535.  
 v. Rawdon, 18 N. Y. 412-1833.  
 v. Remaly, 112 Mich. 214-2213.  
 v. Roddy, 44 N. J. Eq. 244-921, 925.  
 v. Seaman, 63 N. Y. 568-1126, 1127.  
 v. Shaw, 170 N. C. 186-1707.  
 v. Shipley, 41 Md. 81-1998.  
 v. Short (Okla.), 166 Pac. 438-193.  
 v. Shrum, 3 Watts (Pa.) 60-2484, 2491.  
 v. Sidwell, 61 Ohio St. 179-2177, 2757.  
 v. Smith, 71 N. Y. 26-2485.  
 v. Society, 43 Mo. App. 23-2603.  
 v. Stokes, 142 N. Y. 23-721.  
 v. Switzer, 74 W. Va. 509-842.  
 v. Thomas, 42 Wis. 437-1775, 1776.  
 v. Tompkins, 32 N. J. Eq. 170-1624, 2403.  
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 Canfield v. Andrew, 54 Vt. 1-1144.  
     v. Canfield, 62 N. J. Eq. 578-450, 451.  
     v. Hard, 58 Vt. 217-2223, 2298.  
 Cannon v. Atlantic Coast Line R. Co., 97 S. C. 233-1236.  
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 v. Lomax, 29 S. C. 369-713, 715.  
 v. McDaniel, 46 Tex. 303-2552.  
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 v. Fowler, 32 S. C. 589-142, 143.  
 Cantwell v. Barker, 62 Ore. 12-2260.  
 Cape v. Thompson, 21 Tex. Civ. App. 681-2057.  
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 Capek v. Kropik, 129 Ill. 509-860.  
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 v. Peckham, 35 Conn. 88-904, 906, 933.  
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 v. Wilson, 3 McCord (S. C.) 170-1335.  
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 Caprez v. Trover, 96 Ill. 456-2392.  
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 Carbee v. Hopkins, 41 Vt. 250-2129.  
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 Card v. Cunningham (Ala.), 74 So. 335-2046.  
 v. Patterson, 5 Ohio St. 319-2257.  
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 Cardross' Settlement, Re, 7 Ch. D. 728-1067.  
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 Carey v. Boyle, 53 Wis. 574-2300, 2756, 2859.  
 v. Brown, 92 U. S. 171-366.  
 v. Buntain, 4 Bibb (Ky.) 217-804.  
 v. Fulmer, 74 Miss. 729-2722.  
 v. Rae, 58 Cal. 159-1307, 1369, 1535.  
 v. West, 139 Mo. 146-803, 804.  
 Cargill v. Sewell, 19 Me. 288-974.  
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 Carleton v. Redington, 21 N. H. 291-1205, 1218, 2375.  
 Carley v. Fox, 38 Mich. 387-2491.  
 v. Lewis, 24 Ind. 73-1471, 1474.  
 v. Liberty Hat Mfg. Co., 81 N. J. L. 502-1500.  
 Carlin v. Chappel, 101 Pa. St. 348-1194.  
 v. Harris, 100 Md. 49-161.  
 v. Paul, 11 Mo. 32-1314.  
 v. Ritter, 68 Md. 478-928, 934, 939.  
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 Carll v. Butman, 7 Me. 102-772.  
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 Carneal v. Lynch, 91 Va. 114-715, 722.  
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 Carnegie Realty Co. v. Carolina, C. & O. Ry. Co., 136 Tenn. 300-1406, 1414, 1415.  
 Carney v. Byron, 19 R. I. 283-430.  
     v. Hennessey, 74 Conn. 107-1928, 1937.  
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     v. Kain, 40 W. Va. 758-390, 431, 1051.  
 Caro v. Wollenberg, 68 Ore. 420-2387, 2428, 2449, 2472.
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 Caroon v. Cooper, 63 N. C. 386-751.  
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 Carpenter v. Allen, 150 Mass. 281-921.  
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     v. Board, 56 Minn. 513-1015.  
     v. Bowen, 42 Miss. 28-2465, 2466, 2467, 2470.  
     v. Brownlee, 38 Miss. 200-857.  
     v. Capital Electric Co., 178 Ill. 29-1334.  
     v. Carpenter, 88 Ark. 169-1704.  
     v. Carpenter, 126 Mich. 217-2025.  
     v. Carpenter, 131 N. Y. 101-694, 697.  
     v. Cincinnati & Whitewater Canal Co., 35 Ohio St. 307-2460.  
     v. City of St. Joseph, 263 Mo. 705-1865.  
     v. Collins, Yelv. 73-227.  
     v. Cook, 67 Vt. 102-1248.  
     v. Denoon, 29 Ohio St. 379-2014.  
     v. Dexter, 8 Wall. (U. S.) 513-1731.  
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     v. Fletcher, 139 Ill. 440-693.  
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     v. Lancaster, 250 Pa. 541-1529.  
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     v. Longan, 16 Wall. (U. S.) 271-2522, 2539.  
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     v. Plagge, 192 Ill. 82-2658, 2684.  
     v. Pocasset Mfg. Co., 180 Mass. 130-158.  
     v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495-2456, 2457, 2458.  
     v. Smith, 76 Ark. 447-1926.  
     v. Soule, 88 N. Y. 251-2584.  
     v. Thayer, 15 Vt. 552-672.  
     v. U. S., 84 U. S. (17 Wall.) 489-1515.  
     v. Van O'Linder, 127 Ill. 42-536, 537.  
     v. Walker, 140 Mass. 416-916.  
     v. Webster, 27 Cal. 524-2017.  
     v. Westcott, 4 R. I. 225-321.  
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 Carpenter's Estate, 170 Pa. St. 203-2354.  
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 Carpentier v. Brenham, 40 Cal. 221-2580.  
     v. Mendenhall, 28 Cal. 484-673, 674, 677, 2016.  
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 Carr, In re, 16 R. I. 645-1066.  
 Carr v. Anderson, 6 App. Div. (N. Y.) 6-829.  
 Carr v. Branch, 85 Va. 597-445.  
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     v. Brennan, 166 Ill. 108-2228.  
     v. Caldwell, 10 Cal. 380-2670.  
     v. Carpenter, 22 R. I. 528-1012.  
     v. Carr, 52 N. Y. 251-2392.  
     v. Craig, 138 Iowa 526-2003.  
     v. Dodge, 40 N. H. 403-899.  
     v. Frye, 225 Mass. 531-399, 1603.  
     v. Georgia R. Co., 74 Ga. 73-933.  
     v. Givens, 9 Bush (Ky.) 679-831, 837.  
     v. Hobbs, 11 Md. 285-2752.  
     v. Hodge, 130 Mass. 55-2651.  
     v. Lewis Coal Co., 96 Mo. 149-2271.  
     v. Lowry's Adm'x, 27 Pa. St. 257-1407, 1414.  
     v. McColgan, 100 Md. 462-1600.  
     v. Monzon, 86 S. C. 461-701.  
     v. Morrison, 178 Ky. 683-2387.  
     v. Richardson, 157 Mass. 576-348, 350, 1567.  
     v. Thomas, 18 Fla. 736-2789.  
     v. Thompson, 67 Mo. 472-2761.  
     v. Wallace, 7 Watts (Pa.) 394-1541.  
 Carradine v. Wilson, 61 Miss. 573-2420.  
 Carraher v. Bell, 7 Wash. 81-303.  
 Carraway v. Mosley, 152 N. C. 351-1085.  
 Carrico v. Farmers' Nat. Bank, 33 Md. 235-2760.  
 Carrig v. Mechanics' Bank, 136 Iowa 261-1276, 1289.  
 Carrigan v. Drake, 36 S. C. 354-536.  
     v. Rowell, 96 Tenn. 185-859, 2292.  
 Carrigg v. Mechanics' Bank of Providence, 136 Iowa 261-1515.  
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     v. Burns, 108 Pa. 386-540.  
     v. Elmwood, 88 Neb. 352-1885.  
     v. Granite Mfg. Co., 11 Md. 411-1619.  
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     v. Johnston, 55 N. C. 120-2174.  
     v. Mays, 8 Dana (Ky.) 178-1937.  
     v. Newton, 17 How. Pr. (N. Y.) 189-947.  
     v. Norwood's Heirs, 5 Har. & J. (Md.) 155-699.  
     v. Ryder, 34 R. I. 383-1634.  
     v. Safford, 3 How. (U. S.) 441-1562.  
     v. Stewart, 4 Rich. Law (S. C.) 200-1078.  
     v. Tomlinson, 192 Ill. 398-2476.  
 Carroll County v. Bailey, 122 Ind. 46-1129.  
 Carroll County Academy v. Gallatin Academy, 20 Ky. L. Rep. 824-268, 271.  
 Carrollton Telephone Exchange Co. v. Spicer, 177 Ky. 340-1218.  
 Carruth v. Carruth, 148 Mass. 431-388.  
 Carson v. Arvantes, 10 Colo. App. 582-1585.  
     v. Blazer, 2 Bin. (Pa.) 475-1012, 1544.  
     v. Broady, 56 Neb. 648-688, 698, 1996, 2002, 2015.  
     v. Carson, 62 N. C. 57-1099.  
     v. Carson, 122 N. C. 645-707, 2129.  
     v. Murray, 3 Paige (N. Y.) 483-778.  
     v. Percy, 57 Miss. 97-1430.  
     v. Phelps, 40 Md. 73-385.  
     v. Smith, 5 Minn. 78-1061.
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 Carter v. Barnes, 26 Ill. 455-1645, 1667.  
     v. Barnes, 87 S. C. 102-1005.  
     v. Branson, 79 Ind. 14-274.  
     v. Brown, 35 Neb. 670-943, 944.  
     v. Bustamente, 59 Miss. 559-2455.  
     v. Carter, 234 Ill. 507-497.  
     v. Champion, 8 Conn. 549-2184, 2562.  
     v. Chandron, 21 Ala. 88-1727, 1799, 1800.  
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     v. Clark, 92 Me. 225-1933.  
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     v. Dale, 3 Lea (Tenn.) 710-835, 840.  
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     v. Denman's Ex'rs, 23 N. J. Law 260-802, 1683, 1687, 1720.  
     v. Dixon, 69 Ga. 82-1831.  
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     v. Gibson, 29 Neb. 324-379.  
     v. Goodin, 3 Ohio St. 75-754.  
     v. Goodson, 114 Ark. 359-1921.  
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     v. Hammett, 12 Barb. (N. Y.) 253-180.  
     v. Holahan, 92 N. Y. 498-2495.  
     v. Holman, 60 Mo. 498-2747.  
     v. Leonard, 65 Neb. 670-2181.  
     v. Long, 181 Mo. 701-1833.  
     v. Marshall, 72 Ill. 609-192, 193.  
     v. Mosier, 84 Kan. 361-2124.  
     v. Penn, 4 Ala. 140-1726.  
     v. Portland, 4 Ore. 339 1321, 1855.

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     v. Slocumb, 122 N. C. 475-2718.  
     v. Tennessee Coal & Iron Ry. Co., 180 Ala. 367-2198.  
     v. Thompson, 41 Ala. 375-2721.  
     v. Thurston, 58 N. H. 108-1546.  
     v. Tinicum Fishing Co., 77 Pa. St. 310-2030.  
     v. Van Bokkelen, 73 Md. 175-2582.  
     v. Walker, 186 Ala. 140-1922, 2083, 2088.  
     v. Williams, L. R. 9 Eq. 678-1439.  
     v. Williams, 43 N. C. 177-836, 837.  
     v. Williamson, 106 Ga. 280-882.  
     v. Worrell, 96 N. C. 358-2738.  
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 Cartwright, In re, 41 Ch. Div. 532-969.  
 Cartwright v. Cartwright, 3 D. M. & G. 982-280.  
     v. Maplesden, 53 N. Y. 622-1382, 1383.  
 Carty v. Connelly, 91 Cal. 15-1629, 1630.  
 Caruth v. Gillispie, 109 Miss. 679-1922.
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     v. Humphrey, 12 Mich. 270-2362, 2599.  
 Carver v. Carver, 97 Ind. 497-1733.  
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     v. Gough, 153 Pa. 225-928, 930.  
     v. Jackson, 4 Pet. (U. S.) 1 499.  
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 Cary v. Daniels, 8 Mete. (Mass.) 466-1195, 1685.  
     v. Robinson, 8 Mass. 159-2750.  
 Casborne v. Scarfe, 1 Atk. 603-835, 2360, 2421, 2422.  
 Case v. Bumstead, 24 Ind. 429-2183.  
     v. Dwire, 60 Iowa 442 2309.  
     v. Edgeworth, 87 Ala. 203-1562.  
     v. Fant, 53 Fed. 41-2606, 2609.  
     v. Favier, 12 Minn. 89-1866, 1867.  
     v. Green, 53 Mich. 615-2010.  
     v. Haight, 3 Wend. (N. Y.) 632-2189.  
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     v. Hargadine, 43 Ark. 144 2198.  
     v. Higenbotam, 100 N. Y. 248-2602.  
     v. Hoffman, 84 Wis. 438-1161, 1174.  
     v. Minot, 158 Mass. 577-1277, 1278, 1285, 1286.  
     v. Owen, 139 Ind. 22-634.  
     v. Phelps, 39 N. Y. 164-2282.  
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 Case Mfg. Co. v. Garven, 45 Ohio St. 289-915, 921, 923.  
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- v. Gregory, 13 B. Mon. (Ky.) 505-186, 1491.
- v. Hanrick, 69 Tex. 44-187, 194.
- Casey's Lessee v. Inloes, 1 Gill (Md.) 430-1921.
- Casinella v. Allen, 168 Cal. 677-2651.
- Cason v. Cason, 116 Tenn. 173-1734.
- v. Florida Powder Co. (Fla.), 76 So. 535-1146.
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- v. Thompson, 1 N. H. 65-746, 1571, 1572.
- Cassedy v. Jackson, 45 Miss. 397-2290.
- Cassell v. Ross, 33 Ill. 244-2724, 2730.
- Casselman v. Packard, 16 Wis. 114-2296.
- Cassens v. Meyer, 154 Iowa 187-1227, 1229, 1230.
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- v. Witherbee, 119 N. Y. 522-2660, 2661, 2664.
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- Cassidy v. Cook, 99 Ill. 385-2725.
- v. Holland, 27 S. D. 287-1747, 1749.
- v. Old Colony R. Co., 141 Mass. 174-1168.
- v. Sullivan, 75 Neb. 847-1876.
- Cassilly v. Rhodes, 12 Ohio 88-2437.
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- Casterton v. Plotkin, 188 Mich. 333-1427, 1451.
- v. Sutherland, 9 Ves. 445-1099.
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- Castle v. Castle, 78 Mich. 298-2596.
- v. Elder, 57 Minn. 289-1667, 1659.
- v. Palmer, 6 Allen (Mass.) 401-2303.
- Castleberry v. Weaver, 30 Ga. 534-2791.
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- v. Berry, 86 Va. 604-2696.
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 Catlin v. Brown, 11 Hare 372-601, 616.  
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v. Windham, 126 Ala. 552-  
1167.
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Cal. 112-1962.  
v. Tarpey (Utah), 168 Pac.  
554-1961, 2010.
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R. & C. R. Co., 36 C. C. A.  
241-2442.  
v. Columbus, etc., R. Co., 87  
Fed. 815-2580.  
v. Hennen, 90 Fed. 593-1317.  
v. Kneeland, 138 U. S. 414-  
2369.  
v. West India Imp. Co., 169 N.  
Y. 314-2175, 2545.
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v. Proprietors of India Wharf,  
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Co., 51 Me. 413-1652.
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App.), 76 S. W. 790-2026, 2027.
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1933.
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382.  
v. Gregg, 88 Tex. 553-704, 706,  
2130.  
v. Morse, 189 Mass. 550-2724.
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282-2703.
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2335.
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345-1168.
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1002.
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1663.
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Neb. 224-2401.  
v. Chaffee, 70 Vt. 231-791.  
v. City of Aiken, 57 S. C. 507-  
1877, 1879.  
v. Franklin, 11 R. I. 578-743.  
v. Hawkins, 89 Wash. 130-  
2483.
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135 N. C. 95-1147.  
v. Kimball's Heirs, 23 Ill. 36-  
2286.
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R. (Pa.) 425-2781.
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118-2299.
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307.  
v. Dickinson, 1 Conn. 382-  
1037, 2055.
- Challefoux v. Ducharme, 4 Wis.  
554-642.
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Ch. 407-2653.  
v. Doe, 18 Q. B. 231-616.
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225, 962, 966, 971, 980,  
981.  
v. Storil, 2 Ves. & B. 222-785.
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876, 879.
- Chamberlain v. Bell, 7 Cal. 292-  
2185.  
v. Brown, 33 S. C. 597-2293,  
2294.  
v. Child's Unique Dairy Co., 54  
Misc. (N. Y.) 56-982.  
v. Dempsey, 9 Bosw. (N. Y.)  
212-2576.  
v. Dunlop, 126 N. Y. 45-154,  
185.  
v. Forbes, 126 Mich. 86-2455.  
v. Husel, 178 Mich. 1-1059.  
v. Northeastern R. Co., 41 S. C.  
399-2167.  
v. Pybas, 81 Tex. 511-1927.  
v. Runkle, 28 Ind. App. 607-  
1621.

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 v. Chambers, 227 Mo. 262-1751, 1756, 1793.  
 v. Chattanooga Union R. Co., 130 Tenn. 459-2014.  
 v. Davis, 15 B. Mon. (Ky.) 522-788.  
 v. Furray, 1 Yeates (Pa.) 167-1543.  
 v. Great Northern P. Co., 100 Minn. 214-2167.  
 v. Irish, 132 Iowa 319-187.  
 v. Pleak, 6 Dana (Ky.) 432-2015.  
 v. Prewitt, 172 Ill. 615-2407.  
 v. Ross, 25 N. J. L. 293-252.  
 v. Smith, 3 App. Cas. 795-2322.  
 v. St. Louis, 29 Mo. 543-434, 2349.  
 v. Wyatt (Tex. Civ. App.), 151 S. W. 864-329.
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 v. Hinkle, 45 N. J. Eq. 162-2684, 2693.
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 v. Champlin, 16 R. I. 314-764.  
 v. Pendleton, 13 Conn. 23-1661.  
 v. Williams, 9 Pa. 341-2667.
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 v. Coope, 32 N. Y. 543-2673.
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 v. Chandler (Miss.), 71 So. 811-716.  
 v. Cheney, 37 Ind. 391-653, 656.  
 v. Delaplaine, 4 Del. Ch. 503-1073.  
 v. French, 73 W. Va. 658-871.  
 v. Goodridge, 23 Me. 78-1351.  
 v. Hinds, 135 Wis. 43-1585.  
 v. Hollingsworth, 3 Del. Ch. 99-762, 763, 765.  
 v. Howland, 7 Gray (Mass.) 350-1134.  
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 v. Lazarus, 55 Ark. 312-1187.  
 v. Rider, 102 Mass. 268-1077.  
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 Chapin v. Brown, 15 R. I. 579-1320, 1322.  
     v. Cooke, 73 Conn. 72-284.  
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     v. First Universalist Soc., 8 Gray (Mass.) 580-366, 1076.  
     v. Foss, 75 Ill. 280-677.  
     v. Hill, 1 R. I. 446-782, 788.  
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     v. Marvin, 12 Wend. (N. Y.) 538-285.  
     v. Nott, 203 Ill. 341-491.  
     v. School District No. Two, 35 N. H. 445-291, 370.  
     v. Sullivan R. Co., 39 N. H. 53-1249.  
     v. Waters, 116 Mass. 140-2737.  
     v. Wright, 41 N. J. Eq. 438-2658, 2659.  
 Chaplin v. Chaplin, 3 P. Wms. 229-746.  
 Chapman v. Abrahams, 61 Ala. 108-2126, 2756.  
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     v. Dearman (Tex. Civ. App.), 181 S. W. 808-882, 885, 886.  
     v. Floyd, 68 Ga. 455-1855.  
     v. Hamblet, 100 Me. 454-1618.  
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     v. Liggett, 41 Ark. 292-2758.  
     v. Mill Creek Coal & Coke Co., 54 W. Va. 193-868, 1615.  
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 v. McDonnell, 24 Ill. 236-897, 900.  
 v. McLellan, 49 Me. 375-2655.  
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 v. Oregon City, 72 Ore. 527-1861.  
 v. Palmer, 29 Ill. 306-1593.  
 v. Peck, 21 N. Y. 581-2405, 2744, 2750.  
 v. Silverstone, 62 Me. 175-1176.  
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 v. Van Meter, 140 Ind. 321-2609, 2617.  
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 v. Weston, 12 N. H. 413-1722.  
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v. Torlina, 15 N. M. 53-1219.
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v. Southern Pac. Co. (Cal.), 134 Pac. 717-2045, 2052.
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v. Nall, 112 N. C. 370-2407.  
v. Waldrum, 25 Ala. 152-727, 768, 772.
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v. Millard, 1 Johns. Ch. (N. Y.) 409-2675.
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v. Collins, 155 Ky. 312-1536.  
v. Gravitt, 27 Ky. L. Rep. 403-1339.
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v. Bonnell, 58 Ill. 268-309, 895.  
v. Cheney, 110 Me. 61-825.  
v. Crandell, 28 Colo. 383-2711, 2712.  
v. O'Brien, 69 Cal. 199-2034, 2063.  
v. Roodhouse, 32 Ill. App. 49-877.  
v. Selman, 71 Ga. 384-1835.  
v. Straube, 35 Neb. 521-1698, 1702, 1710, 1716.  
v. Teese, 108 Ill. 473-633.
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v. Harris, 92 Ark. 260-956.
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v. Brizzolara, 89 Ark. 309-1275, 1293, 1295.  
v. Dickerson, 128 Ark. 572-2267.  
v. Greene, 115 Ill. 591-1058.  
v. Heming, 4 Exch. 631-1722.  
v. Herring, 83 Ala. 458-1765.  
v. Mott, 1 Mylne & C. 123-618.  
v. Richardson, 120 Ala. 242-390.  
v. Stein, 11 Md. 1-2037.

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- v. Minton, 12 Colo. 557-2267, 2268.
- v. North, 106 Mich. 390-1851.
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- v. Brumagen, 13 Wall. (U. S.) 497-2696.
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- v. Commissioners of South-wark, 5 Rawle (Pa.) 160-828, 829, 830, 831, 833, 835, 836.
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- v. Galt, 224 Ill. 421-2080, 2087.
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Kan. 168-2771.  
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Swalley, 85 Kan. 4-2631.  
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Johnson, 167 Ky. 674-1414.  
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cago, 264 Ill. 24-1873, 1879.  
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Reuter, 223 Ill. 387-1174.  
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237-1173.  
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20 Okla. 101-1169, 1171.  
v. Kennedy, 70 Ill. 350-2243,  
2730.  
v. McKone, 36 Okla. 41-1147.  
v. Morton (Okla.), 157 Pac.  
917-1147.  
v. Porter, 72 Iowa 426-2109.  
v. Sturey, 55 Neb. 137-1532.  
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Ill. 273-921, 945.  
v. Keegan, 185 Ill. 70-1959,  
1961, 1964.  
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Ill. 418-2167.  
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v. Peck, 112 Ill. 408-2692, 2696,  
2699.  
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Wis. 44-911.  
v. Groh, 85 Wis. 641-1938,  
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v. Hoag, 90 Ill. 339-1183, 2006.  
v. Jenkins, 103 Ill. 588-1957.  
v. Sioux City Stock-Yards Co.,  
176 Iowa 659-1363.  
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94 Ind. 319-901.  
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Ill. App. 154-1803.  
Chicago, etc., R. Co. v. Belliwith, 83  
Fed. 437-1638.  
v. Council Bluffs, 109 Iowa  
425-1887.  
v. Groves, 20 Okla. 101-1130.  
v. Johnson, 25 Okla. 760-1165.  
v. Lewis, 53 Iowa 101-1803.  
v. Wasserman, 22 Fed. 872-  
1846.  
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443.  
v. Rollins, 44 Me. 104-2681,  
2682.  
v. Willets, 2 Kan. 384-2362.  
Chickering v. Failes, 26 Ill. 507-  
2022.  
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v. Baylie, Cro. Jac. 459-598.  
v. Chappell, 9 N. Y. (5 Seld.)  
246-192, 1358, 1855.  
v. Douglas, Kay, 560-1446.  
v. Starr, 4 Hill (N. Y.) 369-  
1658.  
Childers v. Bumgarner, 53 N. C.  
297-1951.  
v. Childers, 1 De Gex & J. 482-  
393.  
v. Coleman Co., 122 Tenn. 109-  
883, 887, 2185.  
Children's Aid Soc. v. Loveridge, 70  
N. Y. 387-1825.  
Childs v. Boston & M. R. R., 213  
Mass. 91-1268, 1430.  
v. Childs, 10 Ohio St. 339-2646,  
2650, 2651, 2654, 2701.  
v. Hurd, 32 W. Va. 66-935,  
2433, 2434.  
v. Kansas City, St. J. & C. B.  
R. Co. (Mo.), 17 S. W.  
954-990, 991, 992, 2017.  
v. McChesney, 20 Iowa 431-  
2126.  
v. Rue, 84 Minn. 323-330.



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 v. White, 72 W. Va. 545-1926.
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 v. Thompson, Walk Ch. (Mich.) 405-325.
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 v. Chisholm's Ex'rs, 41 Ala. 327-859.  
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 v. Thompson, 3 Ohio St. 424-2623, 2627.
- Chouteau v. Chouteau, 49 Okla. 105-719.  
 v. Missouri Pac. R. Co., 122 Mo. 375-747.  
 v. Paul, 3 Mo. 260-712.  
 v. Riddle, 110 Mo. 366-2021.  
 v. Thompson, 2 Ohio St. 114-2418.
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 v. Austin, 36 Tex. 540-2760.  
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 v. Clark, 10 Lea (Tenn.) 630-851.  
 v. Dripps, 28 Pa. 271-915.  
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 v. John, 111 Tenn. 92-2572.  
 v. Newbury, 61 Mo. 446-2629.  
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 Chudleigh's Case, 1 Coke 120-598.  
 Church v. Brown, 15 Ves. Jr. 258-160, 161.  
     v. Bull, 2 Denio (N. Y.) 430-782, 784.  
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     v. Church, 3 Sandf. Ch. (N. Y.) 434-743, 749, 751.  
     v. Gilman, 15 Wend. (N. Y.) 556-1741, 1795.  
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 Churchill v. Capen, 84 Vt. 104-1644.  
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     v. Louie, 135 Cal. 608-2035.  
     v. Meade, 88 Ore. 120-2678.  
     v. Morse, 23 Iowa 229-2260.  
     v. Reamer, 8 Bush (Ky.) 256-833.  
     v. Wells, 7 Cold. (Tenn.) 364-2282.  
 Chute v. Washburn, 44 Minn. 312-269, 309.  
 Cibel v. Hills, 1 Leon. 110-200, 206, 1501.  
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     v. Pawtucket Inst. for Sav., 15 R. I. 489-699.  
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     v. Allaman, 71 Kan. 206-1140, 1155.  
     v. Baker, 14 Cal. 629-2118.  
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     v. Beard, 59 W. Va. 669-2015, 2018.  
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     v. Brown, 3 Allen (Mass.) 509-2564.  
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     v. Burnside, 15 Ill. 62-940.  
     v. Butt, 26 Ind. 226-136.  
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 v. Conroe, 38 Vt. 469-1681.  
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 v. Cox, 115 N. C. 93-490, 493, 527, 528, 589, 590.  
 v. Crego, 47 Barb. (N. Y.) 599-2016.  
 v. Creswell, 112 Md. 339-404, 1604, 1740, 1790.  
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 v. Devoe, 124 N. Y. 120-1407, 1409.  
 v. Dustin, 52 Vt. 568-998, 1001.  
 v. Eaton, 100 U. S. 149-2725.  
 v. Elizabeth, 40 N. J. L. 172-1321, 1868.  
 v. Everly, 8 Watts. & S. (Pa.) 226-266.  
 v. Finlon, 90 Ill. 245-2438, 2439, 2662.  
 v. Fisk, 9 Utah 94-2498.  
 v. Fleischman, 81 Neb. 445-1059.  
 v. French, 23 Me. 221-2284.  
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 v. Glidden, 60 Vt. 702-1204, 1209, 1214.  
 v. Glos, 180 Ill. 556-2610.  
 v. Guest, 54 Ohio St. 298-884.  
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 v. Havard, 122 Ga. 273-2522, 2523.
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 v. Hill, 117 N. C. 11-912.  
 v. Holden, 7 Gray (Mass.) 8-960.  
 v. Holland, 72 Iowa 34-2216.  
 v. Hornthal, 47 Miss. 434-1043, 1058.  
 v. Hull, 184 Mass. 164-2087.  
 v. Hulsey, 54 Ga. 608-996.  
 v. Hyman, 55 Iowa 14-2412, 2413, 2414, 2415.  
 v. Kirby, 18 Utah 258-2135.  
 v. Lane, 2 N. J. L. 417-2025.  
 v. Lesser, 106 Ark. 207-2690.  
 v. Lindsey, 47 Ohio St. 437-691, 693.  
 v. Lineberger, 44 Ind. 223-1698.  
 v. Lyster, 155 Fed. 513-663.  
 v. McGee, 159 Ill. 518-1434, 1450.  
 v. McNeal, 114 N. Y. 287-2258.  
 v. Mackin, 95 N. Y. 346-2674.  
 v. Martin, 49 Pa. 289-310, 1426, 1427, 1429, 1443.  
 v. Merriam, 83 Ind. 58-2783.  
 v. Middlesworth, 82 Ind. 240-952, 1059.  
 v. Missouri, K. & T. Trust Co., 59 Neb. 53-2471.  
 v. Moore, 64 Ill. 273-2774.  
 v. Morris, 88 Kan. 752-2391.  
 v. Mumford, 62 Tex. 531-1702, 1705, 1715.  
 v. Neves, 76 S. C. 484-540.  
 v. Paddock, 24 Idaho 142-2410, 2676.  
 v. Paquette, 67 Vt. 681-2661, 2662.  
 v. Parker, 106 Mass. 554-678, 1260.  
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- v. Wilson, 53 Miss. 129-2396, 2715, 2728.
- v. Wotton, 1 Root (Conn.) 299-847.
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 Clay, In re, 16 Ch. Div. 3-1072, 1074.  
 Clay v. Banks, 71 Ga. 363-2665,  
 2667, 2673.  
     v. Cousins, 1 T. B. Mon. (Ky.)  
     75-1899.  
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     2345.  
     v. Hart, 7 Dana (Ky.) 8-1076.  
     v. Layton, 134 Mich. 317-1817.  
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     v. Pittsburg, C., C. & St. L. Ry.  
     Co., 164 Ind. 439-1168.  
     v. Rufford, 5 De G. & Sm. 768-  
     1065.  
     v. Selah Valley Irrigation Co.,  
     14 Wash. 543-2698.  
     v. Smallwood, 100 Ky. 212-  
     1094.  
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 1710, 1718, 1722.  
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     Va. 253-1662.  
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 137-2374.  
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 820-2041, 2074.  
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 1319, 1326.  
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 1333, 1338.
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 1210.  
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 954, 960.  
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     v. Speed, 93 Ky. 284-1294,  
     1295, 1342.  
 Clement v. Bank of Rutland, 61 Vt.  
 298-1718, 1719, 1722.  
     v. Bettle, 65 N. J. L. 675-2045.  
     v. Burns, 43 N. H. 609-1010,  
     1011, 1024, 1027, 1028.  
     v. City of Paris, 107 Tex. 200-  
     1886.  
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     1008.  
     v. Wheeler, 25 N. H. 361-789,  
     979.  
     v. Willett, 105 Minn. 267-2495.  
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 398-2786.  
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     2301.  
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 1980.  
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 1598, 1602.  
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 54-1900.  
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 tion Co., 86 Md. 80-1874.  
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 113-833.  
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 1855.  
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 1106.  
 Clerk v. Clerk, 2 Vern. 323-638.  
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 675-2719.



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     v. Burlington, 2 Vern. 379-1093.  
     v. Hoare, L. R. 9 C. P. 362-1338.  
     v. Kamfife, 147 N. Y. 383-802.  
     v. Minor, 76 Minn. 12-2497.  
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     v. Moses, 16 N. Y. 144-2742.  
     v. Williams, 105 Ky. 559-2213.  
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     v. Gerlach, 44 Pa. St. 43-2331, 2332.  
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     v. Biddle, 14 Pa. 444-1077, 1475.  
     v. Commissioners of Lincoln Park, 202 Ill. 427-1022.  
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     v. Day, 106 Mo. 278-2380.  
     v. Dyer, 69 Me. 494-2669, 2673.  
     v. Fishel, 15 Colo. App. 384-2494.  
     v. Frink (Ala.), 75 So. 939-713.  
     v. Klosterman, 58 Ore. 211-1680, 1704, 1709.  
     v. Lavalley, 89 Ill. 331-2108.  
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     v. Bane, 94 Mo. 444-2125.  
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     v. Hobby, 72 N. Y. 141-1481, 1582.  
     v. Johnson, 18 Ind. 218-2395, 2465.  
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     v. Cooper, 2 Dr. & Sm. 365-1103, 1105.  
     v. Lawrence, 143 Mass. 110-1542.  
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     v. Todd, 130 Minn. 227-1473.  
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     v. Wausau Boom Co., 47 Wis. 314-1024, 1026.  
 Coit v. Braunsdorf, 32 N. Y. Super. Ct. (2 Sweeny) 74-1482.  
     v. Fitch, Kirby (Conn.) 254-2731.  
     v. Fongera, 36 Barb. (N. Y.) 195-2754.  
     v. Starkweather, 8 Conn. 289-1641.  
 Coke v. Gutkese, 80 Ky. 598-138, 144.  
 Coker v. Roberts, 71 Tex. 597-853, 1666.  
     v. Whitelock, 54 Ala. 180-2461.  
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     v. Beale, 89 Ill. App. 424-2606, 2617.  
     v. Boyd, 175 N. C. 555-2473.  
     v. Bradbury, 86 Me. 380-1236, 2036.  
     v. Burnett, 119 Ark. 386-718.  
     v. Cole, 41 Md. 301-2748.  
     v. Cole, 57 Misc. (N. Y.) 490-692.  
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     v. Collie, 131 Ark. 103-1622.  
     v. Drew, 44 Vt. 49-1525.  
     v. Green, 1 Lev. 308-963.  
     v. Hadley, 162 Mass. 579-1316.  
     v. Haynes, 22 Vt. 588-1662, 1674.  
     v. Hester, 31 N. C. (9 Ired. Law) 23-900.  
     v. Hughes, 54 N. Y. 444-1408, 1417.  
     v. Johnson, 53 Miss. 94-943.  
     v. Kimball, 52 Vt. 639-1720, 1721.  
     v. Lake Co., 54 N. H. 242-220.  
     v. McKey, 66 Wis. 500-141.  
     v. Mettee, 65 Ark. 503-661.  
     v. Minnesota Loan & Trust Co., 17 N. D. 409-1863.  
     v. Missouri, K. & O. R. Co., 20 Okla. 227-1184.  
     v. Moffitt, 20 Barb. (N. Y.) 18-2720.  
     v. Mueller, 187 Mo. 638-1673.  
     v. Patterson, 25 Wend. (N. Y.) 456-1483.  
     v. Pennoyer, 14 Ill. 158-2335.  
     v. Sanford, 77 Hun (N. Y.) 198-258.  
     v. Sewell, 4 Dru. & War. 1-610.  
     v. Stewart, 11 Cush. (Mass.) 181-2460, 2463.  
     v. Tyler, 65 N. Y. 78-2282.  
     v. Van Ripper, 44 Ill. 58-732, 849.

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 Coleman v. Beach, 94 N. Y. 545-  
     1070.  
     v. Carhart, 74 Ga. 392-2560.  
     v. Central Trust Co. of New  
         York, 25 Misc. (N. Y.)  
         295, 54 N. Y. Supp. 561-  
         142.  
     v. Chadwick, 80 Pa. 81-1178,  
         1194.  
     v. Coleman, 3 Dana (Ky.) 398-  
         697.  
     v. Coleman, 19 Pa. 100-711.  
     v. Coleman, 71 S. C. 521-1922.  
     v. Foster, 1 Hurlst. & N. 37-  
         1219.  
     v. Holden, 88 Miss. 798-1359.  
     v. Larson, 49 Wash. 321-2140.  
     v. Lewis, 27 Pa. St. 291-922.  
     v. Luksinger, 224 Mo. 1-1721.  
     v. Manhattan Beach Improve-  
         ment Co., 94 N. Y. 229-  
         2290.  
     v. San Rafael Turnpike Road  
         Co., 49 Cal. 517-370.  
     v. Smith, 55 Tex. 254-1000.  
     v. Stewart, 170 Ala. 255-680.  
     v. Virginia Stave & Heading  
         Co., 112 Va. 61-803.  
     v. Whitney, 62 Vt. 123-2405.  
     v. Winch, 1 P. Wms. 755-2653.  
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     Eq.), 16 Atl. 202-2740.  
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     2673.  
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         817.  
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         461.  
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     2023.  
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     171.  
     v. Langdon, 29 Vt. 32-2423,  
         2609.  
 Collamore v. Gillis, 149 Mass. 578-  
     933.  
 Collard & Dückworth, In re, 16 Ont.  
     735-1078.  
 Collet v. Jacques, 1 Ch. Cas. 120-  
     1513.  
 Collier v. Alexander, 142 Ala. 422-  
     2394, 2396.  
     v. Cowger, 52 Ark. 322-1712,  
         1713, 1698.  
     v. Cunningham, 2 Ind. App.  
         254-895.  
     v. Ervin, 2 Mont. 335-2687.  
     v. Gamble, 10 Mo. 467-1721.  
     v. Gault, 234 Mo. 457-2015.  
     v. Grimesey, 36 Ohio St. 17-  
         441, 445, 447.  
     v. Halifax Paper Corp., 172 N.  
         C. 74-701.  
     v. Jenks, 19 R. I. 137-947, 949.  
     v. Miller, 137 N. Y. 332-2562.  
     v. Slaughter's Adm'r, 20 Ala.  
         263-284.  
     v. Walters, L. R. 17 Eq. 252-  
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 Collignon v. Collignon, 52 N. J. Eq.  
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652.
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1037, 1039, 1544.
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- v. Carlile, 13 Ill. 254-2567,  
2568.
- v. Carlisle's Heirs, 7 B. Mon.  
(Ky.) 13-374.
- v. Champ, 15 B. Mon. (Ky.)  
95-440.
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(Ky.) 122-441.
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131 Pa. St. 143-1182.
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1936, 2008, 2025.
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763.
- v. Collins, 51 Miss. 311-1641,  
1642.
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- v. Combs, 160 Ky. 325-445.
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- v. Cunningham, 21 Can. Sup.  
Ct. 139-2704.
- v. Davis, 132 N. C. 106-2251.
- v. Degler, 74 W. Va. 455-1354.
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114-1243.
- v. Gregg, 109 Iowa 506-2404,  
2663.
- v. Gross, 51 Wash. 516-2445.
- v. Harding, 13 Coke 58-1485.
- v. Hasbrouck, 56 N. Y. 157-  
172.
- v. Hopkins, 7 Iowa 463-2714.
- v. Hoxie, 9 Paige (N. Y.) 81-  
370.
- v. Karatopsky, 36 Ark. 316-  
142.
- v. Land Co., 128 N. C. 563-  
1322.
- v. Leary, 74 N. J. Eq. 852-462.
- Collins v. Lindquist, 154 Mich. 658-  
1004.
- v. Lofftus, 10 Leigh (Va.) 5-  
368.
- v. Lynch, 157 Pa. St. 246-1986.
- v. Lynch, 167 Pa. St. 635-  
1928.
- v. McCarty, 68 Tex. 150-1954,  
1955.
- v. Pratt, 181 Mass. 345-168.
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1298, 1305, 1369.
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1260.
- v. Reimers, 181 Iowa 1143-  
1941.
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2651.
- v. Russell, 184 N. Y. 74-836.
- v. Sanitary Dist. of Chicago,  
270 Ill. 108-510.
- v. Slade, 23 Weekly Rep. 199-  
1333.
- v. Smith, 105 Ga. 525-527, 590.
- v. Smith, 144 Iowa 200-762,  
1749, 1750.
- v. Smith, 57 Wis. 284-2259.
- v. Stewart, 58 N. J. Eq. 392-  
386, 387.
- v. Stocking, 98 Mo. 290-2587,  
2632.
- v. St. Peters, 65 Vt. 618-1358.
- v. Torrey, 7 Johns. N. Y. 278-  
2682.
- v. Wakeman, 2 Ves. Jr. 683-  
451.
- v. Williams, 98 Tenn. 523-536.
- Collins Inv. Co. v. Sanner, 42 Okla.  
634-2410.
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242-289, 1429.
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350-1618.
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2771.
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390.

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- Colton v. Colton, 127 U. S. 300-374, 375.
- v. Depew, 60 N. J. Eq. 454-2021, 2620, 2680.
- v. Garham, 72 Iowa 324-1472.
- v. Leavey, 22 Cal. 496-1724.
- v. Smith, 11 Pick. (Mass.) 311-723.
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- v. Hyden, 94 Ky. 180-1747, 1750.
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- v. Burford, 225 Pa. 93-1283, 1289, 1333.
- v. Chapin, 5 Pick. (Mass.) 199-1012, 1037, 1038, 1039, 1516.
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     v. Lay, 12 Bush (Ky.) 283-2301.  
     v. Logan, 5 Litt. (Ky.) 286-2080.  
     v. McNaugher, 131 Pa. St. 55-1537.  
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     v. Marshall, 137 Pa. 170-2080.  
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     v. New York, L. E. & W. R. Co., 132 Pa. St. 591-2144, 2350.  
     v. Roxbury, 9 Gray (Mass.) 521-1032.  
     v. Royce, 152 Pa. St. 88-1879.  
     v. Rush, 14 Pa. St. 186-1855.  
     v. Stauffer, 10 Pa. St. 350-283, 285.  
     v. Susquehanna & D. R. R. Co., 122 Pa. St. 306-2698.  
     v. Upton, 6 Gray (Mass.) 473-2032.  
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     v. Sheehan, 74 Ala. 452-151, 213, 2446, 2447.  
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     v. Smith, 117 Mo. 261-2218, 2262.  
     v. Talbot, 113 Ind. 373-2522, 2526, 2545, 2637.
- Connecticut River Sav. Bank v. Albee's Estate, 64 Vt. 571-375, 389, 1795.
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     v. Stark, 108 Wis. 92-1163.
- Connely v. Rue, 148 Ill. 207-2699, 2700.
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     v. Downer, 4 Bush (Ky.) 631-830.  
     v. Howe, 35 Minn. 518-2665.  
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     v. Follansbee, 59 N. H. 124-384.  
     v. Johnson, 59 S. C. 115-1653.  
     v. McMurray, 2 Allen (Mass.) 202-851.  
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     v. Smith, 17 N. J. Eq. 51-179. 2751.  
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     v. Kelley, 119 Fed. 841-2547.  
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     v. Morehead, 89 N. C. 31-871.  
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     v. Noyes, 66 N. H. 570-399.  
     v. Ware Sav. Bank, 152 Mass. 407-2731.  
 Conway v. Alexander, 7 Cranch (U. S.) 218-2387.  
     v. Rock, 139 Iowa 162-1624, 1745.  
     v. Starkweather, 1 Denio (N. Y.) 113-248, 249.  
     v. Vizzard, 122 Ind. 266-1828.  
     v. Wilson (N. J. Ch.), 2408.  
 Conway's Ex'rs & Devises v. Alexander, 7 Cranch (U. S.) 218-2389.  
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     v. Bartholomew, 60 Conn. 24-2403, 2405.  
     v. Bath Corporation, L. R. 6 Eq. 177-1378.  
     v. Beard, 108 Mich. 17-2071.  
     v. Bell, 114 Mich. 283-2586.  
     v. Berry, 193 Pa. St. 377-2501.  
     v. Bisbee, 18 Pick. (Mass.) 527-218.  
     v. Boldue, 21 Wyo. 281-1830.  
     v. Brightly, 46 Pa. St. 439-1474.  
     v. Brown, 34 N. H. 460-1778, 1786.  
     v. Burlington, 30 Iowa 94-1862, 2108.  
     v. Caswell, 81 Texas 678-2181.  
     v. Champlain Transp. Co., 1 Denio (N. Y.) 91-974, 975, 976.  
     v. Clinton, 64 Mich. 309-1965.  
     v. Cook, 138 Ga. 88-858.  
     v. Cook, 11 Gray (Mass.) 123-824, 959.  
     v. Cook, 24 S. D. 223-2140.  
     v. Cooper, 59 S. C. 560-1810.  
     v. Curtis, 68 Mich. 611-1711, 1717.  
     v. Dillon, 9 Iowa 412-801, 2465, 2780.  
     v. Fisk. Walk. (Miss.) 423-811.  
     v. French, 96 Mich. 525-2192.  
     v. Gammon, 93 Ga. 298-2046.  
     v. Gilchrist, 82 Iowa 277-2626.  
     v. Guerra, L. R. 7 C. P. 132-2446.  
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     v. Mattier, 140 Mo. 23-869.  
     v. Nicholas, 4 Watts & S. (Pa.) 331-2025.  
     v. Parkam, 63 Ala. 456-2520.  
     v. Pridgen, 45 Ga. 331-1209.  
     v. Seaboard Airline Ry., 107 Va. 32-1141, 1154.  
     v. Soule, 56 N. Y. 420-142.  
     v. Smith, 107 Tex. 119-1578, 2207, 2210, 2211.  
     v. Stearns, 11 Mass. 533-1202, 1206.  
     v. Stone, 63 Iowa 352-2543.  
     v. Sudden, 94 Cal. 443-1867.  
     v. Totten, 49 W. Va. 177-1322.  
     v. Travis, 20 N. Y. 400-2022, 2238.  
     v. Union Trust Co., 106 Ky. 803-2516.  
     v. Walker, 70 Me. 232-758.  
     v. Walling, 117 Ind. 9-732.  
     v. Webb, 2 Minn. 428-677.  
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     v. Whiting, 16 Ill. 480-1675.  
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v. Crawford, 13 Sim. 91-1070,  
1076.  
v. Doron, 215 Pa. 393-2351.  
v. Pennington, 15 S. C. 185-  
2687.  
v. Prindle, 97 Iowa 464-2518.  
v. Turner, 15 Mees. & W. 727-  
281.
- Cooke's Appeal, 132 Pa. 533-838.
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2620, 2662.
- Cool v. Peters Box & Lmb. Co., 87  
Ind. 531-887, 968, 1217.
- Coolbaugh v. Lehigh & Wilkes  
Barre Coal Co., 213 Pa. 28-870,  
871.
- Cooley v. Golden, 117 Mo. 33-10f2,  
2105, 2111.  
v. Lee, 170 N. C. 18-2014.  
v. Perry, 34 S. C. 554-1520.
- Cooley's Appeal, 1 Grant (Pa.) 401-  
2673.
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668.  
v. Hager, 43 Vt. 9-1275.  
v. Learned, 8 Pick. (Mass.) 504-  
2029, 2030.  
v. Williams, 4 Mass. 140-1545.
- Coomber v. Howard, 1 C. B. 440-  
1476.
- Coombs v. Aborn, 29 R. I. 40-2258.  
v. Jordan, 3 Bland Ch. (Md.)  
284-2775.
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v. Smith, 29 N. Y. 392-998.
- Cooney v. Coppock, 119 Iowa 486-  
2271.  
v. North Cent. Ry. Co., 180  
N. Y. App. Div. 675-1121.
- Coonradt v. Hill, 79 Cal. 587-2035.
- Cooper v. Adams, 60 Mass. (6  
Cnsh.) 87-227, 242.  
v. Altoona Concrete, etc., Co.,  
231 Pa. 557-1191.  
v. Arnett, 95 Ky. 603-2304.
- Cooper v. Bigley, 13 Mich. 474-2506,  
2511.  
v. Bloodgood, 32 N. J. Eq. 209  
1695.  
v. Brown, 143 Iowa 482-690  
v. Cedar Rapids Water Co., 42  
Iowa 398-711.  
v. Cleghorn, 50 Wis. 113-926.  
v. Cole, 38 Vt. 185-2436.  
v. Cooper, 76 Ill. 57-651.  
v. Cooper, 256 Ill. 160-2590.  
v. Cooper, 162 Mich. 304-1740.  
v. Cooper, 36 N. J. Eq. 121-  
416.  
v. Cooper, 6 R. I. 261-541.  
v. Cooper, 78 S. C. 317-528.  
v. Cooper, 77 Va. 198-787.  
v. Davis, 15 Conn. 556-2460,  
2463.  
v. Flesner, 24 Okla. 47-2194.  
v. Franklin, Cro. Jac. 400-355.  
v. Gambill, 146 Ala. 184-208.  
v. Great Falls Cotton Mills Co.,  
94 Tenn. 588-1970.  
v. Green, 28 Ark. 48-2762.  
v. Hamilton Perpetual Bldg.  
Ass'n, 97 Tenn. 285-1729,  
1731.  
v. Harvey, 21 S. D. 471-2728,  
2733.  
v. Hepburn, 15 Gratt. (Va.)  
559-499.  
v. Holmes, 71 Md. 20-2792.  
v. Kennedy, 86 Neb. 119-879.  
v. Louanstein, 37 N. J. Eq.  
284-1329.  
v. McDonald, 7 Ch. Div. 288-  
839.  
v. McGrew, 8 Ore. 327-899.  
v. Merritt, 30 Ark. 686-2765.  
v. Mitchell Inv. Co., 133 Ga.  
769-498, 499.  
v. Newland, 17 Abb. Prae. 342-  
2527.  
v. Newton, 68 Ark. 150-1667.  
v. Randall, 53 Ill. 24-1124.  
v. Remsen, 3 Johns. Ch. (N. Y.)  
382-280.

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 v. Smith, 8 Watts (Pa.) 536-187.  
 v. Smith, 9 Serg. & R. (Pa.) 25-1543.  
 v. Thomason, 30 Ore. 161-382.  
 v. Trustees of First Presbyterian Church, 32 Barb. (N. Y.) 222-1252.  
 v. Woolfit, 2 Hurl. & N. 122-878.  
 v. Wyatt, 5 Madd. 482-2316.  
 Cooper's Estate, 150 Pa. St. 576-1111.  
 Coopwood v. McCandless, 99 Miss. 364-1698.  
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 Coots v. Yewell, 95 Ky. 367-499, 509.  
 Coover v. O'Conner, 8 Watts (Pa.) 470-1017.  
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 v. Wheeler, 41 N. Y. 303-2731.  
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 v. McAdory, 100 Ala. 553-1683, 1690, 1692, 1695, 1704.  
 v. Manton, 22 Ohio St. 398-2768.  
 v. Stephens, 1 Barn. & Ald. 593-184.  
 v. Watts, 1 Starkie 95-1472.  
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 v. Norcross, 35 N. H. 99-1650, 1728.  
 v. Spencer, 63 Mich. 731-2335.  
 v. Waterman, 11 Iowa 87-2503.  
 v. Woodward, 5 Sawy. 403-2420.  
 v. Wrenn, 25 Ore. 305-1684, 1690, 1711.  
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 v. Healy, 20 Pick. (Mass.) 514-1620.  
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 v. Moore, 86 Va. 721-1735.  
 v. Schuster, 44 Neb. 269-2295.  
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- v. Sims, 3 Mete. (Ky.) 391-2174.
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- v. Ivins, 26 N. J. L. 376-306, 315.
- v. Kessel, 128 U. S. 456-1564.
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- Cornelius' Estate, In re, 151 Cal. 55-1767.
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- v. Jackson, 3 Cush. (Mass.) 506-1707.
- v. Lamb, 2 Cow. 652-1517.
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- v. Frees, 74 Wis. 490 2297.
- v. Strutton, 8 B. Mon. (Ky.) 586 962.
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 Cotling v. Boston, 201 Mass. 97-1363, 1364.  
     v. Commonwealth, 205 Mass. 523-1684.  
 Cotling v. De Sartiges, 17 R. I. 668-1085.  
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 Cottee v. Richardson, 7 Exch. 143-1581.  
 Cattel v. Berry, 42 Ore. 593-1238.  
 Cotten v. McKee, 68 Me. 486-2378.  
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     v. Willoughby, 83 N. C. 75-2368, 2370.  
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     v. Purchase, Cas. Temp. Talb. 61-2381.  
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 v. Shelmadine, 204 Pa. 120-1814.  
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 Courson v. Walker, 94 Ga. 175-2563, 2564.  
 Courtner v. Etheredge, 149 Ala. 78-2373.  
 Courtney v. Staudenmayer, 56 Kan. 392-2681, 2682.  
 Courvoirsier v. Bouvier, 3 Neb. 55-191.  
 Coutts v. Walker, 2 Leigh (Va.) 268-2780.  
 Covell v. Bright, 157 Mich. 419-1279.  
 Coventry v. McLean, 21 Ont. App. 176-324.  
 Cover v. Black, 1 Pa. 493-2624.  
 v. Manaway, 115 Pa. St. 338-1734.  
 Covert v. Morrison, 49 Mich. 133-215.  
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 Covington v. Freking, 8 Bush. (Ky.) 121-1885.  
 v. McNickles's Heirs, 18 B. Mon. (Ky.) 262-1977.  
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 v. Lindsey, 30 Wis. 586-819.  
 v. Radford Iron Co., 83 Va. 547-219.  
 v. Withrow, 111 N. C. 306-2219.  
 Cowardin v. Anderson, 78 Va. 88-2564.  
 Cowden v. Pitts, 2 Baxt. (Tenn.) 59-455.  
 Cowden's Estate, 1 Pa. 207-2507, 2511, 2513, 2740.  
 Cowdrey v. Coit, 44 N. Y. 382-1702.  
 v. Cowdrey, 131 Mass. 186-859.  
 v. Hitchcock, 103 Ill. 262-785, 786, 858.  
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 v. Lumley, 39 Cal. 151-1497.  
 v. Thayer, 5 Mete. (Mass.) 253-2072, 2074.

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- Cowling v. Britt, 114 Ark. 146-2610, 2615, 2648.
- v. Higginson, 4 Mees. & W. 245-1332, 2069, 2070, 2072.
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- v. Arnold, 129 Mo. 390-2094, 2107, 2115.
- v. Boyce, 152 Mo. 576-836.
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- v. Clough, 70 Cal. 345-2066.
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- v. Fenwick, 4 Bibb. (Ky.) 538-182, 1473.
- v. Forrest, 60 Md. 74-1381, 2041, 2045, 2054, 2060.
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- v. Gowan, 116 N. C. 131-2337.
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- v. Holcomb, 87 Ala. 589-1733.
- v. Jagger, 2 Cow. (N. Y.) 638-804.
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- v. Louisville, N. A. & C. R. Co., 48 Ind. 178-1528, 1661.
- v. McMullin, 14 Gratt. (Va.) 82-721.
- v. Matthews, 17 Ind. 367-1909.
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- v. Milner, 23 Ill. 476-2217.
- v. New Bern Lighting & Fuel Co., 151 N. C. 69-925.
- v. Romine, 9 Gratt. (Va.) 27-2177, 2747.
- v. Schnerr, 172 Cal. 371-1739, 1742, 1816.
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- v. Wells, 7 Blackf. (Ind.) 410-780, 1592.
- v. Whitechoke, 2 Bulstr. 292-519.
- v. Wilder, 2 Dill. 45-781.
- v. Williams, 5 Jones Eq. (N. C.) 150-416.
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     v. Wilcox, 4 Gill (Md.) 504-650.  
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 Craggs v. Earls, 8 Okla. 462-2752, 2757.  
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     v. Green, (1899) 1 Ir. Ch. 258-1456.  
     v. Kansas City Terminal Ry. Co., 271 Mo. 516-1190, 1192.  
     v. Leiper, 2 Yerg. (Tenn.) 193-2176.  
     v. Leslie, 3 Wheat. (U. S.) 563-440, 442, 449, 453.  
     v. Miller, 41 S. C. 37-2692.  
     v. Rochester City & B. R. Co., 39 N. Y. 404-1528.  
     v. Rowland, 10 App. Cas. (D. C.) 402-499, 503, 510, 536.  
     v. Sebrell, 9 Gratt. (Va.) 131-2779.  
     v. Stevenson, 15 Neb. 362-2691.  
     v. Summers, 47 Minn. 189-171, 172.  
     v. Van Bebber, 100 Mo. 584-2333, 2335, 2337.  
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 v. Whitmore, 120 Mo. 144-377.  
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 1347.  
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 Marsh.) 255-1514.  
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 228-744, 824.  
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 88-168.  
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 1339, 1366.  
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 2172.  
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 2778.  
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 2305.  
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 2400.  
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 843.  
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 2474.  
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 173.  
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 964.  
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 Kan. 357-1995.  
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 1089.  
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 786.  
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 v. Hendricks, 89 Wis. 632-1864.  
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 v. Gale, 9 Allen (Mass.) 522-2604.  
 v. Howes, 103 Cal. 431-1329, 1346.  
 v. Perley, 24 N. H. 219-229, 239, 240.  
 v. Teske, 84 Neb. 60-2332, 2428.  
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 v. La Grande Water Co., 20 Ore. 34-2007.  
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 v. Cutler, 130 N. C. 1-1840.  
 v. Haven, 8 Pick. (Mass.) 490-2593, 2636.  
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- v. Cheshire R. Co., 20 N. H. 85-1659.
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- v. Gustafson, 33 S. D. 440-2135.
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     v. Latimer, 53 S. C. 363-462.  
     v. Magoon, 13 Ore. 3-962, 964, 982, 983.  
     v. Reg., 3 App. Cas. 115-302.  
     v. Ruckman, 37 N. Y. 568-145.  
     v. Shants, 43 Vt. 346-921, 923, 924, 925.  
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     v. Cox, 10 Neb. 150-1718.  
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     v. Angel, 4 D. F. & J. 524-278, 298.  
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     v. Christian, 15 Gratt. (Va.) 11-666, 1090.  
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 v. Harrisonburg, 116 Va. 864-1144.  
 v. Heard, 44 Miss. 50-2765.  
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 v. Hollingsworth, 113 Ga. 210-559, 1595.  
 v. Holmes, 55 Mo. 349-2684.  
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 v. Jenkins, 93 Ky. 253-779, 780.  
 v. Jernigan, 71 Ark. 494-1626.  
 v. Jones, 2 Barn. & Ald. 165-933, 936.  
 v. Judd, 6 Wis. 85-1727.  
 v. Kennedy, 105 Ill. 300-2217.  
 v. Lang, 153 Ill. 175-759.
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 v. Logan, 9 Dana (Ky.) 185-758.  
 v. Londgreen, 8 Neb. 43-1165.  
 v. Lyman, 6 Conn. 249-1718.  
 v. McArthur, 78 N. C. 357-1921, 1922, 1972.  
 v. Manning, 98 Neb. 707-138.  
 v. Mason, 1 Peters (U. S.) 503-828, 830, 833, 835.  
 v. Maynard, 9 Mass. 242-2624.  
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 v. Morgan, 8 B. & C. 8-1229.  
 v. Morris, 36 N. Y. 569-171.  
 v. Moss, 38 Pa. 346-938.  
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 v. Niagara Falls Tower Co., 171 N. Y. 336-1187.  
 v. O'Ferrall, 4 Greene (Iowa) 168-810.  
 v. Owen, 107 Va. 283-1947.  
 v. Owenby, 74 Mo. 170-2776, 2791.  
 v. Patty, 76 Miss. 753-817.  
 v. Piggott, 57 N. J. Eq. 619-2544.  
 v. Pugh, 81 Ark. 253-2670.  
 v. Pursel, 55 Colo. 287-2220.  
 v. Randall, 117 Cal. 12-2609, 2610.  
 v. Rogers, 28 Iowa 413-2474.  
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 v. Russell, 142 Pa. 426-998.  
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 v. Spragg, 72 W. Va. 672-1532.  
 v. Stambaugh, 163 Ill. 557-383, 389.  
 v. Stroud, 104 N. C. 484-1989.  
 v. Summerfield, 131 N. C. 352-1192.  
 v. Tebbs, 81 Va. 600-2014, 2242.  
 v. Thomas, 66 Neb. 26-2625.  
 v. Thompson, 13 Me. 209-214, 234.  
 v. Thompson, 118 Mass. 497-2587.  
 v. Tremain, 205 N. Y. 236-995.  
 v. Tway, 16 Ariz. 566-1209, 1258.  
 v. Vansands, 45 Conn. 600-2793.  
 v. Vidal, 105 Tex. 444-172.  
 v. Walker, 42 N. H. 482-818.  
 v. Ward, 109 Cal. 186-2253, 2255.  
 v. Watson, 89 Mo. App. 15-1336.  
 v. Welch, 128 La. 785-2539.  
 v. Wetherell, 13 Allen (Mass.) 60-2647, 2669.  
 v. Whitaker, 114 N. C. 279-2193, 2198, 2201.  
 v. Whitehead, (1896) 2 Ch. 133-408.  
 v. Williams, 130 Ala. 530-191, 193.  
 v. Williams, 85 Tenn. 646-609.  
 v. Winn, 2 Allen (Mass.) 111-2448, 2650.  
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 v. Edwards, 189 Ill. 60-846.  
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 v. Gerard Life Ins. Trust Co., 27 Minn. 411-2757.  
 v. Hayden, 67 Ill. 52-419.  
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 v. Marsh, 74 Conn. 498-256.  
 v. Midland R. Co., L. R. 8 Exch. 8-1006.  
 v. Overmyer, 141 Ind. 438-2649, 2660.  
 v. Parsons, 10 N. Y. Misc. 428-667.  
 v. Quinnerly, 118 N. C. 118-532.  
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     v. Atlantic & G. W. R. Co., 41 Ohio St. 392-2224.  
     v. Brenton, 102 Iowa 482-2635.  
     v. Caton, 119 Mass. 513-1246.  
     v. Clark, 25 Vt. 397-2193.  
     v. Coehran, 24 Miss. 261-242, 831, 832, 845, 2014.  
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     v. Day, 4 Md. 262-2055.  
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     v. Griffith, 15 Iowa 104-1789.  
     v. Lacasse, 85 Me. 242-1766.  
     v. Louisville Coal & Coke Co., 60 W. Va. 27-1144.  
     v. Lowrie, 5 Watts (Pa.) 412-2468.  
     v. Solomon, 40 Ga. 32-737.  
     v. Stevens, 88 N. C. 83-898.  
     v. Walden, 46 Mich. 575-1365, 1379, 1380, 1385.  
     v. Watson, 8 Mich. 535-1500.  
     v. West, 2 Edw. Ch. (N. Y.) 592-795.  
     v. Wetherby, 29 Wis. 363-2699.
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     v. Dakin's Estate, 103 Mich. 65-2436.  
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     v. Drainage Com'rs, 128 Ill. 271-1167.
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- v. Willard, 8 Cow. (N. Y.) 206-153, 157, 1473, 1510.
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- v. Miles, 35 Neb. 739-847, 2193, 2194, 2198.
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- v. Old Town Bank, 85 Md. 315-2620, 2636, 2639.
- Den v. Farlee, 21 N. J. Law 279-1752, 1753.
- v. Hardenburgh, 10 N. J. L. 42-632.
- v. Jones, 8 N. J. L. 340-1903.
- v. Kinney, 5 N. J. L. (5 Southard) 552-961.
- v. Milton, 12 N. J. L. 70-1827.
- v. Post, 25 N. J. L. 285-160, 161.
- v. Roake, 6 Bing 475-1084.
- Den ex dem. Belfour v. Davis, 20 N. C. (3 Dev. & B. L.) 443-199.
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- Jackson v. Hampton, 30 N. C. 457-1576.
- Jones v. Willis, 53 N. C. (8 Jones Law) 430-239.
- Love v. Edmonston, 23 N. C. (1 Ired. Law) 152-225.
- Lunsford v. Alexander, 20 N. C. (3 Dev. & B. Law) 166-173.
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- Van Wagenen v. Brown, 26 N. J. L. 196-2610.
- Waugh v. Richardson, 30 N. C. 470-1615, 1616.
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- Derriek v. Brown, 66 Ala. 162-1578, 2173.  
 v. Luddy, 64 Vt. 462-193.
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v. McLeRoy, 82 Ga. 687-453, 454.
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v. Brown, 2 Pick. (Mass.) 387-700.  
v. Brownell, 54 Vt. 441-2449.  
v. Burbank, 77 N. C. 259-2341.  
v. Campau, 4 Mich. 465-1732.  
v. Chicago, 274 Ill. 268-1879.  
v. Dewey, 35 Vt. 555-661.  
v. Great Lakes Coal Co., 236 Pa. 498-1296.  
v. Lambier, 7 Cal. 347-699.  
v. Payne, 19 Neb. 540-164, 180.  
v. Sugg, 109 N. C. 329-2778.  
v. Williams, 40 N. H. 222 311.
- Dewhurst v. Wright, 29 Fla. 223-2128.

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- Dick v. Doughten, 1 Del. Ch. 320-766, 768.
- v. Harby, 48 S. C. 516-1077, 1082, 1083.
- v. Mawry, 9 Sm. & M. (Miss.) 448-2525.
- v. Ricker, 222 Ill. 413-536, 544.
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- v. Williams, 11 Cush. (Mass.) 260-692.
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 v. Shirk, 128 Ind. 278-666, 667, 759.  
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 v. Dickinson, 29 Conn. 600-665.  
 v. Duckworth, 74 Ark. 138-2700, 2704.  
 v. Grand Junction Canal, 7 Exch. 301-1181.  
 v. Hoomes' Adm'r, 8 Gratt. (Va.) 353-1404, 1719.  
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 v. Wright, 56 Mich. 42-460, 2253.
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 v. Satterfield, 53 Md. 317-536, 544.  
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 v. Rex, 106 N. C. 444-2752.  
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 v. Kellogg, 53 Wis. 448-2382, 2383.  
 v. Niebuhr, 15 Daly (N. Y.) 52-2692.  
 Dobschuetz v. Holliday, 82 Ill. 371-210, 928, 1589.  
 Dobson v. Hohenadel, 148 Pa. St. 367-1317, 1321, 1661.  
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 v. Burchell, 1 Hurlst. & C. 113-1283, 1306.  
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 Dodds v. Hills, 2 H. & M. 297-2179.  
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 Dodge v. Bennett, 215 Mass. 545-593.  
 v. Berry, 26 Hun (N. Y.) 246-1031, 1352.  
 Dodge v. Birkenfeld, 20 Mont. 115-2592, 2597.  
 v. Davis, 85 Iowa 77-990.  
 v. Dodge, 1 Root (Conn.) 233-2741.  
 v. McClintock, 47 N. H. 383-1207.  
 v. Manning, 1 N. Y. 298-2739.  
 v. North End Imp. Ass'n, 189 Mich. 16-1886.  
 v. Pennsylvania R. Co., 43 N. J. Eq. 351-1320, 1374.  
 v. Staey, 39 Vt. 559-2030, 2045, 2050, 2067.  
 v. Stephens, 105 N. Y. 585-2794.  
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 v. Williams, 46 Wis. 70-442.  
 Dodson v. Dodson, 147 Mich. 586-1817.  
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 v. Hay, 3 Brown Ch. 404-833.  
 Dodsworth v. Dodsworth, 254 Ill. 49-321, 323.  
 Doe v. Barnard, 13 Q. B. 945-1971.  
 v. Britain, 2 B. & Ald. 93-1104.  
 v. Clayton, 81 Ala. 391-1956, 1998.  
 v. Danvers, 7 East 299-1951, 1997.  
 v. Davies, 1 Q. B. 430, 438-226, 391, 429.  
 v. Dixon, 9 East 15-1619.  
 v. Doe, 37 N. H. 268-2174, 2247.  
 v. Jones, 11 Ala. 63-1858, 2108.  
 v. Jones, 10 B. & C. 459-1104.  
 v. Hutton, 3 Bos. & Pull. 643-1892.  
 v. Kinney, 3 Ind. 50-565.  
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 v. Martin, 4 Term. R. 39-1098.  
 v. Pendleton, 15 Ohio St. 735-2641.  
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 Bastow v. Cox, 11 Q. B. 122-233.  
 Bennett v. Turner, 7 Mees & W. 226-223, 241, 894.  
 Biddulph v. Poole, 11 Q. B. 713-1582.  
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 Brown v. Holme, 3 Wils. 237-511.  
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 Caillaret v. Bernard, 7 Smedes & M. (Miss.) 319-807.  
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 Caldwell v. Thorp, 8 Ala. 253-1973.  
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 Christmas v. Oliver, 10 Barn. & C. 181-2117.  
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 Clarke v. Smaridge, 7 Q. B. 957-257.  
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 Edney v. Benham, 7 Q. B. 976-1462.  
 Ellis v. Ellis, 9 East 382-482.  
 Ferguson v. Doe, 1 Har. (Del.) 524-1836.  
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 Foley v. Wilson, 11 East 56-961, 962.  
 Fonnereau v. Fonnereau, 2 Dougl. 504-612.  
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- Hull v. Wood, 14 Meese & W. 682-234, 237.
- Jarvis v. McCarthy, 5 New Br. (3 Kerr) 63-156, 157.
- Johnson v. Turner, 7 Ohio 216-1728.
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- King v. Grafton, 18 Q. B. 496-234, 238.
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- Lenoir v. South, 32 N. C. 237-1992.
- Lessee of Poor v. Considine, 6 Wall. (U. S.) 458-429, 491, 492, 496, 498, 502.
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- Lockwood v. Clarke, 8 East 185-208.
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- Marrlott v. Edwards, 5 Barn. & Adol. 1065-186.
- Martin v. Watts, 7 Term. R. 85-217, 232.
- Mitchinson v. Carter, 8 Term. R. 57-161.
- Monck v. Geekie, 5 Q. B. 841-231, 1482.
- Mussell v. Morgan, 3 Term. Rep. 763-556.
- Newman v. Rusham, 17 Q. B. 723-2285, 2286, 2287.
- Nowell v. Roake, 2 Bing. 497-1082.
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- Pidgeon v. Richards, 4 Ind. 374-219, 221.
- Pitcher v. Donovan, 1 Taunt. 555-241.
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 Reeve v. Long, 1 Salk. 227-503.  
 Riddell v. Gwinnell, 1 Q. B. 682-811, 814.  
 Roby v. Maisey, 8 Barn. & C. 767-2447.  
 Rouche v. Williamson, 25 N. C. 141-2350.  
 Shelley v. Edlin, 4 Ad. & El. 582-391, 429.  
 Shelton v. Carrol, 16 Ala. 148-808.  
 Sheppard v. Allen, 3 Taunt. 78-303.  
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 Stanway v. Rock, 4 Man. & G. 30-223.  
 Strode v. Leaton, 2 Crompt. M. & R. 728-195, 2117.  
 Tanner v. Dorvell, 5 Term. R. 518-514.  
 Tenant v. Roe, 27 Ga. 418-1799.  
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 Thomas v. Roberts, 16 Mees. & W. 778-239, 242.  
 Thong v. Bedford, 4 Maule & S. 362-538.  
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 Wise v. Wheeler, 28 N. C. 196-1647.  
 White v. Barford, 4 Maule & S. 10 1846.
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 Williams v. Evans, 1 C. B. 717-2289.  
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 Willis v. Martin, 4 Term. R. 39-492, 498, 505.  
 Willson v. Phillips, 2 Bing. 13-269.  
 Wilson v. Phillips, 2 Bing. 13-209.  
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 Doggett v. Hart, 5 Fla. 215-433, 995.  
 Doherty v. Allman, 3 App. Cas. 709-951, 963, 964, 965, 983, 1427.  
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 Dolan v. Brown, 81 N. J. Eq. 262-1076.  
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     v. Hollenbeck, 19 Neb. 639-2541.  
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 Dommett v. Bedford, 6 Term. Rep. 684-2316.  
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 Donahue v. Chicago Bank-Note Co., 37 Ill. App. 552-240.  
     v. Hardman Estate, 91 Wash. 125-935, 937.  
     v. Keystone Gas Co., 181 N. Y. 313-1530, 1534, 1535.  
     v. Sweeny, 171 Cal. 388-1739, 1748, 1759.  
 Donahue's Estate, In re, 36 Cal. 329-1906.  
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     v. Hewitt, 33 Ala. 534-2743.  
     v. Nesbit, 89 Ga. 290-1814.  
 Donalds v. Plumb, 8 Conn. 453-426, 427.  
 Donaldson v. Allen, 182 Mo. 626-424.  
     v. Donaldson 249 Mo. 228-762.  
     v. Grant, 15 Utah 231-2638.  
     v. Hibner, 55 Mo. 492-2136.  
     v. Smith, 1 Ashm. (Pa.) 197-1477.  
     v. State, 182 Ind. 615-2351.  
     v. Wherry, 29 Ont. 552-1487.  
 Donaldson v. Thomson, 137 Ga. 848-2185, 2253, 2255.  
 Donason v. Barbero, 230 Ill. 138-2018.  
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 Donlin v. Bradley, 119 Ill. 412-394, 401.  
 Donnell v. Clark, 19 Me. 174-2046.  
     v. Harshe, 67 Mo. 170-898.  
 Donnelly v. Eastes, 94 Wis. 390-269, 274, 293, 309, 320, 323, 325.  
     v. Frick & Lindsay Co., 207 Pa. 597-934, 936.  
     v. Simonton, 13 Minn. 301-2583.  
 Donner v. Palmer, 23 Cal. 40-2779.  
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 Donohue v. Donohue, 54 Kan. 136-2742.  
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     v. Vosper, 189 Mich. 78-2015, 2131.  
 Donovan v. Boeck, 217 Mo. 70-2402.  
     v. Griffith, 215 Mo. 149-832.  
     v. Simmons, 96 Ga. 340-2783.  
     v. Smith (N. J. Ch.), 83 Atl. 167-2450, 2646, 2683.  
     v. Twist, 85 N. Y. App. Div. 130-2125.  
     v. Ward, 100 Mich. 601-2338, 2339.  
     v. Welch, 11 N. D. 113-1799, 1800.  
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     2650.
- Dooley Block v. Salt Lake R. T. Co.,  
     9 Utah 31-1530.
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     Y.) 45-2715.  
     v. Nurnberg, 27 N. D. 521-2676.  
     v. Robertson, 109 Ala. 412-  
     2128.
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     856, 962, 964.
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     245-1975.  
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     1147.  
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     1316.
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     v. Ross, 177 Ill. 225-2733.
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     2065.
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     2461, 2463.  
     v. Lovering, 147 Mass. 530-499,  
     617.  
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     v. Simerson, 127 Iowa 551-  
     1167.
- Dorrell v. Collins, Cro. Eliz. 6-1614.  
     v. Johnson, 17 Pick. (Mass.)  
     263-207, 243, 482, 491,  
     568.
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     2292.
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     1192, 1193.
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     v. Habersack, 84 Md. 117-1244,  
     1340.  
     v. Hall, 7 Neb. 460-457, 2367.  
     v. St. Louis, A. & T. H. R. Co.,  
     58 Ill. 65-1405, 1412,  
     1414.
- Doscher v. Blackiston, 7 Ore. 143-  
     910, 943.
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     935.
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     487-937.  
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     787.  
     v. Heth, 52 Miss. 530-170, 171.
- Dougal v. McCarty, [1893] 1 Q. B.  
     736-248, 257.
- Dougall v. Foster, 4 Grant's Ch.  
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 v. Cline, 12 Bush (Ky.) 608-2443.  
 v. Dickson, 11 Rich. (S. C.) 417-739, 740.  
 v. Durin, 51 Me. 121-2521, 2527, 2530, 2533, 2697.  
 v. McCrackin, 52 Ga. 596-2272.  
 v. Riffin, 123 Md. 18-1227.  
 v. Seiferd, 18 N. Y. Misc. 188-236.  
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 v. Wiggins, 1 Johns. Ch. (N. Y.) 435-982, 983.  
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 v. Memphis & L. R. R. Co., 124 U. S. 652-2434.  
 v. Sayward, 14 N. H. 9-2789.  
 v. Warren, 6 Mass. 328-1953.  
 v. Whitney, 147 Mass. 1-2205, 2259.  
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     v. Seib, 185 N. Y. 427-722.  
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     v. Mellen, 15 R. I. 523-2471.  
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     v. Wade, 23 Fla. 90-1974, 2260.  
     v. West, 60 Ohio St. 438-2679.  
     v. Whalen, 87 Me. 414-437.  
     v. White, 26 Me. 341-2415.
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     v. Farrior, 187 Ala. 181-2724.  
     v. Gregory, 46 N. C. (1 Jones L.) 100-981, 985.  
     v. Matson, 94 Mo. 328-2140.  
     v. Mitchell, 65 Ala. 511-2440, 2650.  
     v. Toalson, 180 Mo. 546-551, 1810.  
 Drake v. Brown, 68 Pa. St. 223-525, 529.  
     v. Howell, 133 N. C. 162-883, 886.  
     v. Lacoe, 157 Pa. St. 17-171.  
     v. McLean, 47 Mich. 102-2203.  
     v. Mitchell, 3 East 251-2622.  
     v. Moore, 66 Iowa 58-2299.  
     v. Paige, 127 N. Y. 562-2368.  
     v. Reggel, 10 Utah 376-2199.  
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     v. Root, 2 Colo. 685-2302, 2362.  
     v. Wells, 11 Allen (Mass.) 141-887, 888, 1219.  
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     v. Hayden, 111 U. S. 223-2497.  
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     v. Stephens, 19 W. Va. 1 2626.  
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- v. Gates, 124 Mich. 440-1843.
- v. Hurst, 67 Md. 44-911.
- v. Johnson, 102 Ga. 1-944.
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- v. Warde, Ambler 113-929, 934.
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 v. Drury, 9 Pa. 332-2609, 2610, 2665.  
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 v. Gainey, 108 Ind. 579-1053.  
 v. Goldthwait, 216 Mass. 402-1353.  
 v. Hayes, 22 N. J. Eq. 25-1121.  
 v. Hodges, 4 McCord (S. C.) 239-1600, 1641.  
 v. Johnson, 13 Ark. 190-2253.  
 v. Louch, 6 Q. B. 904-1375.  
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 v. County of Gallatin, 15 Ill. 7-2791, 2792.  
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 v. Hedges, 35 W. Va. 287-2445.  
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 v. Higgins, 67 Kan. 110-1050.  
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     v. Lyman, 30 Wis. 429-1711, 1713, 1717, 1718.  
     v. Patterson, 2 Stew. & P. 9-2747.  
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 v. Heard, 106 Mass. 573-1053.  
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     v. Rhett, 5 Rich. L. (S. C.) 405-1274, 1288, 1331, 1345, 1359, 2069.  
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     v. Thompson, 4 Humph. (Tenn.) 99-1709.  
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 Ellis v. Abbott, 69 Ore. 234-1716.  
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     v. Blue Mountain Forest Ass'n, 69 N. H. 385-1301.  
     v. Bradbury, 75 Cal. 234-173, 182.  
     v. Campbell, 84 Ark. 584-702.  
     v. City of Hazlehurst, 138 Ga. 181-1878.  
     v. Clark, 39 Fla. 714-1754, 1755.  
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     v. Hussey, 66 N. C. 501-2731.  
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     v. Kyger, 90 Mo. 600-306, 738.  
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     v. Daniels, 11 N. H. 274-2423, 2424, 2696.  
     v. Dolly, 3 Penn. (Del.) 45-893.  
     v. Ellison, 6 Ves. Jr. 656, 1 White & T. Lead. Cas. Eq. 382-383, 385.  
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 Ellithorpe v. Reidesil, 71 Iowa 315-881.  
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 v. Harris, 6 Mete. (Mass.) 475-768, 769.  
 v. Hedrick, 42 Ark. 263-2795.  
 v. Mooney, 50 N. H. 318-1616.  
 v. Simpson, 43 N. H. 475-270, 273.  
 v. Sturgeon, 59 Mo. 404-254.  
 v. Taylor, 9 Me. 42-1033.  
 v. Weeks, 58 Cal. 439-1515.  
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 v. Swasey, 79 Me. 136-2735.  
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 v. Harding, 162 Ind. 154-1739, 1789.  
 v. Hawk, 62 W. Va. 526-2523.  
 v. Henderer, 24 N. J. Eq. 39-2461.  
 v. Murray, 16 N. H. 385-2336, 2337, 2338.  
 v. Scudder, 115 Mass. 367-247, 259.  
 Emory v. Hazard Powder Co., 22 S. C. 476-1119.  
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 Engle v. Haines, 5 N. J. Eq. 186-2507, 2509.  
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     v. Bowman, 183 Ind. 264-2090, 2091.  
     v. Brittain, 3 Serg. & R. (Pa.) 135-642.  
     v. Calman, 92 Mich. 427-2295, 2296.  
     v. Chew, 71 Pa. St. 47-1072.  
     v. Coleman, 101 Ga. 152-1788.  
     v. Cook, 33 Ky. L. Rep. 788-1357.  
     v. Dana, 7 R. I. 306-1285.  
     v. Elliott, 9 Adol. & El. 342-2447.  
     v. Enloe, 70 Wis. 345-159, 266, 2759.  
     v. Evans. (1892) 2 Ch. 173-533, 539.  
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     v. Merriweather, 4 Ill. 492-1133, 1134.  
     v. Morris, 234 Mo. 177-732.  
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     v. Taylor, 177 Pa. 286-1688.  
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     v. Glenn, 68 N. C. 35-1678, 2120.  
     v. Heighe, 3 Md. 357-2779.  
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v. Peterson, 111 Mass. 148-2291.
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v. Nichols, 132 N. Y. 327-2417.  
v. Perkins, 173 Ala. 923-551, 558, 559, 671.  
v. Semmler, 24 S. D. 290-2136.  
v. Sherman, 11 Mich. 33-732.  
v. Spain, 67 Wis. 631-1248.
- Farra v. Adams, 12 Bush (Ky.) 515-2735, 2739.
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v. Thompson, 5 Barn. & Ald. 826-989.
- Farrar v. Bridges, 5 Hump. (Tenn.) 411-1740.  
v. Dean, 24 Mo. 16-2352.  
v. Earl of Winterton, 5 Beav. 1-461, 462, 463.  
v. Eastman, 10 Me. 191-1991.  
v. Farrar, 4 N. H. 191-1804.  
v. Fessenden, 39 N. H. 268-2289.  
v. Payne, 73 Ill. 82-2241.  
v. Stackpole, 6 Me. 154-912, 915.
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v. Parlier, 50 Ill. 274-2683.  
v. Richards, 30 N. J. Eq. 511-1134.
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v. Kimball, 126 Mass. 313-168, 169.  
v. Putnam, 90 Me. 405-2349.  
v. Turtlelott, 39 Fed. 738-1687.
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     v. Fisher, 65 Mich. 606-1789, 2376.  
     v. Herrick, 101 Ill. 110-1490.  
     v. Leiter, 118 Ill. 17-1328, 1340, 1341.  
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     v. Manchester, 32 Mich. 279-1877.  
     v. Mark, 125 Mo. 502-1306, 1867.  
     v. Mills, 33 N. J. L. 254-161, 173.  
     v. Moody, 111 N. C. 353-2751.  
     v. Morris, 88 Ark. 148-1226.  
     v. Peeples, 180 Ill. 376-498.  
     v. Schieffelin, 7 John. Ch. (N. Y.) 150-2520.  
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 Fifty Associates v. Howland, 11 Metc. (Mass.) 99-294, 301.  
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 Fillmore v. Jennings, 78 Cal. 634-2093, 2111.  
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     v. Hershey, 41 Iowa 393-1157.  
     v. Houser, 22 Ore. 562-2689.  
     v. Simpson, 22 N. J. L. 311-1403, 2486.  
     v. Spratt, 14 Bush. (Ky.) 225-2195.  
     v. Thayer, 42 Ill. 350-2465.  
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     v. Baker, 62 Ill. App. 154-1803.  
     v. Beegle, 52 Kan. 709-880, 2436.  
     v. Bell Silver & Copper Min. Co., 8 Mont. 32-2709.  
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- v. Flath, 10 N. D. 281-2539.
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- v. Gage, 71 Ore. 373-1725.
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- v. Garlich, 137 La. 282-2543.
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- v. Honeyman, 6 Dak. 275-2471.
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- v. Kirby (Mo.), 175 S. W. 926-2678.
- v. Lamont, 5 N. D. 393-2249, 2400.
- v. McCarthy, 18 S. D. 218-2453.
- v. Moor, 34 Tex. Civ. App. 476-2695.
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- v. Robinson, 188 N. Y. 45-2403.
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- v. Security Bank, 61 Minn. 25-1322, 1423, 1424.
- v. Simms, 49 W. Va. 442-2645.
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- v. Thomas, 8 Ky. L. Rep. 690-2717.
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- v. Marovich, 160 Cal. 257-289, 310.
- v. Rowe, 53 N. J. Eq. 520-171, 210, 1589.
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- v. Eslaman, 68 Ill. 78-366.
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- v. Laack, 76 Wis. 313-1267.
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- v. Woodruff, 25 Wash. 67-2451, 2636, 2639.
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- v. Chicago Great Western R. Co., 125 Minn. 380-1023.
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- v. French, 15 Gray (Mass.) 520-2536.
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- v. Howland, 1 Paige (N. Y.) 20-2760.
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   v. Dent, 259 Mo. 86-1634.  
   v. Dixon, 12 Clark & F. 312-911, 929.  
   v. Eggert, (N. J. Ch.) 64 Atl. 957-567.  
   v. Fair, 34 S. C. 203-1056, 1225, 1227.  
   v. Fisher, 98 Mass. 303-2622.  
   v. Fisher, 80 Neb. 145-275, 279, 295, 298.  
   v. Fisher, 89 S. C. 175-781.  
   v. Grimes, 1 Smedes & M. Ch. (Miss.) 107-747.  
   v. Hall, 41 N. Y. 416-1739, 1747, 1752.  
   v. Hallock, 50 Mich. 465-2123.  
   v. Kean, 1 Watts (Pa.) 278-1739.  
   v. Lighthall, 15 D. C. (4 Mackey) 82-137.  
   v. Meister, 24 Mich. 447-2402.  
   v. Mossman, 11 Ohio St. 42-2136.  
   v. Smith, 9 Gray (Mass.) 441-1666.  
   v. Smith, Moore 569-1626.  
   v. Spence, 150 Ill. 253-1823, 1826.  
   v. Strickler, 10 Pa. St. 348-1576.  
   v. Wagner, 109 Md. 243-527, 528.  
   v. Webster, 154 Pa. St. 65-570.  
   v. Wigg, 1 Salk. 390-631, 641.  
   v. Wister, 154 Pa. St. 65-571, 573, 574, 2310.  
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   v. Ley, 76 Conn. 295-1319.
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   v. Gregory, 34 N. H. 414-2487, 2489.  
   v. Ruggles, 4 Gray (Mass.) 528-2585.  
   v. Soule, 87 Cal. 313-879.  
   v. Tolman, 124 Mass. 254-2183, 2490, 2491.  
 Fitch v. Applegate, 24 Wash. 25-2613, 2617.  
   v. Baldwin, 17 Johns. (N. Y.) 161-1678.  
   v. Boyer, 51 Tex. 336-1959.  
   v. Bunch, 30 Cal. 208-1769, 1775, 1778.  
   v. Johnson, 104 Ill. 111-1405, 1408, 1411, 1412.  
   v. Rawling, 2 H. Blackst. 394-1543.  
   v. Walsh, 94 Neb. 32-1002.  
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   v. Weber, 6 Hare 145-451.  
 Fitchburg Cotton Manufactory Corp. v. Melven, 15 Mass. 268-206, 1502.  
 Fitcher v. Griffiths, 216 Mass. 174-800, 2647, 2669.  
 Fitchett v. Mellow, 29 Ont. Rep. 6-1307, 1308.  
 Fithian v. Corwin, 17 Ohio St. 118-2468.  
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 Fitzgerald v. Allen, 280 Ill. 80-1774.  
   v. Barbour, 55 Fed. 440-1314, 1315, 1316.  
   v. Beckwith, 182 Mass. 177-2592.  
   v. Beebe, 7 Ark. 310-154, 206.  
   v. Braker, 85 Mo. 113-2521.  
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 v. Goff, 99 Ind. 28-1740.  
 v. Libby, 142 Mass. 235-2210.  
 v. Modoc County, 164 Cal. 493-268, 272, 273.  
 v. Ryan, [1899] 2 Ir. 637-275.  
 v. Shelton, 95 N. C. 519-2345.  
 v. Standish, 102 Tenn. 383-1077.  
 v. Tvedt, 142 Iowa 40-1793.  
 v. Walsh, 107 Wis. 92-2773.  
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 v. Tyler, 9 B. Mon. (Ky.) 561-2118.  
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 v. Brigman, 130 Ala. 450-1738, 1739.  
 v. Fitzpatrick, 6 R. I. 64-1641.  
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 v. Waring, 11 L. R. Ir. 35-1060.  
 v. Welch, 174 Mass. 486-1186, 1187.  
 Fitzpatrick's Appeal, 87 Conn. 579-1851.  
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 v. Green Island, 122 N. Y. 107-1877.  
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 Flag v. Mann, 14 Pick. (Mass.) 467-2378.  
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 v. Dow, 99 Mass. 18-1582, 1583.  
 v. Eames, 40 Vt. 16-1619.  
 v. Flagg, 11 Pick. (Mass.) 475-2432.  
 v. Geltmacher, 98 Ill. 293-2501, 2502, 2667.  
 v. Mann, 2 Summ. 490-693, 698, 2174, 2234, 2238, 2254, 2387, 2388, 2389, 2406.  
 v. Phillips, 201 Mass. 216-1314, 2045.  
 Flaherty v. Andrews, 2 E. D. Smith (N. Y.) 529-256.  
 v. Columbus, 41 App. D. C. 525-650.  
 v. Moran, 81 Mich. 52-1123.  
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 v. Greeley, 64 N. H. 357-2367, 2368.  
 v. Hall, 159 Mass. 95-2664.  
 v. Jones, 30 N. H. 154-2573, 2578.  
 v. Lamphear, 9 N. H. 201-2406.  
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 v. Moorehead City, 58 Minn. 324-1376.  
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Inv. Co., 25 Ore. 119-146.
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& G. 976-1107.
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2771.
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- v. Elgin, J. & E. Ry. Co., 275  
Ill. 486-1170.
- v. Georgia Railroad Bank, 120  
Ga. 1023-2392, 2418.
- v. Howard, 150 Cal. 28-2045.
- v. King, 100 Ga. 449-201, 202.
- v. Lockwood, 36 Mont. 384-  
1185.
- v. McHale, 47 Ill. 282-403.
- v. Mills, 182 Ill. 464-191, 1089,  
1097.
- v. Morrison, 187 Mass. 120-  
1818.
- v. Parry, 24 Pa. St. 47-2583.
- v. People, 78 W. Va. 176-798.
- v. Sexton, 172 N. C. 250-832.
- v. Townsend, 6 Ga. 103-2285,  
2286.
- Fleming's Estate, In re, 217 Pa.  
610-786.
- Flersheim v. City of Baltimore, 85  
Md. 489-1318, 1871.
- Fleschner v. Sumpster, 12 Ore. 161-  
2185, 2195.
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2008.
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379-2171.
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1172.
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497-439.
- v. Ashburner, 1 White & T.  
Lead Cas. Eq. 1151-453,  
454, 456.
- v. Ashley, 6 Gratt. (Va.) 322-  
764.
- Fletcher v. Bird, Fisher on Mtgs.  
(Appendix)-1980.
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2528.
- v. Daugherty, 13 Neb. 224-  
2676.
- v. Evans, 140 Mass. 241-1204,  
1206.
- v. Ferrell, 9 Dana (Ky.) 372-  
2271.
- v. Fletcher, 4 Hare 67-386,  
388, 1794.
- v. Fuller, 120 U. S. 534-1921.
- v. Herring, 112 Mass. 382-948.
- v. Hoblitzell, 209 Pa. 337-481.
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2368.
- v. Krupp, 35 N. Y. App. Div.  
586-2444.
- v. Livingston, 153 Mass. 388-  
885, 887, 888, 1203.
- v. Monroe, 145 Ind. 56-795.
- v. Northcross, 9 Cal. xvii-2476.
- v. Peck, 6 Cranch. (U. S.) 87-  
2287.
- v. Shepherd, 174 Ill. 262-803.
- v. State Capital Bank, 37 N.  
H. 369-855.
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1212.
- Flight v. Bentley, 7 Sim. 149-1470.
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454-1345.
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- v. Spurr, 17 B. Mon. (Ky.)  
499-1052.
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1713.
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Me. 420-2487, 2685.
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General, 41 Mich. 635-2395.
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v. Peck, 1 Barn. & Adol. 428-303, 319.
- Flowers v. Flowers, 84 Ark. 557-808.  
v. Flowers, 89 Ga. 632-766, 767.
- Floyd v. Floyd, 4 Rich. Law (S. C.) 23-238.  
v. Harding, 28 Gratt. (Va.) 401-2781.  
v. Mintsey, 7 Rich. L. (S. C.) 181-1999.  
v. Ricks, 14 Ark. 286-878, 1725.
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- Fluck v. Replogle, 13 Pa. 405-2669.
- Fluegel v. Henschel, 7 N. D. 276-2254.
- Fluharty v. Fluharty, 54 W. Va. 407-311, 226, 230.
- Fluharty v. Mills, 49 W. Va. 446-886, 887.
- Fluker v. Georgia R. & B. Co., 81 Ga. 461-1206, 1218.
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v. Bourneuf, 143 Mass. 277-1632, 1691.  
v. Flynn, 17 Idaho 147-1738.  
v. Flynn, 171 Mass. 312-800, 802.  
v. Holman, 119 Iowa 731-1669.  
v. Holmes, 145 Mich. 606-2381, 2383, 2466.  
v. Lee, 31 W. Va. 487-2021.  
v. New York W. & B. R. Co., 218 N. Y. 140-1428, 2162.  
v. White Breast Coal, etc., Co., 72 Iowa 738-1693, 1694, 1700.
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v. Hunter, 83 Ore. 183-2666.  
v. Sawyer, 17 Cal. 589-2725.  
v. Stach, 86 Tenn. 610-1622, 1623.
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v. Kirk, 33 N. J. Eq. 170-943.  
v. Rose, 123 Mass. 557-2551.  
v. Wyeth, 2 Allen (Mass.) 131-1187, 1189, 1191, 1359.
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v. Varn, 9 Rich. Eq. (S. C.) 303-1604.
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     v. Schulenberg & Boeckler Lumber Co., 109 Mo. 55-178, 180, 183, 2426.  
     v. Thompson, 80 Va. 229-435.  
 Fonte v. Fairman, 48 Miss. 536-2776.  
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 Foote v. Burnet, 10 Ohio 317-1712, 1720.  
     v. City of Cincinnati, 11 Ohio 408-1495.  
     v. Gooch, 96 N. C. 265-929.  
     v. Sanders, 72 Mo. 616-1059.  
 Forbell v. New York, 164 N. Y. 522-1177, 1178.  
 Forbes v. Balenseifer, 74 Ill. 183-1203, 1218.  
     v. Caldwell, 39 Kan. 14-1957.  
     v. Commonwealth, 172 Mass. 289-1347.  
 Forbes v. Gracey, 94 U. S. 762-867.  
     v. McCoy, 15 Neb. 632-2400, 2679.  
     v. Rome, W. & O. R. Co., 121 N. Y. 505-1531.  
     v. Smith, 40 N. C. (5 Fred. Eq.) 369-833.  
     v. Sweesy, 8 Neb. 520-833.  
 Forbing v. Weber, 99 Ind. 588-1838.  
 Forbush v. Lombard, 13 Mete. (Mass.) 109-1647.  
 Forcum v. Brown, 251 Ill. 301-1771.  
 Ford v. Axelson, 74 Neb. 92-2123, 2124.  
     v. Burks, 37 Ark. 91-2624.  
     v. Cobb, 20 N. Y. 344-918, 921, 923.  
     v. Erskine, 45 Me. 484-818.  
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     v. Ford, 27 App. D. C. 401-1723, 1734.  
     v. Ford, 70 Wis. 19-445, 446, 1108.  
     v. Gregory, 10 B. Mon. (Ky.) 459-1761.  
     v. Harris, 95 Ga. 97-1326, 1379, 1380.  
     v. Knapp, 102 N. Y. 135-688, 689, 691.  
     v. McBrayer, 171 N. C. 420-536, 2126.  
     v. Nesbitt, 72 Ark. 267-2621.  
     v. Oregon Electric R. Co., 60 Ore. 278-1404, 1412, 1414.  
     v. Smith, 60 Wis. 222-2697.  
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 Forge v. Harvey, 151 Ind. 507-192.  
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 Forman v. G. D. Holloway & Son, 122 Ark. 341-2460.  
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 Formby v. Barker, 2 Ch. 539-1435.  
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 Forwood v. Dehoney, 5 Bush. (Ky.) 174-2553.  
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 v. Mapes, Cro. Eliz. 212-1696.  
 v. Marshall, 22 N. H. 491-844, 846.  
 v. Morris, 3 A. K. Marsh (10 Ky.) 609-194.  
 v. Paine, 63 Iowa 85-2624.  
 v. Pierson, 4 Term. R. 617-196, 198, 1701.  
 v. Reynolds, 38 Mo. 553-2568.  
 v. Runk, 109 Pa. St. 291-1614.  
 v. Searsport Spool & Block Co., 79 Me. 508-1547.  
 v. Smith, 156 Mass. 379-570, 571, 573.  
 v. Smith, 211 Mass. 411-1269, 1608.  
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 v. Union Nat. Bank 34 N. J. Eq. 48-2506.  
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 v. Coates, 201 N. Y. 257-291, 311.  
 v. Delaplaine, 79 Ohio St. 279-1210, 1296.  
 v. Duhme, 143 Ind. 248-577, 622.  
 v. Fowler, 50 Conn. 256-690.  
 v. Hyland, 48 Mich. 179-1218.  
 v. Kent, 71 N. H. 388-1414.  
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 v. Saks, 7 Mackey (D. C.) 570-1342.  
 v. Shearer, 7 Mass. 14-779, 1799, 2329.  
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- v. Pierce, 50 Mich. 500-1361.
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 v. Hastings, 253 Ill. 46-436, 437.  
 v. Hersch, 3 Tenn. Ch. 467-2732.  
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 v. Lucas, 14 Bush (Ky.) 395-2296.  
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 v. Chene, 2 Mich. 81-544.  
 v. Fairbanks, 23 Can. Sup. 79-2483.  
 v. Fleming, 190 Mich. 238-2223, 2253.  
 v. Nerney, 89 Vt. 257-1159, 2036.  
 v. Prather, 1 MacArthur (D. C.) 206-2689.  
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 v. Caruthers, 44 Ill. App. 61-174, 213.  
 v. Combs, 140 Ky. 77-2312.  
 v. Hightower, 12 Heisk. (Tenn.) 94-840.  
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 Freeman v. Allen, 17 Ohio St. 527-706.  
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     v. Belfer, 173 N. C. 581-656.  
     v. Bellegarde, 108 Cal. 179-1652, 1656.  
     v. Brown, 96 Ala. 301-2562.  
     v. Campbell, 109 Cal. 360-2434.  
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     v. Peay, 23 Ark. 439-2375.  
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     v. Prendergast, 94 Ga. 360-1070.  
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     v. Simpson, 6 Sim. 75-2741.  
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 v. Morris, 101 Mass. 68-1226.  
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 v. Rowell, 80 Cal. 114-1403, 1408, 1409, 2217.  
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 v. Clifford, 44 Cal. 355-1646, 2204, 2207, 2248, 2251, 2401.  
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 Friend v. Oil Well Supply Co., 165 Pa. St. 652-207, 1501.  
 v. Yahr, 126 Wis. 291-1598, 2630, 2638.  
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 v. Darst, 14 Ill. 308-2124.  
 v. Le Roy, 49 Cal. 314-2428.

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     v. Erath Cattle Co., 81 Tex. 505-1672.  
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     v. Jacobs, 204 Mass. 1-1332, 1354.  
     v. Missionary Soc., 56 Mich. 62-2124.  
     v. Wolf, 77 Tex. 455-1725.  
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     v. Stowers, 98 Va. 417-1991.  
 Fryatt v. Sullivan Co., 5 Hill (N. Y.) 116-905.  
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     v. Moffet, 50 Ore. 495-719.  
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     v. Haldeman, 53 Pa. St. 229-872, 1215, 1397, 1398.  
     v. McReynold's Adm'rs, 33 Ill. 481-2554, 2666.  
     v. Paul, 64 Wis. 35-2248.  
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     v. Voneide, 11 Serg. & R. (Pa.) 109-1684, 1690, 1712.  
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 Funkhouser v. Porter, 32 Ky. Law Rep. 676-1065.  
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 Gadsden v. Cappedeville, 3 Rich. L. 467-391, 429.  
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 Gaffney v. Hicks, 131 Mass. 124-2496.  
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- v. Stern, 250 Pa. 292-2134.
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     v. Early, 72 Iowa 518-2263.  
 Gardner v. Frederick, 96 Wash. 324-327.  
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     v. Gerrish, 23 Me. 46-2128.  
     v. Greene, 5 R. I. 104-756, 761.  
     v. Guild, 106 Mass. 25-524.  
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     v. McClure, 6 Minn. 250-2750.  
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     v. Rowe, 5 Russ. 258, aff'g 2 Sim. & S. 346-379.  
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     v. Tisdale, 2 Wis. 153-1855.  
     v. Webster, 64 N. H. 520-1335, 1337.  
     v. Wright, 49 Ore. 609-2008, 2045, 2064, 2065, 2071.  
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 v. Smith, 164 Mo. 1-1066.  
 v. Towne, 55 N. H. 55-1121, 1185.  
 v. Wells, 15 Neb. 298-1601, 1602.  
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 v. Mundy, 24 N. J. Eq. 243-424.  
 v. Rogers, 47 N. Y. 233-2496.  
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 v. Beers, 97 Kan. 255-1147.  
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 v. Dabney, 27 Miss. 335-1845.  
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**Gascho v. Lennert**, 176 Ind. 677-2048, 2049.  
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     v. Dudgeon, 173 N. Y. 426-1068.  
     v. McLean, 70 Cal. 42-458.  
     v. Max, 125 N. C. 139-1470.  
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     v. Seibert, 157 Mo. 254-602.  
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v. Gaylord, 150 N. C. 222-379, 394, 395, 1742, 1747.  
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v. Taylor, 166 Ky. 501-684.
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v. Shoenberger, 83 Ky. 91-1468.
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v. Hatley, 114 Ark. 376-1933, 2001.  
v. McMillan, 14 Ore. 268-2755.  
v. Moore, 14 Cal. 472-854.  
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 1441.  
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     2502.  
     v. Arthur, 2 Hun (N. Y.) 406-  
     2720.  
     v. Bates, 90 Va. 839-1666.  
     v. Butler, 16 Utah 111-2671.  
     v. Butler, 26 Wash. 456-2516,  
     2621.  
     v. Collins, 72 W. Va. 25-997,  
     999.  
     v. Cox, 114 Mass. 382-1232,  
     1337.  
     v. George, 47 N. H. 27-276, 279.  
     v. Hess, 48 W. Va. 534-801.  
     v. Kent, 7 Allen (Mass.) 16-  
     2513.  
     v. Kimball, 24 Pick. (Mass.)  
     234-2284.  
     v. Morgan, 16 Pa. 95-540.  
     v. Putney, 58 Mass. (4 Cush.)  
     351-197, 1501, 1704.  
     v. Ransom, 15 Cal. 322-657.  
     v. Wood, 9 Allen 80-2202,  
     2507, 2515, 2645.  
 George A. Lowe Co. v. Simmons  
 Warehouse Co., 39 Utah 395-  
 1677, 1684, 1711, 1712.  
 George's Creek Coal Co. v. Detmold,  
 1 Md. Ch. 371-982.  
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 38 S. C. 34-357.  
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 80 Ga. 776-2135.  
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 Holton, 94 Ga. 551-1991.  
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     Atlanta, 118 Ga. 486-  
     1865.  
     v. Bohler, 98 Ga. 184-1147,  
     1148.  
     v. City of Macon, 86 Ga. 585-  
     292.  
 Georgia Realty Co. v. Bank of Cov-  
 ington, 19 Ga. App. 219-2554.  
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 64 Ga. 492-1402, 1405, 1414.  
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 Eq. 448-1302.  
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 94 Kan. 560-911.  
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 1825.  
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 75-2499.  
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 717.  
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 366-595.  
 Gerbert v. Sons of Abraham, 59 N.  
 J. L. 160-939.  
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 2480, 2666, 2673.  
 Geren v. Caldarara, 99 Ark. 260-  
 1687.  
 Gerenger v. Summers, 24 N. C. 229-  
 2061.  
 Gerger v. Bitzer (Ohio), 88 N. E.  
 134-451.  
 Gerick's Ex'rs v. Gerick, 158 Ky.  
 478-436.  
 Gerke v. Colonial Trust Co., 114 Md.  
 289-2311, 2312.  
 Gerling v. Lain, 269 Ill. 337-1427.  
 German v. Chapman, 7 Ch. Div. 271-  
 1429, 1454, 1456.  
     v. Heath (Iowa), 116 N. W.  
     1051-691.  
 German-American Bank v. Caron-  
 delet Real Estate Co., 150 Mo.  
 570-1730.  
 German-American Nat. Bank of  
 Lincoln v. Martin, 277 Ill. 629-  
 1816.  
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 Gollmer, 155 Cal. 683-297.  
 German Ins. Co. of Freeport v. Gibe,  
 162 Ill. 251-2381, 2383.



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v. Gordon, 54 Ore. 147-1282.  
v. Weber, 16 Wash. 95-925, 926.  
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Gerrish v. Black, 104 Mass. 400-2439, 2448.  
v. Clough, 48 N. H. 9-2101.  
v. Gerrish, 62 N. H. 397-2628.  
v. Shattuck, 128 Mass. 571-1336, 1337.  
Gerrity v. Wareham Sav. Bank, 202 Mass. 214-2570.  
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Gerstell v. Shirk, 210 Fed. 223-2765.  
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v. Palmateer, 89 Cal. 89-2765.  
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Gibbons v. Bell, 45 Tex. 417-401.  
v. Dillingham, 10 Ark. 9-879.  
v. Ebding, 70 Ohio St. 298-1354, 1610.  
v. Hoag, 95 Ill. 45-2726.  
v. International Harvester Co., 146 Ga. 467-525.  
v. Joseph Gibbons Consol. Mining & Milling Co., 37 Colo. 96-2386.  
v. Moore, 98 Ark. 501-1718.  
v. Ward, 115 Ark. 184-1832.  
Gibbs v. Davis, 93 Ky. 466-2270.  
v. Drew, 16 Fla. 147-11.  
v. Estey, 15 Gray (Mass.) 587-918.  
v. Haughwout, 207 Mo. 384-2585, 2590.  
v. Johnson, 104 Mich. 120-2616.  
v. McGuire, 70 Miss. 646-1724.  
v. Marsh, 2 Mete. (Mass.) 243-1052, 1071.  
v. Ougier, 12 Ves. 413-444.  
v. Potter, 166 Ind. 471-1603, 1642, 1804.  
v. Ross, 2 Head (Tenn.) 437-1476.  
v. Swift, 12 Cush. (Mass.) 393-642, 1668.  
v. Thayer, 6 Cush. (Mass.) 30-2127.  
v. Williams, 25 Kan. 244-1168, 1174.  
Giberson v. Giberson, 43 N. J. Eq. 116-1074.  
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 v. Chouteau, 13 Wall. (U. S.) 92-1562, 1564, 1975, 2121.  
 v. Crehore, 5 Pick. (Mass.) 146-753, 755, 2440, 2647, 2652.  
 v. Durham, 3 Rich. (S. C.) 85-2046.  
 v. Fischer, 68 Iowa 29-2040.  
 v. Foote, 40 Miss. 788-400.  
 v. Gaines (Ala.), 73 So. 929-1933.  
 v. Gibson, 1 Drew 42-784.  
 v. Gibson, 239 Mo. 490-570.  
 v. Gilman, 71 Kan. 320-2452, 2455.  
 v. Hammersmith & City Ry. Co., 2 Drew. & S. 603-929, 930, 936.  
 v. Hardaway, 68 Ga. 370-337.  
 v. Herriott, 55 Ark. 85-2135.  
 v. Heyward, 67 N. H. 265-1003.  
 v. Holden, 115 Ill. 199-179, 1263, 1415, 1418, 1420, 1424.  
 v. Hopkins, 80 W. Va. 756-2386.  
 v. Hough, 60 Ga. 588-2382.  
 v. Kelly, 15 Mont. 417-1012.  
 v. Land, 27 Ala. 117-497.  
 v. McCormick, 10 Gill & J. (Md.) 65-789.  
 v. Morris State Bank, 49 Mont. 60-1387, 2173, 2386.  
 v. Mundell, 23 Ohio St. 523-2301.  
 v. Southwestern Land Co., 89 Wis. 49-2733.  
 v. Winslow, 46 Pa. St. 380-694.  
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 Gifford v. Corrigan, 117 N. Y. 257-2491, 2498.  
 v. Dyer, 2 R. I. 99-1844.  
 v. Gifford, 100 Mich. 258-2025.  
 v. Horton, 54 Wash. 595-1019, 1665.  
 v. Meyers, 27 Ind. App. 348-900.  
 v. Yarborough, 5 Bing. 163-2093.  
 Gigson v. Keyes, 112 Ind. 568-2560.  
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 v. Cowan, 3 Lea (Tenn.) 203-2292.  
 v. Eldridge, 47 Minn. 210-2096.  
 v. Holmes, 68 Ill. 548-2419.  
 v. Hopkins, 171 Fed. 704-718.  
 v. Jess, 31 Wis. 110-2186.  
 v. Knox, 52 N. Y. 125-1822.  
 v. North American Fire Ins. Co., 23 Wend. (N. Y.) 43-1765, 1774.  
 v. Peteler, 38 N. Y. 168-268, 312.  
 v. Port, 28 Ohio St. 276-460.  
 v. Reynolds, 51 Ill. 513-797, 821.  
 v. Richards, 7 Vt. 203-629.  
 v. Sanderson, 56 Iowa 349-294, 2491.  
 v. Sleeper, 71 Cal. 290-2172.  
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- v. Gough, 63 Ind. 576-2198, 2200, 2248, 2249.
- Gilcrest v. Gottschalk, 39 Iowa 311-2774.
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- v. Baremore, 5 Johns. Ch. (N. Y.) 545-2681.
- v. Comstock, 4 N. Y. 270-1501, 1502.
- v. Ebsworth, 10 Md. 333-189.
- v. Hunter, 103 N. C. 194-2262.
- v. Little, 104 U. S. 291-284.
- v. Miller, 36 Neb. 346-2299, 2303, 2304.
- v. Simonds, 5 Gray (Mass.) 441-968, 1216, 1217.
- v. Solomon, 10 Abb. Prac. (N. S.) 97-1907, 1908.
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- v. De Armant, 90 Mich. 425-905.
- v. Fauntleroy, 8 B. Mon. (Ky.) 177-2016, 2194.
- v. Ferrin, 71 N. H. 421-1632, 1689, 1692.
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- v. Middleton, 105 Mass. 477-143.
- v. Pinney's Adm'r, 12 Ohio St. 38-2375.
- Gill's Heirs v. Logan's Heirs, 11 B. Mon. (Ky.) 231-421.
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- v. Broas, 23 Barb. (N. Y.) 370-335.
- v. Gillespie, 149 Ala. 184-2009.
- v. Rogers, 146 Mass. 610-2198.
- v. Weinberg, 148 N. Y. 238-1345.
- v. Worford, 2 Cold. (Tenn.) 632-842.
- Gillett v. Johnson, 30 Conn. 180-1161.
- v. Mathews, 45 Mo. 307-186.
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- v. McDowall, 66 Neb. 814-2550.
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- Gillihan v. Cieloha, 74 Ore. 462-2106.
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     v. Brown, 5 Cow. (N. Y.) 388-747.  
     v. Chase, 67 N. H. 161-1135, 1137, 1139.  
     v. Gillis, 96 Ga. 1-1823.  
     v. Martin, 17 N. C. 470-2440, 2450.  
     v. Nelson, 16 La. Ann. 275-1349.
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- Gillvon v. Reilly, 50 N. J. L. 26-147.
- Gilman v. Bell, 99 Ill. 144-1041, 1070, 1107.  
     v. City of Milwaukee, 31 Wis. 563-249.  
     v. Dingeman, 49 Iowa 308-2756.  
     v. Havey, 26 Mo. 280-2777.  
     v. Heitman, 137 Iowa 336-2455.  
     v. Illinois & M. Tel. Co., 91 U. S. 603-2433, 2731.  
     v. Moody, 43 N. H. 259-2413, 2414, 2560.  
     v. Smith, 12 Vt. 150-1654.  
     v. Tilton, 5 N. H. 231-1155.  
     v. Wells, 66 Me. 273-2435.
- Gilmer v. Mobile & M. R. Co., 79 Ala. 569-1405, 1406, 1408, 1411, 1414.
- Gilmor's Estate, 154 Pa. St. 523-1832.
- Gilmore v. Burch, 7 Ore. 374-835, 837.  
     v. Driscoll, 122 Mass. 199-1187, 1190, 1191, 2040, 2056.  
     v. Hamilton, 83 Ind. 196-220.  
     v. Royal Salt Co., 84 Kan. 729-1182.  
     v. Wilbur, 12 Pick. (Mass.) 120-698, 1205.  
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- Gimon v. Davis, 36 Ala. 589-1804, 2188.
- Gindrat v. Montgomery Gas-Light Co., 82 Ala. 596-1082, 1084.  
     v. Western Railway, 96 Ala. 162-487.
- Ginn v. Hancock, 31 Me. 42-1681.  
     v. Tobey, 62 Mich. 252-2170.
- Ginrich v. Ginrich, 146 Ind. 227-492.
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- Girard Life Ins. Co. v. Chambers, 46 Pa. 485-2324.
- Girard Trust Co. v. Russell, 179 Fed. 446-619.
- Girardin v. Lampe, 58 Wis. 267-2185, 2639.
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     v. Nelson, 86 Ill. 591-2370.
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- Given v. Hilton, 95 U. S. 591-450.  
     v. Marr, 27 Me. 212-810, 2608.
- Givens v. McCalmont, 4 Watts (Pa.) 460-2464.  
     v. Mullinax, 4 Rich. Law (S. C.) 590-192.  
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 Glascock v. Glascock, 217 Mo. 362-779, 2331.  
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     v. Hortig, 1 Black (U. S.) 595-1542.  
 Glass v. Glass, 71 Ind. 392-550.  
     v. Hieronymus, 125 Ala. 140-2389.  
 Glascock v. Stringer (Tex. Civ. App.), 32 S. W. 920-2779.  
 Glassell v. Hansen, 135 Cal. 547-2111, 2115.  
 Gleason v. Carpenter, 74 Vt. 399-2611, 2616.  
     v. Dyke, 22 Pick. (Mass.) 390-2668.  
     v. Gleason, 43 Ind. App. 426-974.  
     v. Kinney's Adm'r, 65 Vt. 560-2620.  
     v. Spray, 81 Cal. 217-852.  
     v. Tuttle, 46 Me. 288-2061.  
     v. Wright, 53 Miss. 247-2625.  
 Gleason's Adm'r v. Burke, 20 N. J. Eq. 300-2367.  
 Glencoe v. Reed, 93 Minn. 518-1525.  
 Glendenning v. Bell, 70 Tex. 632-2234.  
 Glenn v. Canby, 24 Md. 127-1413, 1416.  
     v. Clark, 53 Md. 580-740, 741, 749, 775.  
     v. Crescent Coal Co., 145 Ky. 137-1140.  
     v. Davis, 35 Md. 208-1377.  
     v. Glenn, 21 S. C. 308-1096.  
     v. Hill, 210 Mo. 291-141, 143.  
     v. Jamaison, 48 S. C. 316-1623.  
 Glenn v. Line, 155 Mich. 608-2039.  
     v. Rudd, 68 S. C. 102-2611.  
     v. Spry, 5 Md. 110-2735, 2742.  
 Glennon v. Wilcox, 159 Ill. App. 42-2442.  
 Glenorchy v. Bosville, Cas. Temp. Talbot, 3, 1 White & T. Lead. Cas. Eq. 1-414, 415.  
 Glickauf v. Maurer, 75 Ill. 289-148.  
 Glidden v. Bennett, 43 N. H. 306-910.  
     v. Blodgett, 38 N. H. 74-524.  
     v. Towle, 31 N. H. 147-1003.  
 Glide v. Dwyer, 83 Cal. 477-2699.  
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 Glocke v. Glocke, 113 Wis. 303-326, 330.  
 Glodig v. Implement & Hardware Co., 20 Idaho 348-2676.  
 Gloniger v. Coal Co., 55 Pa. 911-868.  
 Glorieux v. Lighthipe, 88 N. J. L. 199-2189, 2190.  
 Glover v. Bradley, 233 Fed. 721-722.  
     v. Condell, 163 Ill. 566-542, 613.  
     v. Fillmore, 88 Kan. 545-1809.  
     v. Fisher, 11 Mich. 9-458.  
     v. Glover, 45 S. C. 51-825, 855, 856.  
     v. Hill, 57 Miss. 240-855, 859.  
     v. Mersman, 4 Mo. App. 90-1262.  
     v. Pfenffer (Tex. Civ. App.), 163 S. W. 984-1960.  
     v. Powell, 10 N. J. Eq. 211-1007.  
     v. Stamps, 73 Ga. 209-366.  
     v. Stillson, 56 Conn. 316-514, 1076.  
 Gluckauf v. Reed, 22 Cal. 468-2136.  
 Glynn v. George, 20 N. H. 114-1220.  
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 Gnash v. George, 58 Iowa 492-2760.

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     v. Moulton, 67 Cal. 536-1626.  
 Goater v. Ely, 80 N. J. Eq. 40-1427.  
 Gochenour v. Mowry, 33 Ill. 331-2125.  
 Goddard v. Bolster, 6 Me. 427-943.  
     v. Chicago, B. & Q. R. Co., 143 Wis. 169-1148.  
     v. Keate, 1 Vern. 87-1513.  
     v. Winchell, 86 Iowa 71-866.  
 Godden v. Crowhurst, 10 Sim. 649-2322.  
 Godfrey v. Black, 39 Kan. 193-264.  
     v. City of Alton, 12 Ill. 29-1862, 2108.  
     v. Dixon P. & L. Co., 228 Ill. 487-1933, 1989.  
     v. Monroe, 101 Cal. 224-2788.  
     v. Thornton, 46 Wis. 677-854.  
     v. Walker, 42 Ga. 562-223.  
     v. Watson, 3 Atk. 517-2448.  
 Godley v. Weisman, 133 Minn. 1-1427.  
 Godman v. Simmons, 113 Mo. 122-527.  
 Godolphin v. Godolphin, 1 Ves. Sr. 298-1054.  
 Godwin v. Harris, 71 Neb. 59-293, 318.  
     v. Maxwell, 106 Ga. 194-1690.  
 Goebel v. Thieme, 85 Wis. 286-1088.  
 Goelet v. Board of Aldermen, 14 R. I. 295-2087.  
     v. Gori, 31 Barb. (N. Y.) 320-646.  
     v. Spofford, 55 N. Y. 647-210, 334.  
 Goelz v. Goelz, 167 Ill. 33-404.  
 Goerke v. Town of Manitou, 25 Colo. App. 482-2090, 2091.  
 Goetz v. Glos, 266 Ill. 238-1979.  
 Goff v. Anderson, 91 Ky. 303-832.  
     v. Goff, 78 W. Va. 423-995.  
 Goff v. Hedgecock, 144 Ind. 415-2679.  
     v. Kilts, 15 Wend. (N. Y.) 550-1035.  
     v. Pensenhafer, 190 Ill. 200-262, 278, 1082, 1084.  
     v. Price, 42 W. Va. 384-2411, 2413, 2414.  
 Goffe v. Goffe, 37 R. I. 542-614.  
 Gogarn v. Connors, 188 Mich. 161-2390.  
 Going v. Emery, 16 Pick. (Mass.) 107-1058.  
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 Gold Hill Quartz Min. Co. v. Ish, 5 Ore. 104-872.  
 Golden v. Tyer, 180 Mo. 196-2016.  
 Golder v. Bressler, 105 Ill. 419-421, 1076.  
 Goldfrank v. Young, 64 Tex. 432-2717.  
 Goldman v. Beach Front Realty Co., 83 N. J. L. 97-1221, 1224, 1256.  
     v. Broyles (Tex. Civ. App.), 141 S. W. 283-1493.  
     v. Dieves, 159 Wis. 47-1491.  
 Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 153 N. C. 49-959.  
 Goldsborough v. Gable, 140 Ill. 269-248, 1481.  
     v. Turner, 67 N. C. 412-2174.  
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 Goldsmith v. Petersen, 159 Iowa 692-2308, 2311.  
 Goldstein v. Raskin, 271 Ill. 249-1232.  
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 Goldthwaite v. Janney, 102 Ala. 431-662.  
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- Gonzales v. Wasson, 51 Cal. 295-1248.
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- v. Botts, 110 Mo. 419-2541, 2651.
- v. Phillips, 46 Okla. 145-2532.
- v. Vaughan, 92 N. C. 610-2722.
- Good v. Jarrard, 93 S. C. 229-460.
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- v. Goodale, 107 Me. 301-1355, 1356.
- v. Patterson, 51 Mich. 532-2594.
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- v. Mopley, 45 Ind. 355-2696, 2697.
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- Gooding v. Riley, 50 N. H. 400-941, 2368.
- v. Shea, 103 Mass. 360-2462, 2463.
- Goodkind v. Bartlett, 136 Ill. 18-798, 799, 2191.
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- v. Heilig, 157 N. C. 6-1687, 1694.
- v. Randall, 44 Conn. 321-1723, 2373, 2572, 2748.
- v. Smith, 94 Neb. 227-1627.
- v. White, 26 Conn. 317-2649, 2704.
- v. Wineland, 61 Md. 449-2282.
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- v. Burbank, 12 Allen (Mass.) 459-1224, 1226, 1236, 1390, 1392.
- v. Georgia R., etc., Co., 115 Ga. 340-1141.
- v. Harding, 3 Rand. (Va.) 280-481.
- v. Jones, 2 Hill (N. Y.) 142-910, 940, 946, 948.
- v. Kimberly, 48 Conn. 395-2452, 2453.
- v. Otego, 216 N. Y. 113-653.
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- v. Cornish, 1 Salk. 226-501.
- v. Davids, Cowp. 803-302.
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- v. Glazier, 4 Burrows 2512-1850.
- v. Searle, 2 Wils. 29-590, 1892.
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- v. Ellisson, 3 Russ. 583-430.
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- v. Lawrence, 208 Mass. 258-745.
- Goodtitle v. Alker, 1 Burrow 133-1526.
- v. Bailey, Cowp. 600-1589.
- v. Billington, Doug. 753-554.
- v. Herbert, 4 Term. R. 680-215.
- v. Jones, 7 Term. R. 45-366.
- Goodwillie Co. v. Commonwealth Elec. Co., 241 Ill. 42-1225, 1229, 1259, 1331, 1346.
- Goodwin v. Bragaw, 87 Conn. 31-1200, 1227, 1354, 1357, 1385, 2017, 2037.
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- v. Colorado M. Inv. Co., 110 U. S. 1-2302.
- v. Goodwin, 33 Conn. 314-748.
- v. Kency, 47 Conn. 486-2608, 2609.
- Goodwin v. McMinn, 193 Pa. 646-2384.
- v. Massachusetts Loan & Trust Co., 152 Mass. 189-2248.
- v. Norton, 92 Me. 532-1604.
- v. Perkins, 134 Cal. 564-215.
- v. Sharkey, 80 Pa. St. 149-1478.
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- v. White, 59 Md. 503-1624.
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- v. Fitzhugh, 27 Gratt. (Va.) 835-2557.
- v. George, 12 Ind. 408-177.
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- v. Mulhare, 13 Wis. 22-2636, 2637.
- v. Munn, 87 Kan. 624-793.
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- v. Richardson, 185 Mass. 492-322, 323, 325.
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- v. Tweedy, 74 Ala. 232-801, 943.
- v. White, 33 S. D. 234-1742.
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- v. Davis, 124 N. C. 234-2687.
- v. Dickenson, 98 Ala. 363-711.
- v. Gore, 2 P. Wms. 28-554, 585, 586.
- v. Townsend, 105 N. C. 228-753, 754.
- Goree v. Clements, 94 Ala. 337-2473.
- Gorham v. Daniels, 23 Vt. 600-347.
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- v. Hadsell, 9 Cush. (Mass.) 508-1252.
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- v. Roach, 46 Mich. 294-2130.
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- v. Singleton, 2 Head (Tenn.) 67-388, 1794.
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 v. Howe, 131 Ill. 490-1613.  
 v. Hudson River R. Co., 6 N. Y. 522-1022.  
 v. Kemp, 2 Mylne & K. 304-638.  
 v. Lynde, 114 Mass. 366-394, 1626.  
 v. McKenna, 86 Pa. St. 297-1186.  
 v. Mather, 104 Mass. 283-1075.  
 v. Murch, 70 Me. 288-460.  
 v. Newman, 6 Mass. 239-2696.  
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 v. Wheeler, 28 N. J. Eq. 514-2706.  
 v. Winthrop, 5 R. I. 319-2591.  
 v. Wise, 97 Cal. 532-1743, 1744, 2563.  
 v. Womack, 2 Ala. 33-793.  
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 Goulding v. Clark, 34 N. H. 148-1542.  
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 Goundie v. Northampton Water Co., 7 Pa. 233-704, 705.  
 Gourdin v. Deas, 27 S. C. 479-498, 542.  
 Gourley v. Kinley, 66 Pa. 270-804.  
 v. Williams, 46 Okla. 629-2733.  
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 Gowan v. Christie, L. R. 2 H. L. Sc. 273-869, 1462.  
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 v. Philadelphia Exch. Co., 5 Watts & S. (Pa.) 141-1205.  
 v. Shaw, 40 Me. 56-678.  
 Gower v. Doheney, 33 Iowa 36-2259.  
 v. Quinlan, 40 Mich. 572-1957.  
 v. Winchester, 33 Iowa 303-2656, 2658.  
 Grabenhorst v. Nicodemus, 42 Md. 236-203.  
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 Grable v. McCulloh, 27 Ind. 472-2362.  
 Grabow v. McCracken, 23 Okla. 612-879.  
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 v. Perry, 197 Mo. 550-1048, 1062, 1084.  
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 Grady v. McCorkle, 57 Mo. 172-766, 773.  
 v. Royar (Mo.), 181 S. W. 428-2105, 2116.  
 v. Wolsner, 46 Ala. 381-146.  
 Graeff v. De Turk, 44 Pa. St. 527-1062, 1094.  
 Graff v. Fitch, 58 Ill. 373-884.  
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 v. Houston, 15 N. C. (4 Dev. Law) 232-897.  
 v. King, 50 Mo. 22-1068.  
 v. Law, 6 Up. Can. C. P. 310-795.  
 v. Little, 5 Ired. Eq. (40 N. C.) 407-2737.  
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 v. Moffett, 119 Mich. 303-2755.  
 v. Suddeth, 97 Ark. 283-1789, 1790.  
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 Grandona v. Lovdal, 70 Cal. 161-864, 896.  
 Grange v. Tiving, O. Bridgman 111-1103.  
 Grange Mill Co. v. Western Assur. Co., 118 Ill. 396-2456.  
 Granger v. Crouch, 86 N. Y. 494-2554, 2560.  
 v. Granger, 147 Ind. 95-536.  
 v. Parker, 137 Mass. 228-187.  
 v. Roll, 6 S. D. 611-2490.  
 Granham v. Hawley, Hob. 132-2370.  
 Granite Bituminous Pav. Co. v. McManus, 241 Mo. 184-1861.  
 Granite Building Corp. v. Greene, 25 R. I. 586-161, 177, 303.  
 v. Rubin, 40 R. I. 208-1472, 1583.  
 Grannis v. Clark, 8 Cow. (N. Y.) 36-134.  
 Grant v. Baird, 61 N. J. Eq. 389-1633.  
 v. Bell, 26 R. I. 288-327, 328.  
 v. Bennett, 96 Ill. 513-1577, 2777.  
 v. Bissett, 1 Caines Cas. (N. Y.) 112-2582.  
 v. Burr, 54 Cal. 298-2397, 2717.  
 v. Chase, 17 Mass. 443-1291.  
 v. Duane, 9 Johns. (N. Y.) 611-2645, 2649.  
 v. Lynam, 4 Russ. 292-1085.  
 v. McArthur's Ex'r, 153 Ky. 356-1698.  
 v. Moon, 128 Mo. 43-1661.  
 v. Oregon Nav. Co., 49 Ore. 324-1029.  
 v. Parham, 15 Vt. 649-804, 807.  
 v. Phoenix Life Ins. Co., 121 U. S. 105-367, 2698.  
 v. Saunders, 121 Iowa 80-436.  
 v. Squire, 2 Ont. L. Rep. 131-533.  
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- Gratrex v. Homfray, 6 Adol. & El. 206-355.
- Grattan v. Wiggins, 23 Cal. 16-2551, 2554, 2649.
- Gratz v. Land & River Imp. Co., 82 Fed. 381-2263, 2265.
- Graver v. Sholl, 42 Pa. 58-1147.
- Graves v. Atwood, 52 Conn. 512-551.
- v. Berdan, 26 N. Y. 501-1244, 1350, 1498.
- v. Causey, 170 N. C. 175-2023.
- v. Cochran, 68 Mo. 74-808, 812.
- v. Deterling, 120 N. Y. 447-271, 1441.
- v. Graves, 6 Gray (Mass.) 391-1728, 2185.
- v. Graves, 29 N. H. 129-395, 1627.
- v. Johnson, 172 N. C. 176-780.
- v. Leathers, 17 B. Mon. (Ky.) 665-2291.
- v. Momford, 26 Barb. (N. Y.) 95-2643.
- v. Rose, 246 Ill. 76-1669.
- v. Smith, 87 Ala. 450-1245, 1340, 1341, 1344.
- v. Trueblood, 96 N. C. 495-834.
- v. Vinton Co., 8 S. D. 385-897.
- v. Weld, 5 B. & Ad. 105-876, 877, 890, 891.
- Gravlee v. Lamkin, 120 Ala. 210-2626.
- Gray v. Bailey, 117 N. C. 439-653, 656.
- Gray v. Baird, 4 Lea (Tenn.) 212-2756.
- v. Bartlett, 20 Pick. (Mass.) 186-2135.
- v. Beard, 66 Ore. 59-381.
- v. Biscoe, Noy. 142-1707.
- v. Blanchard, 8 Pick. (Mass.) 284-268, 288, 296, 311, 312.
- v. Bryson, 87 Miss. 304-2722.
- v. Cornwall's Assignee, 95 Ky. 566-2751.
- v. Deluce, 5 Cush. (Mass.) 9-1032.
- v. Denson, 129 Ala. 406-2259.
- v. Franks, 86 Mich. 382-2125.
- v. Gillespie, 59 N. H. 469-2426.
- v. Gilliam, 166 Ky. 194-2629.
- v. Givens, 26 Mo. 291-700.
- v. Haas, 98 Iowa 502-1867.
- v. Harris, 107 Mass. 492-1147.
- v. Holdship, 17 Serg. & R. (Pa.) 413-915.
- v. Holmes, 57 Kan. 217-1909, 1912.
- v. Jordan, 87 Me. 140-401.
- v. Kaufman, etc., Co., 162 N. Y. 388-1587.
- v. Kelley, 194 Mass. 533-1337, 1666.
- v. Lamb, 207 Ill. 258-2233.
- v. Loud & Sons Lmb. Co., 128 Mich. 427-2507, 2508, 2511.
- v. Lynch, 8 Gill (Md.) 421-634, 1054.
- v. McClellan, 214 Mass. 92-2569.
- v. McWilliams, 98 Cal. 157-1167, 1174, 1201.
- v. Nelson, 77 Iowa 63-2441, 2662.
- v. Robinson, 4 Ariz. 24-897, 900.
- v. Schofield, 175 Ill. 36-852.
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     v. Whittemore, 192 Mass. 367-496, 592, 597, 613, 615.  
 Gray's Adm'r v. Patton's Adm'r, 13 Bush (Ky.) 625-2787.  
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 Graydon's Ex'rs v. Graydon, 23 N. J. Eq. 229-284.  
 Grayson v. Tyler's Adm'x, 80 Ky. 358-526, 527, 528.  
     v. Weddle, 63 Mo. 523-1094.  
 Graysonia-Nashville Lumber Co. v. Wright, 117 Ark. 151-1667.  
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 Great Falls Waterworks v. Great Northern Ry. Co., 21 Mont. 487-1204, 1209, 1210, 1221.  
 Great Western Ry. Co. v. Swindon, etc., Ry. Co., 22 Ch. Div. 706-1224.  
     v. Talbot, (1902) 2 Ch. 759-1346.  
 Greathead's Appeal, 42 Conn. 374-806.  
 Greaton v. Smith, 1 Daly (N. Y.) 380-250.  
 Greatrex v. Hayward, 8 Exch. 291-2038.  
 Greaves' Settlement Trusts, In re, 23 Ch. Div. 313-441.  
 Grebe v. 'Swords, 28 N. D. 330-2403.  
 Green v. Abraham, 43 Ark. 420-1728.  
     v. Arnold, 11 R. I. 364-679, 682, 708.  
     v. Biddle, 8 Wheat. (U. S.) 75-1648.  
     v. Bridges, 4 Sim. 96-322.  
 Green v. Brown, 146 Ind. 1-707.  
     v. Butler, 26 Cal. 595-2472.  
     v. Cannady, 77 S. C. 193-651.  
     v. Carotta, 72 Cal. 267-1174.  
     v. Chelsea, 24 Pick. (Mass.) 71-2034.  
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     v. Crow, 17 Tex. 180-856.  
     v. Cumberland, etc., Co., 110 Tenn. 35-2291.  
     v. Currier, 63 N. H. 563-2611.  
     v. Eales, 2 Q. B. 225-142.  
     v. Early, 39 Md. 223-2241.  
     v. Ellis, 145 Ga. 241-2023.  
     v. Farrar, 53 Iowa 426-2302.  
     v. Frick, 25 S. D. 342-2410.  
     v. Fricker, 7 Watts & S. (Pa.) 171-2681.  
     v. Garrington, 16 Ohio St. 548-2201.  
     v. Goff, 153 Ill. 534-1354.  
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     v. Green, 41 Kan. 472-2254.  
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     v. Green, 23 Wall. (U. S.) 486-542.  
     v. Hall, 45 Neb. 89-2483, 2489, 2490.  
     v. Hart, 1 Johns. (N. Y.) 580-2522.  
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     v. Houston, 22 Kan. 35-2571, 2573.  
     v. Huntington, 73 Conn. 106-749, 756.  
     v. Irving, 54 Miss. 450-1701, 1702.  
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     v. Mizelle, 54 Miss. 220-2680.  
     v. Morehead, 104 Tex. 254-2131.  
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     v. Morris & E. R. Co., 12 N. J. Eq. 165-1635.  
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     v. Tidball, 26 Wash. 338-1684.  
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     v. Walker, 22 R. I. 14-691.  
     v. Wescott, 13 Wis. 606-2440.  
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     v. Winter, 1 Johns. Ch. (N. Y.) 27-418.  
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 Greenaway v. Adams, 12 Ves. Jr. 395-161.  
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 Greene v. Anglemire, 77 Mich. 168-1934, 1946.  
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     v. Cole, 2 Wms. Saund. 658-977, 981, 985.  
     v. Creighton, 7 R. I. 1-1435, 1686.  
     v. Dennis, 6 Conn. 293-370.  
     v. Graham, 5 Ohio 264-669, 671.  
     v. Greene, 125 N. Y. 506-371, 426, 712.  
     v. Greene, 19 R. I. 619-1064.  
     v. Greene's Surviving Partners, 1 Ohio 535-760.  
     v. Harvey, 1 Rolle, Abr. 680-795.  
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     v. Reynolds, 72 Hun (N. Y.) 565-770.  
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     v. Warnick, 64 N. Y. 220-2546, 2550, 2561.  
 Greeney v. Greeney, 155 Wis. 621-712.  
 Greenfield v. Stout, 122 Ga. 303-2193, 2715.  
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     v. Francis, 18 Pick. (Mass.) 117-1180, 1181.  
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 Greenwood v. Coleman, 24 Ala. 150-2334.  
     v. Maddox, 27 Ark. 649-2293, 2394.  
     v. Marvin, 111 N. Y. 423-664, 666, 667, 760.  
     v. Moore, 79 Miss. 201-1998.  
     v. School Dist., 126 Mich. 81-2141.  
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     v. Van Meter, 54 N. J. Eq. 270-1233, 1274, 1276, 1292.  
     v. Wintersmith, 85 Ky. 516-2290.  
 Gregg v. Blackmore, 10 Watts (Pa.) 192-701.  
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     v. Sayre, 8 Pet. (U. S.) 244-1989.  
 Gregon's Estate, In re, 2 De G. J. & S. 428-580.  
 Gregor v. Cady, 82 Me. 131-140, 143.  
 Gregory v. Arms, 48 Ind. App. 562-2483, 2666.  
     v. Bush, 64 Mich. 37-1129, 1163, 1235.  
     v. Ellis, 86 N. C. 579-860.  
     v. Gregory, 69 N. C. 522-809.  
     v. Hill, 8 Term. R. 299-256.  
     v. Peoples, 80 Va. 355-2129.  
     v. Rosenkrans, 72 Wis. 220-2434.  
     v. Savage, 32 Conn. 250-2218, 2219.  
     v. Thomas, 20 Wend. (N. Y.) 17-2628, 2629.  
     v. Van Vorst, 85 Ind. 108-2407.  
     v. Winston, 23 Gratt. (Va.) 102-764.  
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 Greider's Appeal, 5 Pa. 422-210, 1581, 1588.  
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 Greiner v. Klein, 28 Mich. 12-759, 801.  
 Greist v. Amrkyn, 80 Conn. 280-1345, 1359, 1537.  
     v. Gowdy, 81 Conn. 351-2627.  
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- v. Eubanks, 12 Bush (Ky.) 510-791.
- v. Wood, 178 Fed. 908-1668.
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- v. Bingham, 51 Ill. 153-2284.
- v. Wynant, 23 How. (U. S.) 500-371.
- Grier v. McAlarney, 148 Pa. 587-1518.
- v. Rhyne, 67 N. C. 338-2787.
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- Griffin v. Bartlett, 55 N. H. 119-2071, 2074.
- v. Bixby, 12 N. H. 454-896.
- v. Byrd, 74 Miss. 32-2754.
- v. Fairmont Coal Co., 179 Fed. 191-1243.
- v. Gilchrist, 29 R. I. 200-1355.
- v. Gingell, 25 Ky. L. Rep. 2031-2507, 2675.
- v. Griffin, 141 Ill. 373-1089, 1090, 1097, 1098.
- v. Griffin, 82 S. C. 256-676, 2672.
- v. Hall, 111 Ala. 601-2235.
- v. Howey, 179 Mich. 104-1754.
- v. Johnson, 161 Ill. 377-2100, 2111.
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- v. Lowell, 42 Miss. 402-2589, 2697.
- v. McIntosh, 176 Mo. 392-1812, 1814.
- v. Marine Co. of Chicago, 52 Ill. 130-2425.
- v. Martel, 77 Vt. 19-255.
- v. New Jersey Oil Co., 11 N. J. Eq. 49-2568.
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- v. Ransdell, 71 Ind. 440-934.
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- v. Sheffield, 38 Miss. 359-187, 242, 2123.
- v. Shepard, 124 N. Y. 70-527, 589.
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- v. Depew, 3 A. K. Marsh. (Ky.) 177-2765.
- v. Diffenderffer, 50 Md. 466-1831.
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- v. Griffith, 5 Harr. (Del.) 5-761.
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- v. Lewis, 17 Mo. App. 605-230.
- v. Ricketts, 7 Hare 299-446, 452.
- v. Rigg, 18 Ky. L. Rep. 463-1333.
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 302, 304.  
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 737, 739.  
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 (Ky.) 629-577, 578.  
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 1774, 1784, 1785, 1786.  
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 1942.  
 Grimes v. Bryan, 149 N. C. 242-  
 2025.  
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 1344.  
 Grimman v. Legge, 8 Barn. & C.  
 324-1584.  
 Grimmer v. Friedrich, 164 Ill. 245-  
 580.  
 Grimstead v. Marlowe, 4 Term.  
 Rep. 717-2036.  
 Grimston v. Bruce, 1 Salk. 156, 2  
 Vern. 594-321.  
 Grimstone v. Carter, 3 Paige (N.  
 Y.) 421-2174, 2238.  
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 328-2722.  
 Grinnell v. Cockerill, 79 Ill. 79-2730.  
 Grissom v. Hill, 17 Ark. 483-289,  
 319.  
     v. Moore, 106 Ind. 629-759,  
     766.  
 Griswold v. Butler, 3 Conn. 227-  
 1975.  
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 1816.  
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     v. Johnson, 5 Conn. 363-611.  
     v. McGee, 102 Minn. 114-799.  
 Grizea v. Terwilliger, 144 Cal. 456-  
 1157.  
 Grizzard v. Roberts, 110 Ga. 41-187,  
 194.  
 Grobham v. Thornborough, Hob. 82-  
 1502.  
 Groce v. Ponder, 63 S. C. 162-741.  
 Groesbeck v. Seeley, 13 Mich. 329-  
 1735.  
 Groff v. Morehouse, 51 N. Y. 503-  
 2648.  
     v. Ramsey, 19 Minn. 44-2221.  
     v. Rohrer, 35 Md. 327-393, 394,  
     1626.  
 Grogan v. Garrison, 27 Ohio St. 50-  
 791, 793.  
     v. Grogan (Mo.), 177 S. W.  
     649-688.  
 Groh v. South, 119 Md. 297-1146.  
 Gromie v. Home Society, 3 Bush  
 (Ky.) 865-2349.  
 Grommes v. St. Paul Trust Co.,  
 147 Ill. 634-167, 301, 1471, 1472,  
 1494, 1495, 1583.  
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 458.  
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 Civ. App.), 18 Tex. Ct. Rep. 906,  
 100 S. W. 1006-154.  
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 S.) 481-2295.  
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 1828.  
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 1105.  
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 Grove's Appeal, 68 Pa. St. 143-2775.  
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 Grow v. Garlock, 97 N. Y. 81-2644.  
 Grubb v. Bayard, 2 Wall. Jr. (U. S.) 81-1393, 1397.  
     v. Grubb, 74 Pa. 25-868, 1392, 1393.  
 Grubbie v. Toms, 70 N. J. Law 338-1483.  
 Grube v. Lilienthal, 51 S. C. 442-801.  
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     v. Wells, 34 Iowa 148-1947.  
 Gruber v. Baker, 20 Nev. 453-2391.  
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 Guest v. Farley, 19 Mo. 147-359, 360.  
     v. New Hampshire Fire Ins. Co., 66 Mich. 98-2455.  
     v. Reynolds, 68 Ill. 478-1122, 1123, 2039.  
 Guffey v. O'Reilly, 88 Mo. 418-2134.  
 Guffy v. Hukill, 34 W. Va. 49-308, 309.  
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- Gully v. Grubbs, 1 J. J. Marsh. (Ky.) 387-1627.
- v. Ray, 18 B. Mon. (Ky.) 107-750.
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- v. Jones, 67 Ga. 398-2416.
- v. Seovil, 4 Day (Conn.) 228-1514, 2290.
- v. Sinclair, 52 Mo. 327-186, 238, 240.
- Gunn's Appeal from Commissioners, 55 Conn. 149-2378.
- Gunning's Estate, In re, 234 Pa. 139, 144-278, 280, 524, 556.
- Gunnison v. Erie Dime Savings & Loan Co., 157 Pa. 303-663, 671.
- Gunson v. Healy, 100 Pa. 42-1231, 1232, 1333, 1347.
- Gunst v. Pelham, 74 Tex. 586-2499.
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- Guthrie v. Canadian Pac. R. Co., 27 Ont. App. 64-1225.
- v. Field, 21 Ark. 379-2680.
- v. Field, 85 Kan. 58-1598, 1602.
- v. Guthrie, 105 Ga. 86-1810.
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 Haar v. Schloss, 168 N. C. 97-462.  
 Haas v. Brown, 21 Misc. (N. Y.) 434-966.  
     v. Chicago Bldg. Soc., 89 Ill. 498-2444.  
     v. Dudley, 30 Ore. 355-2500, 2501.  
     v. Fontenot, 132 La. 812-2171.  
     v. Wilson, 97 Kan. 176-1927.  
 Haatja v. Saarenpaa, 118 Minn. 255-327.  
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 Haberman v. Baker, 128 N. Y. 253-1665.  
 Habig v. Dodge, 127 Ind. 31-2118, 2123.  
 Hach v. Hill (Mo.), 14 S. W. 739-732.  
     v. Rollins, 158 Mo. 182-763, 765.  
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     v. Monroe, 176 Ill. 384-913.  
 Hacker's Appeal, 121 Pa. St. 192-1078, 1726.  
 Hackett v. Amsden, 57 Vt. 432-912, 915, 1675.  
     v. Badeau, 63 N. Y. 476-2771.  
     v. Callender, 32 Vt. 97-2784.  
     v. Reynolds, 4 R. I. 512-2750.  
     v. Richards, 13 N. Y. 138-1494.  
     v. Watts, 138 Mo. 502-2745, 2750.  
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     v. Geiger, 9 N. J. Law 225-2291.  
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     v. Oldroyd, 14 Mees. & W. 789-1381.  
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     v. Boston Belting Co., 140 Mass. 73-173, 180, 1513.  
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     v. Augsburg, 46 N. Y. 622-2062, 2074.  
     v. Austin, 20 Tex. Civ. App. 59-2050.  
     v. Blackman, 8 Idaho 272-1157.  
     v. Bliss, 118 Mass. 554-2710, 2718, 2727.  
     v. Boyd, 14 Ga. 1-1205.  
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     v. Bray, 51 Mo. 288-1709.  
     v. Breyfogle, 162 Ind. 494-1868, 1878.  
     v. Center, 40 Cal. 63-264.  
     v. Chaffee, 14 N. H. 216-525, 589.  
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     v. City of Baltimore, 56 Md. 187-1867.  
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     v. Crabb, 56 Neb. 392-835.  
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 v. Hiley, 134 Ga. 77-2223.  
 v. Hooper, 47 Neb. 111-2021, 2657.  
 v. Ionia, 38 Mich. 493-1151, 1224.  
 v. Irvin, 78 N. Y. App. Div. 107-201, 203.  
 v. Irwin, 7 Ill. 176-1072, 1074.  
 v. Kary, 133 Iowa 465-1598, 1601.  
 v. Kauffman, 106 Cal. 451-1875.  
 v. La France Fire Engine Co., 158 N. Y. 570-487, 529.  
 v. Lance, 25 Ill. 277-2424.  
 v. Lawrence, 2 R. I. 218-1392, 1393, 1399, 1400.  
 v. Leonard, 1 Pick. (Mass.) 27-1595.  
 v. Livingston, 3 Del. Ch. 348-378.  
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 v. Morgan, 79 Mo. 47 2505, 2509.  
 v. Morris, 13 Bush (Ky.) 322-707.  
 v. Myers, 43 Md. 446-239, 240, 257, 259.  
 v. Otis, 71 Me. 326-572.  
 v. Paine, 14 Ohio St. 417-1721.  
 v. Palmer, 87 Vt. 354-571.  
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 v. Powell, 8 Okla. 276-852.  
 v. Preble, 68 Me. 100-1084.  
 v. Priest, 6 Gray (Mass.) 18-481, 515, 577.  
 v. Rising, 141 Ala. 431-1170.  
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 v. Rood, 40 Mich. 46-1362.  
 v. Sauntry, 72 Minn. 420-2213.  
 v. Savage, 4 Mason (U. S.) 273-780.  
 v. Sears, 210 Mass. 185-1752.  
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 v. Turner, 110 N. C. 292-337.

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 v. Railroad Co., 160 Mass. 459-1607.  
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 v. Crosby, 68 Ga. 767-1934.  
 v. Dean, 8 Baxt. (Tenn.) 193-199.  
 v. Eads, 146 Ky. 162-1227, 1229, 1231.  
 v. Hammond, 258 Pa. 51-1330, 1334, 1348.  
 v. Jones, 41 Ind. App. 32-135, 136, 1694.  
 v. Port Royal & A. Ry. Co., 15 S. C. 10-290, 307.  
 v. Putman, 110 Mass. 232-441, 446.  
 v. Ryman, 120 Va. 131-1280, 1283, 1285.  
 v. Shepard, 186 Ill. 235-2112, 2115.  
 v. Sheppard, 186 Ill. 235-2099.  
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 v. Thompson, 168 Mass. 531-1477, 1480.  
 v. Wall (Utah), 171 Pac. 35-2483.  
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 2727.  
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 (Md.) 64-2781.  
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 843.  
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 2349.  
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     132-2456.  
     v. Franklin Ins. Co., 114 Mass.  
     155-2602.  
     v. Hancock, 22 N. Y. 568-2707.  
     v. Henderson, 45 Tex. 479-  
     2787.  
     v. McAvoy, 151 Pa. 460-1254,  
     1358, 2242.  
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     v. Titus, 39 Miss. 224-578.  
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     446-1364.  
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 174, 213.  
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 C. 267-1146.  
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 551-2040.  
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 2674.  
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 542.  
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 1028, 1029.  
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 701.  
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 1280, 1285.  
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 555-1621.  
     v. Enloe, 33 Tex. 624-678.  
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     Co., 235 Fed. 769-696.  
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 140-1712.  
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 2610, 2611, 2641.  
     v. Hobson, 24 Colo. 284-1657,  
     1658.  
     v. Pollard, 17 Neb. 368-2295.  
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1083, 1084.  
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53-272.
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1065.  
v. Carrington, 18 Ark. 85-2675.  
v. Carver, 121 Ind. 278-689.  
v. Collins, 94 Ind. 201-2128.  
v. Davis, 112 Mo. 599-2375.  
v. Swarner, 3 Watts & S. (Pa.)  
223-440.  
v. Swarner, 8 Watts (Pa.)  
11-1739.  
v. Vensel, 19 Idaho 796-2362.
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Co., 5 Dak. 1-1170.
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2402, 2417.  
v. Osborn, 4 Paige (N. Y.)  
336-676.  
v. Oxley, 23 Wis. 519-377.  
v. Seidentopf, 113 Iowa 658-  
2173, 2205, 2209, 2235,  
2262.
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2380.
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365-718.
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v. Shortridge, 86 Mo. 662-  
2751.
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Mo. 158-2011.
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457-865.
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459-526, 633, 2118, 2121.  
v. Hannah, 9 Gratt. (Va.) 146-  
673.
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792.  
v. Hilliard, 83 Ind. 363-2663.  
v. Hounihan, 85 Va. 429-2012.  
v. Kelly, 156 Wis. 509-942.  
v. Osborn, 4 Paige (N. Y.) 336-  
690.
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1449, 1450.
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517-1193.
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2269.  
v. Patrick, 119 U. S. 156-2122.
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Creamery Co., 106 Iowa  
167-1209.  
v. Green, 275 Ill. 221-2085.  
v. Hall, 167 Mich. 7-868.  
v. Meyer, 81 Ill. 321-183.
- Hansford v. Berry, 95 Ky. 56-2046.  
v. Elliott, 9 Leigh (Va.) 79-  
581.
- Hansom v. Buckner, 4 Dana (Ky.)  
251-1574, 1624.
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Md. 223-1662.  
v. Cruse, 155 Ind. 176-142.  
v. Eastman, 21 Minn. 509-1869.  
v. Hanson, 78 Neb. 584-2001.  
v. Hanson Hardware Co., 23  
N. D. 169-298.  
v. Ingwaldson, 77 Minn. 533-  
713, 2012, 2019.  
v. Johnson, 62 Ind. 25-1985.  
v. Little Sisters of the Poor of  
Baltimore, 79 Md. 431-  
2349.  
v. McCue, 42 Cal. 303-1176-  
1182, 2038.  
v. Proffer, 23 Idaho 705-1862.  
v. Taylor, 23 Wis. 517-2083.  
v. Willard, 12 Me. 142-711.

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- v. Vaughan, 42 Ark. 539-2293.
- v. White, 46 Conn. 106-1124.
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- v. Forsythe, 99 Ill. 312-186.
- v. Hardin, 32 S. C. 599-1593.
- v. Hardin, 34 S. C. 77-2433, 2441.
- v. Hardin, 26 S. D. 601-664.
- v. Harrington, 11 Bush. (Ky.) 367-2254.
- Hardin v. Hassell, 118 Tenn. 143-1073.
- v. Hooks, 72 Ark. 433-2756.
- v. Hyde, 40 Barb. (N. Y.) 435-2580.
- v. Jordan, 140 U. S. 371-1013, 1018, 1020, 1021, 1657.
- v. Neal Loan & Banking Co., 125 Ga. 820-1770.
- Harding v. Alden, 9 Me. 140-796.
- v. Allen, 70 Md. 395-2195.
- v. Crethorn, 1 Esp. 57-239, 252.
- v. Garber, 20 Okla. 11-2445.
- v. Gillett, 25 Okla. 199-2654, 2672, 2683, 2700.
- v. Glyn, 2 White & T. Lead. Cas. Eq. 1859 et seq.-375, 376.
- v. Harding, 140 Ky. 277-786.
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- v. Larkin, 41 Ill. 413-1713, 1714, 1715.
- v. Springer, 14 Me. 407-2125.
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- v. City of Keene, 67 N. H. 166-2659.
- v. De Leon, 5 Tex. 211-2351.
- v. Galloway, 111 N. C. 519-2306, 2310.
- v. McCullough, 23 Gratt. (Va.) 251-1274.
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 topp, (1905) 1 K. B. 472-148.  
 Hargue v. Calchina, 78 Ore. 326-1699.  
 Haring v. Van Houten, 22 N. J. L. 61-1000.  
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 Harkins v. Coalter, 2 Port. (Ala.) 463-729.  
 Harkness v. Cleaves, 113 Iowa 140-1744.  
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     v. Sears, 26 Ala. 493-918, 929, 930.  
     v. Woodmansee, 7 Utah 227-2048.  
 Harkreader v. Clayton, 56 Miss. 383-1771.  
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 Harlan v. Harlan, 273 Ill. 155-2141.  
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 Harland v. Manington, 152 Iowa 707-537.  
     v. Person, 93 Ala. 273-2735, 2741, 2742.  
 Harley v. Harley, 140 Wis. 282-749.  
     v. King, 2 Crompt. M. & R. 18-158.  
 Harlow v. Biley, 189 Mass. 208-286.  
     v. Fisk, 12 Cush. (Mass.) 302-1656, 1658.  
     v. Lake Superior Iron Co., 36 Mich. 105-956, 1393, 1397, 1398.  
     v. Marquette, H. & O. R. Co., 41 Mich. 336-1204.  
     v. Mister, 64 Miss. 25-2699.  
     v. Whitcher, 136 Mass. 553-1289.  
 Harlowe v. Cowdrey, 109 Mass. 183-421.  
 Harman v. Fisher, 90 Neb. 688-381, 1630.  
     v. Gartman, Harp. Law (S. C.) 430-684.  
     v. Harman, 54 S. C. 100-944.  
     v. May, 40 Ark. 146-2423.  
     v. Oberdorfer, 33 Gratt. (Va.) 497-1761.  
     v. Richards, 10 Hare 81-1630.  
     v. Southern R. Co., 72 S. C. 228-2226.  
     v. Stearns, 95 Va. 58-1617.  
 Harmer v. Bean, 3 Car. & K. 307-156.  
 Harmon v. Bower, 78 Kan. 135-1740.  
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 Harnas v. Coryell, 177 Ill. 496-2239.  
 Harn v. Common Council of Dadeville, 100 Ala. 199-2031.  
     v. Smith, 79 Tex. 310-998, 2128.  
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 Harnett v. Maitland, 16 Mees. & W. 257-969, 971.  
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     v. Clayton, 84 Md 346-806.  
     v. Edwards, 115 N. C. 246-2518.  
     v. Ely, 70 Ill. 581-2448, 2651.  
     v. Hampton, 1 Harr. J. 622-1798.  
     v. State, 109 Ala. 66-1862, 2081, 2086.  
     v. Young, 123 Ark. 162-1506.  
 Harper's Appeal, 64 Pa. St. 315-2449, 2450.  
 Harr v. Shaffer, 52 W. Va. 207-1698.  
 Harral v. Leverty, 50 Conn. 46-1931, 2221.  
 Harraway v. Harraway, 136 Ala. 499-1630.  
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     v. Mason, 170 Ala. 282-681.  
     v. Miller, 35 Miss. 700-886.  
 Harrelson v. Sarvis, 39 S. C. 14-1724.  
 Harrer v. Wallner, 80 Ill. 197-656.  
 Harrigan v. Rice, 39 Minn. 49-1678.  
 Harrill v. Stapleton, 55 Ark. 1-2662.  
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     v. Moore, 74 N. H. 277-2088.  
     v. Park, 55 N. H. 471-1247.  
     v. Southam, 16 Ind. 190-1597.  
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     v. Woburn Elec. Light Co., 163 Mass. 85-2396.  
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 Harrington v. Bean, 89 Me. 470-1700, 1711.  
     v. Clark, 56 Kan. 644-1701.  
     v. Coper, 126 Ark. 53-566.  
     v. De Maris, 46 Ore. 111-1154, 1161, 1238.  
     v. Erie County Sav. Bank, 101 N. Y. 257-2171.  
     v. Harrington, 142 N. C. 517-811.  
     v. Manchester, 76 N. H. 347-1868, 1873.  
     v. Murphy, 109 Mass. 299-802.  
     v. Pier, 105 Wis. 485-434, 436, 439, 451.  
     v. Sheldon, 196 Mich. 388-195, 242.  
     v. Watson, 11 Ore. 143-214, 1498.  
     v. Williams, 173 Ky. 575-2015.  
     v. Wise, Cro. Eliz. 486-1469.  
 Harriot v. Harriot, 25 App. Div. (N. Y.) 245-747.  
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     v. Chesterfield, (1911) App. Cas. 623-1398.  
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     v. Commonwealth, 20 Gratt. (Va.) 833-1862, 1867.  
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     v. Drewe, 2 B. & Ad. 164-1347.  
     v. Elliott, 10 Pet. (U. S.) 25-1538, 1673.  
     v. Foster, 97 Cal. 292-155, 252, 2446.  
     v. Frank & Reinach, 52 Miss. 155-173, 182, 1473, 1510.  
     v. Frink, 49 N. Y. 24-892.  
     v. Goslin, 3 Har. (Del.) 340-961.  
     v. Haine, 37 Ark. 348-2754.  
     v. Hancock, 91 N. Y. 340-1581.  
     v. Haynes, 34 Vt. 220-2463.  
     v. Harper, 50 Md. 537-2704.  
     v. Harris, 205 Pa. 460-371, 426.  
     v. Harris, 10 Wash. 555-1841.  
     v. Heackman, 62 Iowa 411-167, 1472, 1583.  
     v. Hiscock, 91 N. Y. 340-210, 1588.  
     v. Jex, 55 N. Y. 421-2603, 2604.  
     v. Johnson, 176 Ala. 445-462.  
     v. Larkins, 22 Hun (N. Y.) 488-717.  
     v. McElroy, 45 Pa. 216-528.  
     v. McGovern, 99 U. S. 61-1974.  
     v. McIntyre, 118 Ill. 275-2231.  
     v. Miller, Meigs (Tenn.) 158-1258.  
     v. Mills, 28 Ill. 44-2621.  
     v. Norfolk & W. R. Co., 153 N. C. 542-1138.  
     v. Powers, 129 Ga. 74-752.  
     3 R. P.—48
- Harris v. Reed, 21 Idaho 364-1728, 2185, 2186, 2188.  
     v. Riggs (Ind. App.), 112 N. E. 36-875.  
     v. Ryding, 5 Mees. & W. 60-1244.  
     v. Scoville, 85 Mich. 32-940.  
     v. Strodl, 132 N. Y. 392-1066.  
     v. Winsted, 79 Ark. 499-681.  
     v. Wright, 118 N. C. 422-277, 279.  
 Harrison, In re, 3 Aust. 836-633; 202 Pa. St. 331-1836.  
 Harrison v. Augusta Factory, 73 Ga. 447-1321, 1538.  
     v. Battle, 21 N. C. 213-1041, 1070.  
     v. Boyd, 36 Ala. 203-807.  
     v. Cole, 50 Colo. 470-698.  
     v. Des Moines, etc., Co., 91 Iowa 114-1686.  
     v. Digman, 2 Dru. & W. 295-2736.  
     v. Eldridge, 7 N. J. L. 392-2590.  
     v. Foote, 9 Tex. Civ. App. 576-290, 333.  
     v. Foreman, 5 Ves. Jr. 207-493.  
     v. Forth, Finch Pree. Ch. 51-2257.  
     v. Good, L. R. 11 Eq. 338-1121.  
     v. Guerin, 27 N. J. Eq. 219-2510.  
     v. Harrison, 105 Ga. 517-277, 290.  
     v. International Silver Co., 78 Conn. 417-719.  
     v. McReynolds, 183 Mo. 533-705.  
     v. Manson, 95 Va. 593-2721.  
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     v. Morton, 87 Md. 671-2379.

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 v. Pacific R. & Navigation Co., 72 Ore. 553-1010.  
 v. Pinkney, 6 Ont. App. 225-208.  
 v. Ray, 108 N. C. 215-650, 705, 2129.  
 v. Roberts, 6 Fla. 711-2425.  
 v. Simons, 55 Ala. 510-1592.  
 v. Taylor, 111 Ala. 317-718.  
 v. Wyse, 24 Conn. 1-2433, 2440, 2441, 2662.
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 Harrison's Ex'rs v. Payne, 32 Gratt. (Va.) 387-812.  
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 Harrisons v. Harrisons' Adm'x, 2 Gratt. (Va.) 1-375, 376.  
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 Harrold v. Morgan, 66 Ga. 398-2128.  
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 Harrop v. Hirst, L. R. 4 Exch. 3-1135, 1358.  
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 Harshbarger v. Carroll, 163 Ill. 636-551, 1815.  
 Hart v. Anderson, 198 Pa. St. 558-2645.  
     v. Bayliss, 97 Tenn. 72-356.  
     v. Bucher, 182 Pa. St. 604-2681.
- Hart v. Burch, 130 Ill. 426-809, 2692.  
 v. Chalker, 14 Conn. 77-2411.  
 v. Chase, 46 Conn. 207-835, 2662.  
 v. Chesley, 18 N. H. 373-290.  
 v. Chureh, 126 Cal. 471-853.  
 v. Connor, 25 Conn. 331-1335.  
 v. Deering, 222 Mass. 407-1369.  
 v. Emery, 184 Ill. 560-2494.  
 v. Farmers' & Mechanics' Bank, 33 Vt. 252-2789.  
 v. Freeman, 42 Ala. 567-2596.  
 v. Gardner, 74 Miss. 153-551.  
 v. Gardner, 81 Miss. 650-2187, 2259.  
 v. Gregg, 10 Watts (Pa.) 185-672.  
 v. Hayden, 79 Ky. 348-2270.  
 v. Homiller, 20 Pa. 248-321.  
 v. Lake, 273 Ill. 60-306, 716.  
 v. Leonard, 42 N. J. Eq. 416-1361.  
 v. Logan, 49 Mo. 47-751.  
 v. Pratt, 19 Wash. 560-1581, 1584.  
 v. Randolph, 142 Ill. 521-2388, 2389.  
 v. Respess, 89 Ga. 87-2442.  
 v. Ruter, 223 Mass. 207-1450.  
 v. Seymour, 147 Ill. 598-609.  
 v. Town of Red Cedar, 63 Wis. 634-2081.  
 v. Williams, 189 Pa. 31-1969, 1970.  
 v. Windsor, 12 Mees. & W. 68-136.  
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v. Tatham, 2 Abb. Dec. 333-2575.  
v. Vermillion, 141 Cal. 339-2083.
- Hartley's Appeal, 53 Pa. St. 212-1056.
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v. Nettles, 64 Miss. 495-2027.  
v. Six, 155 Ill. App. 202-2487.  
v. Strickler, 82 Va. 225-1831.  
v. Thompson, 104 Md. 389-184.  
v. Tresise, 36 Colo. 146-1038, 1548.  
v. Wells, 257 Ill. 167-1427.
- Hartnett v. Stillwell, 121 Ga. 386-666, 670.
- Harton v. Harton, 7 Term. R. 652-356.  
v. Lyons, 97 Tenn. 180-2286.
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v. Watson, 4 Bing. N. Cas. 178-1494.
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- Hartung v. Witte, 59 Wis. 285-1403, 1415.
- Hartwell v. Camman, 10 N. J. Eq. 128-871.  
v. De Vault, 159 Ill. 325-746.
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v. Ladd, 3 Ore. 353 1733.
- Hartz v. Eddy, 140 Mich. 479-167.  
v. Kales Realty Co., 178 Mich. 560-1439.  
v. Sobel, 136 Ga. 565-1840.
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- Harvard Inv. Co. v. Smith, 66 Wash. 429-1473.
- Harvell v. Lively, 30 Ga. 315-1851.
- Harvey v. Alexander, 1 Rand. (Va.) 219-802.  
v. Aston, 1 Atk. 361-282.  
v. Briggs, 68 Miss. 60-2336.  
v. Brydges, 14 Mees. & W. 437-256.  
v. Copeland, 30 L. R. Ir. 412-240.  
v. Crane, 85 Mich. 316-1334, 1349, 1351.  
v. Edens, 69 Tex. 420-1646.  
v. Gardner, 41 Ohio St. 642-378, 388.  
v. Gunzberg, 148 Pa. St. 294-249.  
v. Illinois Cent. R. Co., 111 Miss. 835-2069.  
v. Kelley, 41 Miss. 49-2754.  
v. McGrew, 44 Tex. 412-173.  
v. Mason City & Fort Dodge R. Co., 129 Iowa 465-1169.  
v. Mutter, 66 W. Va. 208-2265.  
v. Northern Pac. R. Co., 63 Wash. 669-1169, 1174.  
v. Shippe, 78 W. Va. 246-2393.  
v. Weisbaum, 159 Cal. 265 1499.
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v. Lehman, Durr & Co., 72 Ala. 344-2707.
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v. Goodright, 1 Cowp. 87-1807, 1809.  
v. Kirby, 1 Paige (N. Y.) 470-707.  
v. Tompkins, 24 N. J. Law, 425-1122.  
v. Underwood, 28 Mich. 427-2649.  
v. Williams, 161 Mich. 368-893.
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v. Nuss, 97 Kan. 228-1538.
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v. Friend, 196 Mass. 198-1659.  
v. House, 3 Brev. (S. C.) 242-1055.  
v. Wright, 23 N. J. Eq. 389-1303.
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v. McManus, 161 Mich. 372-1158.
- Hassam v. Barrett, 115 Mass. 256-2385.
- Hassard v. Tomkins, 108 Wis. 186-684.
- Hasselbuch v. Mohm-King, 76 N. J. L. 691-1684, 1712.
- Hassell v. Hassell, 129 Ala. 326-2563, 2629.
- Hasselmann v. Allen, 42 Ind. 257-818.  
v. Yandes, Wils. (Ind.) 276-2550.
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v. Kelly, 57 Vt. 293-2296.
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 Hayes' Appeal, 123 Pa. 110-716.  
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 Hays, In re, 181 Fed. 674-754.  
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     v. Pumphrey, 226 Mo. 119-1925.  
     v. Reger, 102 Ind. 524-381, 2785.  
     v. St. Paul M. E. Church, 196 Ill. 633-1426, 1445.  
     v. Sanderson, 7 Bush. (Ky.) 489-842.  
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 Hazel v. Hagan, 47 Mo. 277-1101.  
 Hazlett v. Farthing, 94 Ky. 421-858.  
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     Minn. 319-2502, 2644.  
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     Co., 75 Cal. 426-1138,  
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     Cal. 189-1135.  
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 v. Eason, 17 Q. B. 701-675.  
 v. Gaforth, 34 S. D. 441-2057.  
 v. Galloway, 8 Humph. (Tenn.) 692-2728.  
 v. Henderson, 136 Iowa 564-195, 714.  
 v. Herrod, 10 Sm. & M. (Miss.) 631-2551.  
 v. McGhee, 6 Heisk. (Tenn.) 55-2213.  
 v. Mack, 82 Ky. 379-1622.  
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 v. Tobey, 105 Ill. App. 154-1632.  
 v. Truitt, 95 Ind. 309-2507.  
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 v. Standard Oil Co., 126 Md. 577-1119, 1124.
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 v. Safe Deposit & Trust Co., 101 Md. 60-579.  
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     v. Goodspeed, 20 R. I. 537-1377, 2131.  
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- Hodgkinson v. Ennor, 4 Best. & S. 229-1183.
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     v. Beltzhoover, 71 W. Va. 72-2323, 2324.  
     v. City of Port Huron, 102 Mich. 417-1655.  
     v. Clark, 63 Mich. 175-187, 222.  
     v. Dickson, 47 Wash. 431-1419, 1421.  
     v. Dickson, 65 Wash. 556-1715.  
     v. Dorris, 83 Ore. 625-1380, 1384.  
     v. Flint & P. M. R. Co., 114 Mich. 316-1532.  
     v. Harrington, 28 Mich. 90-1577.  
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     v. Hoffman, 66 Md. 568-1101, 1102.  
     v. Kirby, 136 Cal. 26-1710.  
     v. Kuhn, 57 Miss. 746-1245, 1343, 1366.  
     v. McColgan, 81 Md. 390-2770.  
     v. Mackall, 5 Ohio St. 124-2400.  
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     v. Jacques, 19 N. J. Eq. 123-395, 2386.  
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     v. McMahon, 115 Md. 195-687, 691.  
     v. Page, 22 Mo. 55-1646.  
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- v. Finney, 4 Mass. 566-739, 740, 758.
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- v. Schotfield, 211 Mass. 234-1634.
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- v. Young, 108 Mass. 83-197, 198, 227.
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 v. Wood, 88 Mich. 435-229, 233.  
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 v. Sargent, 15 Gray (Mass.) 97-1537.  
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Ky. 479-1882.
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Mich. 689-2518.  
v. Sherman, 46 N. Y. 370-197,  
198, 1501.
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168 Ill. 618-2670, 2673.
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Society, 206 Ill. 9-2259.
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266-2302.
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418.
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Ill. 409-2458.  
v. Wilshire, 109 Ill. 103-2527.
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Mon. (Ky.) 67-2760.
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1128.
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Eq. 306-957, 958.
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(Tenn.) 392-355.
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540-248.  
v. Fabnestock, 1 Pa. St. 470-  
2223, 2234.  
v. Haden, 82 Va. 588-1068,  
1081, 1083.  
v. Hague, 131 Tenn. 421-2757.  
v. Hood, 110 Mass. 463-795.  
v. Hood, 85 N. Y. 561-441.  
v. Mackinnon, (1909) 1 Ch.  
476-1094.  
v. Maires, 255 Pa. 128-491, 496.  
v. Mercer, 150 N. C. 699-653,  
654, 655.  
v. Oglander, 34 Beav. 513-2309.
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2720.
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210-991.  
v. Joyce, 94 Ky. 450-1253.  
v. Northwest Thresher Co., 91  
Minn. 482-2298.
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v. Burr, 137 Cal. 663-2694.  
v. Cummings, 20 Johns. (N. Y.)  
90-1036, 1544, 1545,  
1547.  
v. Pierce, 2 Hill (N. Y.) 650-  
2191.  
v. Utica & M. Turnpike Road  
Co., 12 Wend. (N. Y.)  
371-337.
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1472.  
v. Frost, 165 Pa. St. 238-210,  
334.  
v. Lee, 42 N. C. 83-841.
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190-1861, 1871.
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986, 990.
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37-1455.  
v. Columbus & W. Ry. Co., 78  
Ala. 213-369.  
v. Cummings, 45 Me. 359-272,  
304, 316.  
v. De Vries, 115 Mich. 231-719,  
2266.  
v. Dora Coal Min. Co., 95 Ala.  
235-1300.  
v. Felgner, 80 Md. 262-357,  
429.  
v. Henry, 31 Minn. 264-2479,  
2668.  
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171 S. W. 27-1447, 1450,

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 Hooton v. Holt, 139 Mass. 54-216, 227.  
 Hoover v. Donally, 3 Hen. & M. (Va.) 316-2174.  
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     v. Harman, 16 Q. B. 751-1751.  
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 Hopkins v. Bryant, 85 Tenn. 520-766.  
     v. Frey, 2 Gill (Md.) 359-749.  
     v. Garrard, 7 B. Mon. (Ky.) 312-2238.  
     v. Grimshaw, 165 U. S. 342-395, 603, 608, 617, 618.  
     v. Hopkins, Cas. t. Talb. 44-553, 554, 563.  
     v. Hopkins, West, 606-505.  
     v. Keazer, 89 Me. 347-489.  
     v. Myall, 2 R. & M. 86-1094.  
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     v. Paxton, 4 Dana (Ky.) 36-2290.  
     v. Ratliff, 115 Ind. 213-140.  
     v. Robinson, 2 Lev. 2-1397.  
 Hopkins v. Sanders, 172 Mich. 227-2451.  
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     v. Herring, 75 N. J. L. 212-1389, 1393.  
     v. Hopper, 151 Ky. 120-2735.  
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 Hoppes v. Cleek, 21 Ark. 585-1696.  
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 2128.  
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 124 N. Y. 273-1538.  
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 458, 2172.  
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     v. Bennett, 135 Ind. 158-2556.  
     v. Broyles (Tenn. Ch.), 62 S.  
     W. 297-1606.  
     v. Clark Hardware Co., 54 Colo.  
     522-906, 926.  
     v. Horn, 2 Sim. & St. 448-  
     2740.  
     v. Indianapolis Nat. Bank, 125  
     Ind. 381-909, 922, 941,  
     2449, 2661.  
     v. Keteltas, 46 N. Y. 605-2380,  
     2388.  
     v. Metzger, 234 Ill. 240-2025.  
     v. Miller, 136 Pa. 640-1409.  
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     2058.  
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 (N. Y.) 73-1268, 1617.  
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 375-1992.  
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 1025, 1027, 1028.  
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 1207.  
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 2451.  
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 970.  
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 381-1067.  
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 3-1710.  
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 366.  
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 2368.  
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 2536, 2596, 2598.  
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 1964.  
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     Co., 12 Abb. N. C. (N. Y.)  
     30-301, 320, 325.  
     v. Sledge, 29 Ala. 478-481, 719,  
     1589.  
     v. Upham, 72 Conn. 29-491.  
     v. Williams, 99 Mich. 423-1319,  
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 1091.  
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 869.  
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 2690, 2704.  
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 v. Dary, 154 Mass. 7-455.  
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 v. Hobson, 53 Me. 451-2342, 2343, 2344, 2345, 2346.
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 v. Britton, 67 N. H. 484-1236.  
 v. Buffalo, 211 N. Y. 241-1148.  
 v. Burns, 279 Ill. 256-2667, 2670.  
 v. Carpenter, 11 Md. 259-1070, 1092, 1093.  
 v. Carusi, McArth. & M. (11 D. C.) 260-1079.  
 v. Carusi, 109 U. S. 725-570, 571.  
 v. City of Buffalo, 211 N. Y. 241-1169, 1173.  
 v. Clark, 72 Vt. 429-2440, 2452, 2608.  
 v. Daniels, 2 N. H. 137-2787.  
 v. Erwin, 221 Mo. 93-2636.  
 v. Fessenden, 14 Allen (Mass.) 124-945.  
 v. Gresham, 27 Ga. 347-2540.  
 v. Handy, 35 N. H. 315-2521.  
 v. Harris, 1 Vern. 190-2363, 2364.  
 v. Heinerschüt, 16 Hun (N. Y.) 177-185.  
 v. Henderson, 142 Ga. 1-2013.  
 v. Huffman, 3 Head (Tenn.) 562-1804.  
 v. Hunter, 115 Ga. 357-1842.  
 v. Illinois Cent. R. Co., 114 Minn. 189-1164.  
 v. Lincoln, 13 Me. 122-879, 1614.  
 v. Massengale, 13 Lea (Tenn.) 577-943.  
 v. Merriam, 5 Cush. (Mass.) 563-216, 224.  
 v. Milwaukee & St. P. Ry. Co., 101 U. S. 837-2704.  
 v. Murphy, 23 Pa. 173-188.  
 v. North, 5 Tex. 290-731, 1645.  
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     v. Carpenter, 49 Wis. 697-2475.  
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     v. Norman, 13 R. I. 488-1158, 1159.  
     v. Stevens, 47 Vt. 262-1251, 1359.
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     v. Folsom, 38 Ore. 184-653.  
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     v. Jones, 91 Tenn. 402-860, 2297.  
     v. King, 1 Mod. 190-1331.  
     v. Knight, 100 N. C. 251-537.  
     v. Lewis, 7 C. & P. 566-1187.  
     v. McCrie, 36 Kan. 644-851, 2580.  
     v. Mellon, 189 Pa. 169-443.  
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     v. Richards, 11 East 641-1681.  
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     v. Schneider, 24 App. Cas. (D. C.) 532-138, 141.  
     v. Thompson, 95 Tenn. 396-795.
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v. Dew, 90 Ala. 178-2125.  
v. Whitehead, 93 Miss. 578-1246, 1343, 1350.
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v. Chamberlain, 228 Pa. 31-575.  
v. Finney, 147 Mass. 616-1064.
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v. Bramhall, 19 N. J. Eq. 563-2509, 2643, 2687.  
v. Holt, 81 Pa. St. 88-140.  
v. Sterrett, 2 Watts (Pa.) 327-1144, 1155.  
v. Taliaferro, 8 Sm. & M. (Miss.) 727-1703.  
v. Varner, 100 Va. 600-754, 755, 815.  
v. Warner, 100 Va. 600-773.
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v. Stowe, 13 N. C. 318-699.
- Hoyleman v. Kanawha & O. R. Co., 33 W. Va. 489-973.
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v. Dimon, 5 Day (Conn.) 479-2125.  
v. Hoyt, 85 N. Y. 142-2738.  
v. Hudson, 27 Wis. 656-1129.  
v. Jaques, 129 Mass. 286-1064, 1065.  
v. Jones, 31 Wis. 389-2265.  
v. Kennedy, 170 Mass. 54-2062.
- Hoyt v. Ketcham, 54 Conn. 60-289, 313.  
v. Lightbody, 98 Minn. 189-695.  
v. McLagan, 87 Iowa 746-1779.  
v. Northup, 256 Ill. 604-1740.  
v. Swar, 53 Ill. 134-2334.  
v. Thompson, 5 N. Y. 320-2290.  
v. Thompson, 19 N. Y. 207-2548.  
v. Zumwalt, 149 Cal. 381-1929.
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v. Bell, 54 Ill. 110-1017, 1546.  
v. Burton, 75 Mo. 65-885.  
v. Cummings, 1 Me. 11-2340.  
v. Ensign, 46 Conn. 576-2491.  
v. Greeley, 84 Me. 340-1764, 1765, 1772.  
v. Hubbard, 97 Mass. 188-302, 304, 305, 306.  
v. Jones, 61 Kan. 722-2779.  
v. McMahon, 117 Ark. 563-405.  
v. Manwell, 60 Vt. 235-2112, 2113.  
v. Norton, 10 Conn. 423-1686, 1690, 1707.  
v. Sage Land, etc., Co., 81 Miss. 616-853.  
v. Shaw, 12 Allen (Mass.) 120-961.  
v. Slaven, 218 Mo. 598-2138.  
v. Stanaford, 30 Ky. L. Rep. 1044-1703, 1705.  
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     v. Blakeslee, 71 N. Y. 63-2643, 2673.  
     v. Broadwell's Adm'rs, 8 Ohio 120-2689.  
     v. East Cambridge Five Cent Sav. Bank, 132 Mass. 447-915, 916.  
     v. Moulson, 53 N. Y. 225-2362, 2428, 2438, 2448.  
     v. Sibley, 50 N. Y. 468-2021.  
     v. Warren, 8 Allen (Mass.) 173-1433.  
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     v. Stark, 124 Wis. 359-1187, 1210, 1211.  
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 v. Blackwood, 1 MacA. & M. (Dist. Col.) 188-2635.  
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 v. Bull, 10 Johns. (N. Y.) 19-569, 575.  
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 v. Davis, 5 Cow. (N. Y.) 130-1488.  
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- Jenkins v. Andover Theological Seminary, 205 Mass. 376-2623, 2682.
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- v. Jones, 9 Q. B. Div. 128-2289.
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- v. Colwell, 66 Mich. 420-921, 923.
- v. Edwards, 11 Exch. 775-135.
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- v. Quinn, 137 N. Y. 223-1702.
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- v. Williams, 115 Mass. 217-1122.
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- v. Kiernan, 35 Ore. 349-1699, 1701, 1706.
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- v. Rickard, 10 Colo. 395-664.
- v. Southern Carbon Co., 73 W. Va. 215-875.
- v. Smith, 29 Ill. 116-440.
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     **v. McCarter**, 94 U. S. 734-2693, 2707, 2708.  
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     **v. Peron**, 94 Mich. 83-2768.  
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**Jewett v. Black**, 60 Neb. 173-457.  
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2176.
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767-1935.
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1773.
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2673.
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(16 Jones & S.) 180-184.
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1059.
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434.
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1094.
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2126.
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- v. Brown, 74 Kan. 346-715,  
716.
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207-1803.
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Ry. Co., 80 Wis. 641-  
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369.
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265-1252.
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1108.
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77 Miss. 15-1823.



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 v. Farlow, 13 Ired. L. (35 N. C.) 84-2123.  
 v. Fitzgeorge, 50 N. J. L. 470-1956.  
 v. Foreman, 40 Ill. App. 456-232, 233.  
 v. Fritz, 44 Pa. St. 449-838.  
 v. Gaylord, 41 Iowa 362-856.  
 v. Georgia L. & T. Co., 72 C. C. A. 639-2266.  
 v. Gibson, 116 Ill. 294-2258.  
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 v. Hahne, 61 N. J. Eq. 438-1338, 1378.  
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 v. Hayard, 74 Neb. 157-2176.  
 v. Hines, 31 Ga. 720-377.  
 v. Hoffman, 53 Mo. 504-899.  
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 v. Hosford, 110 Ind. 572-2651, 2705.  
 v. Irwin, 16 Wash. 652-2271, 2678.
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 v. Jeldness, 85 Ore. 657-1037.  
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 v. Johnson, 18 N. H. 594-959, 961, 988.  
 v. Johnson, 38 N. D. 138-674, 676.  
 v. Johnson, 13 R. I. 467-232, 235.  
 v. Johnson, 24 R. I. 571-1747, 1786.  
 v. Johnson, 2 Hill Eq. (S. C.) 277-993.  
 v. Johnson, 27 S. C. 309-2395, 2719, 2726.  
 v. Johnson, 48 S. C. 408-573.  
 v. Johnson, 92 Tenn. 559-436.  
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 v. Johnson's Adm'r, 23 Mo. 561-793.  
 v. Jordan, 2 Mete. (Mass.) 234-1286.  
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 v. Kinnicutt, 2 Cush. (Mass.) 153-1335, 1338.  
 v. Kirby (Tex. Civ. App.), 193 S. W. 1074-1059.  
 v. Knapp, 146 Mass. 70-1236, 1275, 1285, 1286, 1364, 1387, 1685.  
 v. Leonards, 68 Me. 237-2582.  
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- v. Muzzy, 45 Vt. 419-1511, 1512.
- v. Myer, 168 Ky. 430-2014.
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- v. Nations, 26 Miss. 147-2587.
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- v. Norton, 3 B. Mon. (Ky.) 429-995.
- v. Norway, Winch 37-475.
- v. Nyce's Ex'rs, 17 Ohio 66-802, 1695.
- v. Olberg, 32 S. D. 346-2221.
- v. Oldham, 126 Ala. 309-2023.
- v. Olmstead, 49 Conn. 509-824.
- v. Oppenheim, 12 Abb. Pr. N. S. (N. Y.) 454-203.
- v. Pacific Land Co., 84 Ore. 356-907, 919.
- v. Paulson, 103 Minn. 158-328.
- v. Pelot, 24 S. C. 255-688.
- v. Perley, 2 N. H. 56-745, 824.
- v. Pike, 51 N. Y. 333-2666.
- v. Plume, 77 Ind. 166-739.
- v. Prairie, 91 N. C. 159-366.
- v. Preston, 226 Ill. 447-596, 613, 2308, 2323.
- Johnson v. Rayner, 6 Gray (Mass.) 107-1646, 1647.
- v. Rice, 8 Me. 157-2515.
- v. Richardson, 33 Miss. 462-2297.
- v. Robertson, 156 Iowa 64-1446, 1653, 1655, 1863.
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- v. Thomas, 2 Paige (N. Y.) 377-820, 822.
- v. Thompson, 185 Ala. 666-171.
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- v. Touchet, 37 Law J. Ch. 25-1093.
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 v. Whitcomb, 166 Ky. 673-487.  
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 v. Wilson, 77 Mo. 639-2730.  
 v. Wilson, Willes 248-700.  
 v. Wiseman, 4 Metc. (Ky.) 361-913.  
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 v. Gray, 16 Serg. & R. (Pa.) 361-2364.  
 v. Hargrove, 81 Va. 118-293, 294.  
 v. Hyde, 33 N. J. Eq. 632-1331.  
 v. Hyre, 83 Kan. 38-1140, 1164.  
 v. Jickling, 141 Iowa 444-381, 752.  
 v. Jones, 1 Black (U. S.) 210-2112.  
 v. King, 83 Wis. 8-209, 334.  
 v. Knight, 117 N. C. 122-1083, 1086.  
 v. Los Angeles (Cal.), 168 Pac. 1047-269, 310.  
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 v. Slater, 11 Gratt. (Va.) 321-1728.  
 v. Smith's Adm'r, 70 Ala. 108-803.  
 v. Vandyke, 6 McLean (U. S.) 422-814.  
 v. Wallace, 53 Miss. 333-1734.
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 v. Ainell, 123 Ark. 532-2263.  
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 v. Balsley, 154 N. C. 61-1705, 1715.  
 v. Barnett, 30 Tex. 637-1901.  
 v. Berkshire, 15 Iowa 248-2209.  
 v. Bigstaff, 95 Ky. 395-708, 709, 724.  
 v. Blake, 33 Minn. 362-2477.  
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 v. Bramblet, 2 Ill. 276-278, 297, 298.

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     v. Bush, 4 Harr. (Del.) 1-1755.  
     v. Cable, 114 Pa. 586-628, 629.  
     v. Caird, 153 Wis. 384-1810.  
     v. Caldwell, 97 Pa. 42-443.  
     v. Carter, 15 Mees. & W. 718-301, 303, 306, 308.  
     v. Carter, 73 N. C. 148-845.  
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     v. Chesapeake & O. R. Co., 14 W. Va. 514-279, 296.  
     v. Chiles, 2 Dana (Ky.) 25-1993.  
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     v. Crow, 32 Pa. St. 398-2030, 2035, 2070.  
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     v. Dutch, 3 Neb. (Unof.) 673-2706.  
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     v. Fletcher, 42 Ark. 422-2440.  
     v. Flint, 10 Ad. & Ell. 753-884.  
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     v. Gatliff (Ky.), 113 S. W. 436-1625.  
     v. Gilbert, 135 Ill. 27-823, 859.  
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     v. Grimes, 115 Miss. 874-2240.  
     v. Guaranty & Indemnity Co., 101 U. S. 622-2567.  
     v. Habersham, 107 U. S. 174-2313, 2349.  
     v. Hannovan, 55 Mo. 462-1147.  
     v. Hartley, 2 Whart. (Pa.) 103-1848.  
     v. Hert, 192 Ala. 111-462.  
     v. Higgins, 80 Ky. 409-2498.  
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   v. Jones, 64 Wis. 30-763.  
   v. Kearney, 1 Dru. & W. 134-2121.  
   v. King, 25 Ill. 383-2122.  
   v. Knappen, 63 Vt. 391-523.  
   v. Lamar, 34 Fed. 454-2606, 2668.  
   v. Lapham, 15 Kan. 540-2188, 2745, 2747.  
   v. Llanrwyst Urban Council, (1911) 1 Ch. 393-1144.  
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   v. McKenna, 4 Lea (Term.) 630-2672.  
   v. McLain, 16 Tex. Civ. App. 305-303.  
   v. McNealy, 139 Ala. 379-1636.  
   v. Manley, 58 Mo. 559-808.  
   v. Marks, 47 Cal. 242-2184.  
   v. Miller (Va.), 23 S. E. 35-2164.  
   v. Mills, 10 C. B. (N. S.) 788-240.  
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   v. Morris, 61 Ala. 518-1799.  
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   v. New Orleans & S. R. Co., 70 Ala. 227-916, 917, 943.  
   v. New York, N. H. & H. R. Co., 211 Mass. 521-2086.  
   v. Nixon, 1 Hurl. & C. 48-231.  
   v. Oemler, 110 Ga. 202-1008.
- Jones v. Parker, 163 Mass. 564-158, 167.  
   v. Parker, 51 Wis. 218-741.  
   v. Percival, 5 Pick. (Mass.) 485-2034, 2037.  
   v. Perkins, 43 Okla. 734-2571.  
   v. Perry, 50 N. H. 134-1248.  
   v. Perry's Lessee, 3 Term. R. 88-527.  
   v. Peteron, 178 Iowa 1389-1864.  
   v. Phelps, 2 Barb. Ch. (N. Y.) 440-2560.  
   v. Phillips, 59 Ark. 35-1867, 2086, 2087.  
   v. Port Huron E. & T. Co., 171 Ill. 502-2311, 2314, 2315.  
   v. Porter, 59 Miss. 628-1731.  
   v. Porter, 29 Tex. 456-2661.  
   v. Powell, 6 Johns. Ch. (N. Y.) 194-821.  
   v. Pritchard, (1908) 1 Ch. 630-1350.  
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   v. Reilly, 174 N. Y. 97-192.  
   v. Richardson, 10 Mete. (Mass.) 481-2369.  
   v. Rigby, 41 Minn. 530-152.  
   v. Robinson, 77 Ala. 499-2248, 2249.  
   v. Roe d. Perry's Lessee, 3 Term. R. 88-590.  
   v. Sanders, 138 Cal. 405-1288.  
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   v. Seaboard Airline R. Co., 67 S. C. 181-1174.  
   v. Shears, 4 Adol. & E. 832-232, 247.  
   v. Shibley, 113 Ark. 598-208.  
   v. Shidlin, 45 W. Va. 729-937.  
   v. Smith, 2 Ves. Jr. 372-2653.  
   v. Smith, 64 N. Y. 180-1001.  
   v. Smith, 73 N. Y. 205-1670.  
   v. Smith, 149 N. C. 316-650, 651, 652, 656.  
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   v. Southall, 32 Beav. 31-1081.  
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     v. Towne, 58 N. H. 462-1251.  
     v. Trawick, 31 Ala. 253-2381.  
     v. Turk, 48 N. C. 202-1827.  
     v. Van Bochove, 103 Mich. 98-1377.  
     v. Walkup, 5 Sneed (Tenn.) 135-455, 456.  
     v. Warner, 81 Ill. 343-1697.  
     v. Way, 78 Kan. 535-671.  
     v. Webster, 48 Ala. 109-2370.  
     v. Westcomb, 1 Eq. Cas. Abr. 245-587.  
     v. Whichard, 163 N. C. 241-529, 836, 1622.  
     v. Williams, 11 Mees. & W. 176-1363.  
     v. Williams, 155 N. C. 179-2704, 2705.  
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 Jones' Appeal, 8 Watts & S. (Pa.) 143-417.  
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     v. Cheney, 74 Me. 359-2523, 2525, 2619.  
     v. City of Benwood, 42 W. Va. 312-1164.  
     v. Collins, 107 Ala. 572-2283.  
     v. Ferree, 101 Iowa 440-1000.  
     v. Garner, 101 Ala. 411-400.  
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     v. Katz, 89 Va. 628-192.  
     v. Kirkpatrick, 251 Ill. 116-2342, 2346.  
     v. Kraft, 33 Neb. 844-1421.  
     v. Lang, 22 S. C. 159-2060, 2067.  
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     v. Surghnor, 107 Mo. 520-2017.  
     v. Van Epps, 85 N. Y. 427-759, 801.  
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- v. Mackin, 9 Smedes & M. (Miss.) 387-1741.
- v. Mink, 64 Iowa 84-197, 198.
- v. Templin, 158 Iowa 24-1285.
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v. Campbell, 6 Ariz. 145-1491.  
v. Day, 65 Ill. App. 623-913.
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v. Obenchain, 48 Ore. 352-2611.  
v. Walkinshaw, 141 Cal. 116-1177, 1178.
- Kauffelt v. Bower, 7 Serg. & R. (Pa.) 64-2752.
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v. Peacock, 115 Ill. 212-801.
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v. Lenker, 164 Iowa 689-1167.  
v. Robey, 60 Tex. 308-2219.
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v. Oxley, L. R. 10 Q. B. 360-1291.  
v. Seates, 37 Pa. St. 31-347, 355, 356.  
v. Whittaker, 44 N. Y. 565-2705.
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- Keady v. Martin, 69 Ore. 299-2118.
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v. German-American Sav. Bank, 118 Cal. 336-2732.  
v. Hoffecker, 2 Harr. (Del.) 103-528, 590, 1893.  
v. Kolkschneider, 21 Mo. App. 538-1490.  
v. Rogers, 146 Iowa 559-1584, 1586.
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v. Tanner, 17 Serg. & R. (Pa.) 94-2501.  
v. Vaughan, 50 Mo. 284-1801.  
v. Westchester, 199 Pa. 392-2036.
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v. Craig, 73 Mo. 507-2792, 2793.  
v. Korfhage, 88 Mo. 524-1419, 1423, 1424.  
v. Springer, 146 Ill. 481-203, 1233, 1276, 1277.
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v. Sandford, 1 White & T. Lead. Cas. Eq. 48-418.
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 Keith v. Keith, 80 Mo. 125-2013.  
 v. Miller, 174 Ill. 64-390.  
 v. Reynolds, 3 Greenl. (Me.) 393-1671.  
 v. Ridge, 146 Mo. 90-1266.  
 v. Swan, 11 Mass. 216-2423.  
 v. Trapier, 1 Bailey Eq. (S. C.) 63-801, 820.  
 v. Wolf, 5 Bush (Ky.) 646-2760.  
 Keithley v. Wood, 151 Ill. 566-2386, 2387.  
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 v. Dearman, 65 W. Va. 49-2331.  
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 v. Jenness, 50 Me. 455-402, 2128, 2479, 2643, 2668, 2673.  
 v. Jones, 110 Me. 360-1877.  
 v. Leachman, 2 Idaho 1112-2378.  
 v. Ohio Oil Co., 57 Ohio St. 317-873.  
 v. Rummerfield, 117 Wis. 620-900.  
 v. Todd, 1 W. Va. 197-893.  
 Kelley's Appeal, 108 Pa. 29-1624.  
 Kellogg v. Ames, 41 N. Y. 259-2643.  
 v. Dickinson, 18 Vt. 266-1252, 2681.  
 v. Hale, 108 Ill. 164-355, 377.  
 v. Ingersow, 2 Mass. 101-1686.  
 v. Lowe, 38 Wash. 293-203.  
 v. Malin, 50 Mo. 496-1681, 1686, 1687, 1690, 1711, 1712.  
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     v. Corr, 209 N. Y. 486-1922.  
 Kelly v. Blakeney (Tex. Civ. App.), 172 S. W. 770-2237.  
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     v. Duff, 61 N. H. 435-2671.  
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     v. Kansas City Southern Ry. Co., 92 Ark. 465-1170.  
     v. Kelly, 54 Mich. 30-2670, 2748, 2751.  
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     v. McGrath, 70 Ala. 75-762, 765, 802.  
     v. Miller, 249 Pa. 314-137, 201.  
     v. Nichols, 17 R. I. 306-372.  
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     v. Searing, 4 Abb. Pr. (N. Y.) 354-2687.  
     v. Shimer, 152 Ind. 290 1815.  
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 Kelsay v. Farmers' & Traders' Bank, 166 Mo. 157-2716, 2725.  
 Kelsey v. Bertram, 63 Ore. 563-1209.  
     v. Dodd, 52 L. J. Ch. 34 1452.  
     v. Norris, 53 Colo. 306-2204.  
     v. Remer, 43 Conn. 129-1683, 1684.  
     v. Welch, 8 S. D. 255-2703.  
 Kelsey's Appeal, 113 Pa. 119-688.  
 Kelso v. Lorillard, 85 N. Y. 177-493, 528.  
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 Kelso's Appeal, 102 Pa. St. 7-796.  
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 Kendall v. Baker, 11 C. B. 482-1481.  
     v. Carland, 5 Cush. (Mass.) 74-1510.  
     v. Crenshaw, 116 Ark. 427-796.  
     v. Green, 67 N. H. 557-1652.  
     v. Hardy, 208 Mass. 20-1351.  
     v. Hathaway, 67 Vt. 122-908 916.  
     v. Honey, 5 T. B. Mon. (Ky.) 282-820.  
     v. Kendall, 42 Iowa 92-825.  
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     v. Tracy, 64 Vt. 522-2516, 2517, 2681.
- Kendall Smith Co. v. Lancaster Co., 84 Neb. 654-2081, 2091, 2092.
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     v. Colyar, 143 Ala. 597-2183, 2266.  
     v. Eggleston, 56 Iowa 128-2752, 2761.  
     v. Latham, 25 Fla. 819-1970.  
     v. Ray, 173 Mass. 305-387.
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- Kenley v. Hudelson, 99 Ill. 493-2295, 2305.
- Kenna v. Kirkwood, 50 Mich. 544-2663.
- Kennard v. Kennard, 63 N. H. 303-491, 494.
- Kennedy, In re, 159 Mich. 548-1818.
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     v. Blodgett, 19 S. C. 591-424.  
     v. Burnap, 120 Cal. 488-1276.  
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     v. Dunn, 58 Cal. 339-2721, 2725.
- Kennedy v. Indianapolis, 103 U. S. 599-2165.  
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     v. Kingston, 2 Jac. & W. 431-1100.  
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     v. Lyell, 15 Q. B. Div. 491-2289.  
     v. Maness, 138 N. C. 35-1668.  
     v. Mayor & City Council of Cumberland, 65 Md. 514-1876, 1879.  
     v. Miles Water Supply Co., 173 Mich. 474-2036, 2074.  
     v. Northup, 15 Ill. 148-2211.  
     v. Owen, 136 Mass. 199-176, 1402, 1403.  
     v. Pittsburg & L. E. R. Co., 216 Pa. 575-1059.  
     v. Reynolds, 27 Ala. 364-1957.  
     v. Ten Broeck, 11 Bush. (Ky.) 241-1066.  
     v. Winn, 80 Ala. 165-1794.
- Kennedy's Appeal, 60 Pa. 511-630.
- Kenner v. American Contract Co., 9 Bush. (Ky.) 202-304, 305, 306, 307, 315.
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     v. Bailey, 181 Iowa 489-2640, 2670.  
     v. Brown, 59 N. H. 236-904.  
     v. Ceel (Tex. Civ. App.), 25 S. W. 715-1762.  
     v. Church of St. Michaels, 136 N. Y. 10-722.  
     v. Dobyns, 112 Va. 586-1209, 2050, 2054.  
     v. Gerhard, 12 R. I. 92-2752, 2761.  
     v. Judkins, 53 Me. 162-1335.  
     v. Lix, 47 Mo. App. 567-1248.  
     v. Mahaffey, 10 Ohio St. 204-1839.  
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     v. Taylor, 64 N. H. 489-1660.  
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 Kenyon, In re, 17 R. I. 149-525.  
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     v. Hookway, 17 N. Y. Misc. 452-1318.  
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     v. See, 94 N. Y. 563-527, 590.  
     v. Young, 48 Neb. 890-174.  
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v. Kern, 154 Ind. 29-1843.
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v. Manss, 53 Ohio St. 118-2549.
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v. Swope, 2 Watts (Pa.) 75-2186.
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v. Day, 14 Pa. 112-464, 2221, 2236.  
v. Freeman, 33 Miss. 292-1577.  
v. Gilmore, 6 Watts (Pa.) 405-2388.  
v. Hill, 27 W. Va. 576-879.  
v. Kingsbury, 39 Mich. 150-927, 935, 939, 2232.  
v. Merchant's Exch. Co., 3 Edw. Ch. (N. Y.) 315-214.  
v. Nicholas, 88 Ala. 346-944.  
v. O'Keefe, 138 Cal. 415-308.  
v. Russell, 69 Ill. 666-1723.  
v. Shaw, 13 Johns. (N. Y.) 236-1703.  
v. Verner, 66 Pa. St. 326-514, 629.
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v. Simpson, 46 Wash. 313-696.  
v. Supplee, 1 Rawle (Pa.) 131-212.
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v. Shaw, 28 Ohio St. 503-753.  
v. St. Louis, 101 U. S. 306-2743, 2747.  
v. Waisworth, 5 Wis. 95-645, 650, 656.
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 Keyser v. Evans, 30 Pa. St. 509-2016.  
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 Kieffer v. Imhoff, 26 Pa. St. 438-1289, 1371.  
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 Kierulff v. Harlan, 150 Iowa 671-786.  
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 Kille v. Ege, 79 Pa. St. 15-1752.  
 Killebrew v. Hines, 104 N. C. 182-2433, 2435.  
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- v. Smith, 77 N. Y. 226-2486.
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- Kimball v. Adams, 52 Wis. 554-910.
- v. Bible Society, 65 N. H. 139-1083.
- v. Blaisdell, 5 N. H. 533-2127.
- v. Bryant, 25 Minn. 496-1707, 1709, 1721.
- v. Chicago, 253 Ill. 105-1761, 1869, 1874, 1879.
- v. Cochecho R. Co., 27 N. H. 448-1297.
- v. Ellison, 128 Mass. 41-1808.
- v. Houston Oil Co., 100 Tex. 336-2261, 2264, 2265.
- v. Hutchins, 3 Conn. 450-2285.
- v. Johnson, 14 Wis. 674-1731.
- v. Kenosha, 4 Wis. 321-1317.
- v. Lockwood, 6 R. I. 138-151, 2446, 2447.
- v. McKee, 149 Cal. 135-1653.
- v. McPherson, 46 Cal. 105-1008.
- v. Masters, Wardens & Members of Grand Lodge of Masons in Massachusetts, 131 Mass. 59-196, 202.
- v. Pike, 18 N. H. 419-151.
- v. Rowland, 6 Gray (Mass.) 224-294.
- v. Sattley, 55 Vt. 285-876, 883, 2368.
- v. Schoff, 40 N. H. 190-1672.
- v. Second Congregational Parish in Rowley, 24 Pick. (Mass.) 347-1251.
- Kimball v. Semple, 25 Cal. 440-2122.
- v. Stormer, 65 Cal. 116-1990.
- v. Story, 108 Mass. 382-1832.
- v. Walker, 30 Ill. 482-1626.
- Kimberlin v. Templeton, 55 Ind. App. 155-457, 1698.
- Kimberly's Estate, 249 Pa. 469-437.
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- Kistler v. McBride, 65 N. J. L. 553-1476.
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- v. Mudgett, 37 Mich. 81-2671.
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     v. Harris, 5 R. I. 402-676.  
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     v. Lawton, 18 Ga. 476-2610.  
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v. Tramel, 71 Iowa 132-2239, 2249, 2563.
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v. Thele, 104 Minn. 267-2669.
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v. Friz, 128 Wis. 428-2737.
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v. Everett, 99 N. C. 30-1635.
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 Krueger v. Ferrant, 29 Minn. 385-141, 148.  
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 Krupke v. Stockard, 103 Minn. 349-1160.  
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 Kruse v. Conklin, 82 Kan. 358-2265, 2266.  
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 Ladd v. Byrd, 113 N. C. 466-2012.  
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 Laing v. Ontario Loan & Savings Co., 46 U. C. Q. B. 114-2434.  
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 Lainson v. Lainson, 5 De G., M. & G. 754-521.  
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- v. Gray, 30 Iowa 415-781.
- v. Hancock, 38 Fla. 53-2264, 2266.
- v. Page, 63 N. H. 318-856, 857.
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- v. Lakin, 2 Allen (Mass.) 45-794.
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- v. Manning, 171 Ill. 612-1210, 1219, 2042.
- Lamberson v. Bailey, 158 Wis. 105-2665, 2668.
- v. Bashou, 167 Cal. 387-2392.
- Lambert v. Alcorn, 144 Ill. 213-1129, 1172.
- v. Estes, 99 Mo. 604-1702, 1704.
- v. Kinney, 74 N. C. 348-851.
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2660.  
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v. Murray, 52 Colo. 156-1669.  
v. Robinson, 162 Mass. 34-1216.  
v. Smith, 9 Ore. 185-1576, 1589.  
v. Thwaites, L. R. 2 Eq. 151-  
1099, 1100.
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(N. Y.) 336-2757.  
v. Youmans, 84 Minn. 109  
2002.
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2076.
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251-1451.
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501-1926.
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2483, 2489, 2499, 2756.
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Co. v. Belden, 90 Vt. 535-1632,  
2216, 2255, 2413.
- Lamont v. Cheshire, 65 N. Y. 30-  
2267, 2268.
- Lamott v. Ewers, 106 Ind. 310-1348.
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546-1170.
- Lampert v. Haydel, 96 Mo. 439-  
2320, 2321.
- Lampet's Case, 10 Co. Rep. 486-426,  
585, 589.
- Lampkin v. First Nat. Bank, 96 Ga.  
487-2560.
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1274, 1279, 1286.  
v. Van Alstyne, 94 Wis. 417-  
1940.
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1016.  
v. Nudd, 29 N. H. 299-2532.  
v. Pike, 28 Fed. 30-2134.  
v. State, 52 Minn. 181-1018,  
1019, 1021, 1157.
- Lamson v. Clarkson, 113 Mass. 348-  
195.  
v. Drake, 105 Mass. 564-2646.
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664-1076.  
v. Mason, 75 N. C. 455-154,  
158, 186.
- Lancaster v. Amsterdam Improve-  
ment Co., 140 N. Y. 576-  
2348, 2349.  
v. Connecticut Mut. Life Ins.  
Co., 92 Mo. 460-366.  
v. Dolan, 1 Rawle (Pa.) 231-  
1065, 2285, 2286.  
v. Flowers, 198 Pa. 614-283.  
v. Flowers, 208 Pa. 199-676.  
v. Lancaster, 187 Ill. 540-1833.
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10 Pa. St. 398-727, 844, 845, 2779.
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Jones, 75 N. H. 172-1147.
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v. Tainter, 137 N. C. 249-1730.
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v. Land, 172 Ky. 145-1621,  
1622.  
v. Ship, 98 Va. 284-778.  
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Hotel Co., 89 Tex. 332-2772.
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73 N. J. Eq. 524-2442.  
v. Shoemaker, 257 Pa. 213-  
2570.
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2482, 2666.
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23-1405, 1429, 1455, 1456, 1457.
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953, 979.  
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630-2080.
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1632.
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1774, 1779.
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    227, 1956, 1971.
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132 Mich. 651-250.
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181.
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    1585.
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Conn. 685-1029.
- v. Copley, 1 Root (Conn.) 68-  
    2024.
- v. Courtney, 1 Heisk (Tenn.)  
    331-751.
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- v. Davis, 14 Allen (Mass.) 225-  
    2553.
- v. Debenham, 11 Hare 188-  
    1076.
- v. Erskine, 13 Ill. 501-2702.
- v. Ewing, 31 Mo. 75-379, 383.
- v. Fury, 31 Ohio St. 574-1704,  
    1715, 1716, 1717.
- v. Harbor Commissioners, 70  
    Conn. 685-1025, 1026.
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    1850.
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    213-2462.
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    213, 894, 2436, 2447.
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    1085.
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2249.
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304-2367.
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751-1912.
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N. Y. 129-1007.
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    1010.
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- v. Pulliam, 162 Ala. 142-2233, 2266.
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- Larisey v. Larisey, 93 S. C. 450-399, 1788.
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 Larson v. Anderson, 74 Neb. 361-2022, 2023.  
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 Larwell v. Stevens, 12 Fed. 559-1929.  
 Lasala v. Holbrook, 4 Paige (N. Y.) 169-1192, 1243, 2640.  
 La Salle Varnish Co. v. Glos, 254 Ill. 326-1661.  
 Laselle v. Barnett, 1 Blackf. (Ind.) 150-2562.  
 Lash v. Ames, 171 Mass. 487-226, 228.  
     v. Lash, 209 Ill. 595-451.  
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 Lasley v. Blakeman, 4 B. Mon. (Ky.) 539-1061.  
     v. Stout, 90 Kan. 712-2206, 2209.  
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 Latham v. Atwood, Cro. Car. 515-877, 890.  
 Latham v. Illinois Cent. R. Co., 253 Ill. 93-269, 319.  
     v. Los Angeles, 87 Cal. 514-1865.  
     v. McLean, 64 Ga. 32-751.  
     v. Roanoke R. & L. Co., 139 N. C. 9-986, 987.  
 Lathrop v. Atwood, 21 Conn. 117-2679.  
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     v. Elsner, 93 Mich. 599-1225, 1230, 1231, 1268.  
     v. Merrill, 207 Mass. 6-2320.  
     v. Nelson, 4 Dill. 194-2692.  
     v. Singer, 39 Barb. (N. Y.) 396-2301.  
     v. Standard Oil Co., 83 Ga. 307-1515.  
     v. Tracy, 24 Colo. 382-2725.  
 Latimer v. Latimer, 174 Ill. 418-1760.  
     v. Latimer, 38 S. C. 379-2501.  
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     v. Waddell, 119 N. C. 370-2311, 2312.  
 Latshaw's Appeal, 122 Pa. 142-717.  
 Latta v. Brown, 96 Tenn. 343-523.  
     v. Catawba Elec. & Power Co., 146 N. C. 285-1275, 1287, 1290, 1674.  
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     v. Weiss, 131 Mo. 230-1471.  
 Lattimer v. Livermore, 72 N. Y. 174-1233, 1454.  
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- Launstein v. Launstein, 150 Mich. 524-1163, 1168.
- Lauricella v. Lauricella, 161 Cal. 61-408.
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- Lavenson v. Standard Soap Co., 80 Cal. 245-906, 2460, 2461, 2462.
- Lavery v. Arnold, 36 Ore. 84-1327, 2041.
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     v. Law, 83 Ala. 432-1840.  
     v. Long, 41 Ind. 586-768, 2334, 2335.  
     v. Spence, 5 Idaho 244-2621.
- Lawes v. Bennett, 1 Cox 167-464.
- Lawler v. Byrne, 252 Ill. 194-651, 732.
- Lawley, In re, (1902) 2 Ch. 673-1107.
- Lawlor v. Holohan, 70 Conn. 87-566, 568.
- Lawrence v. Brown, 5 N. Y. 394-797, 823.  
     v. Burroll, 17 Abb. N. C. (N. Y.) 312-204, 1504.  
     v. Combs, 37 N. H. 331-1249.  
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 v. Thomas, 7 Car. & P. 327-970.  
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- v. Leavitt, 47 N. H. 329-216, 228, 229.
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- v. Miller, 11 Allen (Mass.) 37-2235.
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     v. Stone, 1 Exch. 674-579.  
     v. Stone, 5 Gill & J. (Md.) 1-  
     2653, 2654, 2780.  
     v. Summers, 2 Ore. 260-458,  
     1562.  
     v. Wrixon, 37 Wash. 47-2781.  
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     Cal. 593-684.  
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     Ark. 462-1754.  
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     251, 690.

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 v. Gollner, 129 N. Y. 227-1427, 1432.  
 v. Gorman, 5 Pa. St. 164-1903.  
 v. Hamilton, 26 Colo. 263-2428, 2728.  
 v. Hawkins, 23 Wall. (U. S.) 119, 418, 2003, 2010, 2011.  
 v. Henderson, 22 Ore. 548-2757.  
 v. Herrera, 10 Ariz. 74-1728.  
 v. Hinman, 56 Conn. 55-2193, 2198, 2202, 2611, 2645, 2669.  
 v. Hughes, 12 Colo. 208-294.  
 v. James, 8 Humph. (Tenn.) 537-810.  
 v. John L. Roper L. Co., 113 N. C. 55-2106.  
 v. Johns, 24 Cal. 98-657.  
 v. Jones, 1 Pa. St. 336-1526.  
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 v. Kirk, 28 Kan. 497-2539, 2637.  
 v. Lewis, 74 Conn. 630-296, 307.  
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 v. Lewis, 5 Rich. L. (S. C.) 12-1682, 1699.  
 v. Llewellyn, Turn. & R. 104-1085.  
 v. McGee, 1 H. K. Marsh. (Ky.) 199-1593.  
 v. McGrath, 191 Ill. 401-1734.
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 v. Payn, 4 Wend. (N. Y.) 423-206.  
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 v. Payne, 8 Cow. (N. Y.) 71-1643, 1644.  
 v. Phillips, 17 Ind. 408-2255, 2258.  
 v. Pingree Nat. Bank, 47 Utah 35-864.  
 v. Portland, 25 Ore. 133-1865, 1867.  
 v. Rees, 3 Kay & J. 132-2286.  
 v. Ridge, Cro. Eliz. 863-1718.  
 v. Rosler, 16 W. Va. 333-940.  
 v. Ross, 95 Tex. 358-1709, 1717.  
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 v. Schwenn, 93 Mo. 26-2717.  
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 v. Smith, 9 N. Y. 502-463, 767, 772, 784, 2693, 2708.  
 v. Starke, 10 Sm. & M. (Miss.) 120-2623, 2629, 2679.  
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 Ley v. Peter, 3 Hurl. & N. 101-222, 223.  
 Leyden v. Lawrence, 79 N. J. Eq. 113-2458.  
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 Liddy v. Kennedy, L. R. 5 H. L. 134-209, 334.  
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 v. Garvin, 31 S. C. 259-2418.  
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 v. Pleasants, 4 Ired. Eq. (N. C.) 39-450, 451, 1835.  
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 v. Darden, 5 Fla. 51-1051, 1070, 1094.  
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 v. Patton, 10 W. Va. 187-2777, 2778.  
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 v. Ray, 9 Wall. (U. S.) 241-1223, 1369.  
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 v. Hart, 25 Pa. St. 193-151, 196, 1473, 1483, 1486, 1500.

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     v. McClellan, 72 Ala. 151-1924.
- Lipsky v. Heller, 199 Mass. 310-1269, 1277, 1314, 1337, 1353, 1608, 1616.
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     v. Cudworth, 15 Pick. (Mass.) 23-727.  
     v. Ferguson, 141 Mass. 97-1660.  
     v. Sewell, 97 Iowa 247-1940, 1961, 1962.  
     v. White, 7 N. Y. 438-417.
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- Lithograph Bldg. Co. v. Watt, 96 Ohio 74-234.
- Littaner v. Houck, 92 Mich. 162-2220.
- Littell v. Grady, 38 Ark. 584-2724, 2728.
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     v. Birdwell, 21 Tex. 597-286.  
     v. Bishop, 9 B. Mon. (Ky.) 210-2290.  
     v. Downing, 37 N. H. 355-1927.  
     v. Dwinell, 57 Vt. 301-793.  
     v. Eaton, 267 Ill. 623-1759, 1792.  
     v. Gibb, 57 Wash. 92-1386.  
     v. Giles, 25 Neb. 313-576.  
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     v. Lathrop, 5 Me. 360-1003.  
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- Little Rock Ice Co. v. Consumers' Ice Co., 114 Ark. 532-136, 140.
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 Littleton v. Addington, 59 Mo. 275-1072, 1101.  
     v. Green, 130 Ga. 692-1678.  
     v. Littleton, 18 N. C. 327-762, 763, 767.  
 Lively v. Paschal, 35 Ga. 218-778.  
 Livermore v. Aldrich, 5 Cush. (Mass.) 431-399.  
     v. Boutelle, 11 Gray (Mass.) 217-2465.  
     v. Maxwell, 87 Iowa 705-2638.  
 Liverpool Wharf v. Prescott, 7 Allen (Mass.) 494-998, 1003.  
 Livezey v. Schmidt, 96 Ky. 441-1175.  
 Livingston v. Adams, 8 Cow. (N. Y.) 175-1185.  
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     v. Ketchum, 1 Barb. (N. Y.) 592-1399.  
     v. Livingston, 4 Johns. Ch. (N. Y.) 287-1513.  
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     v. McDonald, 21 Iowa 160-1164.  
     v. Mildrum, 19 N. Y. 440-2692.  
     v. New York, 8 Wend. (N. Y.) 85-1315, 1323.  
     v. Pendergast, 34 N. H. 544-2023, 2025.  
     v. Reynolds, 26 Wend. (N. Y.) 115-950.  
     v. Stickles, 8 Paige (N. Y.) 398-309.  
     v. Tanner, 14 N. Y. (4 Kern.) 64-241, 255.  
     v. Ten Broeck, 16 Johns. (N. Y.) 14-1400.  
     v. Thompson, 4 Johns. Ch. (N. Y.) 415-309.  
 Livingstone v. Murphy, 187 Mass. 315-2257, 2580.  
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 Lloyd v. Attwood, 3 De Gex & J. 614-2749.  
     v. Carew, Show. Carl. Cas. 137-599.  
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     v. Conover, 25 N. J. L. 47-706, 759.  
     v. Cozens, 2 Ashm. (Pa.) 131-172.  
     v. Fritz, 235 Pa. St. 538-1094.  
     v. Hart, 2 Pa. 473-455.  
     v. Lowe (Colo.), 165 Pac. 609-2482, 2486.  
     v. Lynch, 28 Pa. 419-2265, 2266.  
     v. Oates, 143 Ala. 231-1616.  
     v. Passingham, 6 Barn. & C. 305-358, 360.  
     v. Rawl, 63 S. C. 219-1929.  
     v. Sandusky, 203 Ill. 621-879, 1627, 1707.  
     v. Spillet, 2 Atk. 150-393, 395, 397, 398.  
     v. Tench, 2 Ves. Sr. 212-1897, 1902.  
 Lobdell v. Hayes, 4 Allen (Mass.) 187-751.  
 Loch v. Fulford, 52 Ill. 166-2506.  
 Locke v. Caldwell, 91 Ill. 417-2656, 2681.  
     v. Farmers' Loan & Trust Co., 140 N. Y. 135-375.  
     v. Hale, 165 Mass. 20-1686.  
     v. Homer, 131 Mass. 93-2488, 2500.  
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     1221.  
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     631.  
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     2395, 2397.  
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     1831.  
     v. Mace, 109 Mo. 162-606, 614.  
 Lockwood v. Bassett, 49 Mich. 546-  
     1600.  
     v. Lockwood, 22 Conn. 425-  
     234, 238.  
     v. Lockwood, 124 Mich. 627-  
     327.  
     v. Marsh, 3 Nev. 138-2670.  
     v. Mildeberger, 159 N. Y. 181-  
     1086.  
     v. New York & H. R. R. Co.,  
     37 Conn. 387-2108.  
     v. Noble, 113 Mich. 418-2542,  
     2645.  
     v. Stadley, 1 Del. Ch. 298-1072.  
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     1680, 1682.  
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     297-1142, 2052, 2057.  
 Lockyer v. Savage, 2 Strange 947-  
     2314.  
 Loddington v. Kime, 1 Salk. 224-  
     506, 510, 511.  
 Lodge v. Lee, 6 Cranch (U. S.) 237-  
     1671.  
     v. Martin, 31 N. Y. App. Div.  
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     1720.  
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     tion, 64 Ill. 479-460.  
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- v. Cummings, 156 Ala. 577-1001.
- v. Dietz, 191 Ill. 161-2487.
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- v. Dufur, 58 Ore. 162-2640.
- v. Fitzsimmons, 1 Watts & S. (Pa.) 530-139, 970, 1481.
- v. Fuller, 21 Wis. 121-1572.
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- v. Gieret, 57 Minn. 278-1505.
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- v. Gracher, 64 N. C. 31-845, 847.
- v. Grant, 163 Ala. 507-673.
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- v. Little, 119 Ill. 600-2722.
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- v. Mellet, 94 Iowa 548-2649.
- v. Michler, 133 Tenn. 51-1822.
- v. Moler, 5 Ohio St. 272-1690, 1691.
- v. Moore, 19 Tex. Civ. App. 363-273.
- v. Morrison, 251 Ill. 143-2020.
- v. Rankin, Sugden, Powers, 899-1104.
- v. Richards, 170 Mass. 120-2439, 2471, 2648, 2661, 2663.
- v. Ryan, 166 Cal. 442-1787.
- v. Scott, 24 App. Cas. (D. C.) 1-402.
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- v. Longfellow, 61 Me. 590-187, 188, 252.
- v. McGregor, 61 Minn. 494-2521.
- Longhead v. Armstrong, 84 N. J. Eq. 49-2218.
- v. Phelps, 2 W. Bl. 704-645.
- Longino v. Ball-Warren Commission Co., 84 Ark. 521-2660, 2663.
- v. Webster (Tex. Civ. App.), 88 S. W. 445-1675.
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- Longton v. Stedman, 182 Mich. 405-1360.
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- v. Sedevie, 165 Mo. 221-1868.
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- Loomis v. Bedel, 11 N. H. 74-1702.
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- v. Cobb (Tex. Civ. App.), 139 S. W. 305-2218, 2212.
- v. Collins, 272 Ill. 221-1443, 1451.
- v. Connecticut Ry. & Lighting Co., 78 Conn. 156-1865.
- v. Gerson, 62 Ill. 11-2301.
- v. G. F. Henklein & Bro., 91 Conn. 116-302, 337.
- v. Jackson, 19 Johns. (N. Y.) 449-1668.
- v. Knox, 60 Conn. 313-2646, 2648, 2650.
- v. Loomis, 178 Mich. 221-1786.
- v. McClintock, 10 Watts (Pa.) 274-1087.
- v. O'Neal, 73 Mich. 582-899.
- v. Pingree, 43 Me. 299-678, 1762.
- v. Riley, 21 Ill. 307-723.
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     1249.  
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     Cas. 544-1011.  
 Lord Paget's Case, 1 Leon. 195-  
     519.  
 Lord Say and Seal v. Jones, 3  
     Brown, Parl. Cas. 113-542.  
 Lord Stafford's Case, 8 Co. Rep.  
     74-501.  
 Lord's Estate, In re, 106 Me. 51-  
     1838.  
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     614-1422.  
 Lorillard v. Coster, 5 Paige (N. Y.)  
     172-440.  
 Loring v. Arnold, 15 R. I. 428-490,  
     527, 528.  
     v. Bacon, 4 Mass. 575-945.  
     v. Blake, 98 Mass. 253-592,  
     593, 597, 602, 1091.  
     v. Carnes, 148 Mass. 223-524.  
     v. Cooke, 3 Pick. (Mass.) 48-  
     2582.  
     v. Eliot, 16 Gray (Mass.) 568-  
     395, 471, 537, 542.  
     v. Harmon, 84 Mo. 123-192,  
     193.  
     v. Hildreth, 170 Mass. 328-  
     376, 386.  
     v. Norton, 8 Me. 61-1654.  
     v. Otis, 7 Gray (Mass.) 563-  
     1315.  
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     Angeles, 103 Cal. 461-1129.  
 Los Angeles Terminal Land Co. v.  
     Muir, 136 Cal. 36-1410, 1426,  
     1439, 1457.
- Los Angeles Univ. v. Swarth, 107  
     Fed. 798-1441.  
 Losch v. Pickett, 36 Kan. 216-308.  
 Losee v. Buchanan, 51 N. Y. 476-  
     1184.  
 Loser v. Plainfield Sav. Bank, 149  
     Iowa 672-2181.  
 Losey v. Simpson, 11 N. J. Eq. 246-  
     2222, 2543.  
     v. Stanley, 147 N. Y. 560-427.  
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     819, 1592.  
     v. Thayer, 138 Mass. 466-978.  
 Loubat v. Kipp, 9 Fla. 60-1768.  
     v. Nourse, 5 Fla. 350-579, 759.  
 Loud v. Lane, 8 Mete. (Mass.) 517-  
     2646.  
     v. Loud, 4 Bush (Ky.) 453-  
     778.  
     v. Prendergast, 206 Mass. 122-  
     1452, 1455.  
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     Land Co., 64 N. J. L. 405-2483,  
     2491.  
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     1662.  
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     250-2602.  
 Loughborough's Ex'rs v. Lough-  
     borough, 14 B. Mon. (Ky.) 441-  
     446.  
 Loughram v. Gorman, 256 Ill. 46-  
     2134.  
     v. Ross, 45 N. Y. 792-935, 936,  
     937.  
 Loughridge v. Bowland, 52 Miss.  
     546-2215, 2217, 2235.  
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     Miss. 485-2755.  
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     650.  
     v. Mutual Life Ins. Co., 147  
     Ky. 141-1873.  
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     156-1994.

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     v. Conn, 166 Ky. 327-1147.  
     v. Cornelius, 165 Ky. 132-2048.  
     v. Covington, 2 Bush (Ky.) 526-291, 1377, 1381.  
     v. Hames, 135 Ga. 67-2089.  
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     v. Mossman, 90 Tenn. 157-1235, 2039.  
     v. Philyaw, 88 Ala. 264-1959, 1972.  
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 Lounsberry v. Norton, 59 Conn. 170-2393, 2655.  
     v. Purdy, 16 Barb. (N. Y.) 376-401.  
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     v. Johnston, 34 N. C. 355-1852.  
     v. Law, 57 Miss. 596-257, 2794.  
     v. Lindstedt, 76 Ore. 66-477.  
     v. Morrill, 19 Ore. 545-995.  
     v. Peers, 4 Burrow 2225-284.  
     v. Robertson, 7 Tex. 6-657.  
     v. Sierra Nevada Lake Water & Min. Co., 32 Cal. 639-1801, 2743, 2745, 2746.  
     v. Turner, 78 S. C. 513-1960.  
     v. Walker, 59 Ore. 95-559.  
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- v. Burron, 3 P. Wms. 262-600.
- v. Elwell, 121 Mass. 309-254, 256.
- v. Fox, 56 Iowa 221-2640.
- v. Graff, 80 Ill. 360-400.
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- v. Schaffer, 24 Ore. 239-1972.
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- Lowe v. Butler, 129 Ala. 531-457.
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- v. Miller, 3 Gratt. (Va.) 205-899.
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 v. Mason, 174 Ill. 505-1743.
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 v. La Motte Lead Co., 54 Mo. 426-1727.  
 v. Speaks, 112 N. C. 608-2728.  
 v. Turner, 5 J. J. Marsh. (Ky.) 104-198.
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- Lutz v. Billick, 172 Iowa 543-662.  
 v. Hoyle, 167 N. C. 632-378, 2393.
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- Luxford v. Cheeke, 3 Lev. 125-497.
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 v. State, 61 Neb. 309-2084.
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- Lyford v. City of Laconia, 75 N. H. 220-264, 337.
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 v. Richards, 5 Serg. & R. (Pa.) 332-506.  
 v. Russell, 1 Barn. & Adol. 394-934.
- Lyles v. Murphy, 88 Tex. 75-188.
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 v. Lyman, 32 Vt. 79-2507.
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 v. Cade, 41 Wash. 216-2375.  
 v. Cox, 23 Pa. 265-1974.  
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 v. Hancock, 14 S. C. 66-2639, 2680.  
 v. Herrig, 32 Mont. 267-402, 403.  
 v. Johnson, 171 N. C. 611-1790.  
 v. Livingstone, 6 N. Y. 422-1570, 1604, 1731.



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     v. Sauer, 16 N. Y. Misc. 1-969.  
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 Lynn's Appeal, 31 Pa. 44-956, 966.  
 Lynnfield v. Peabody, 219 Mass. 322-1158.  
 Lyon v. Alley, 130 U. S. 177-2791, 2792.  
     v. Cunningham, 136 Mass. 532-234, 246.  
     v. Fishmongers' Co., 1 App. Cas. 662-1022, 1023.  
     v. Gombert, 63 Neb. 630-2216, 2241.  
     v. Gormley, 53 Pa. St. 261-867.
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     v. Mitchell, 1 Madd. 480-559.  
     v. Moore, 259 Ill. 23-171.  
     v. Odell, 65 N. Y. 28-1488.  
     v. Parker, 45 Me. 474-1404, 1407.  
     v. Reed, 13 Mees. & W. 285-1582.  
     v. Robbins, 45 Conn. 513-2505.  
     v. Washburn, 3 Colo. 201-188, 192, 193, 198.  
 Lyons, In re, 96 Wis. 339-1845.  
 Lyons v. Carr, 77 Neb. 883-1974.  
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     v. Ingle, 91 Wash. 179-2076.  
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     v. Philadelphia & R. R. Co., 209 Pa. 550-232.  
     v. Stroud, 257 Ill. 350-1942.  
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     v. Weeks, 29 N. Y. Misc. 714-491.  
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 Lysaght v. Edwards, L. R. 2 Ch. Div. 499-457, 461.  
 Lysle v. Williams, 15 Serg. & R. (Pa.) 135-2452.  
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 L. & M. Mercantile Co. v. Wimer, 94 Kan. 573-906.  
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     v. Zitzer, 119 Ill. 273-2452, 2455.  
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     v. O'Connell, 16 N. M. 469-2183, 2234.  
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 McBrayer v. Harrill, 152 N. C. 712-2180.  
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v. Galbraith, 7 Rich. Law (S. C.) 74-356.
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v. McClanahan, 258 Mo. 579-1999.  
v. Porter, 10 Mo. 746-813, 814.
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v. Ellis, 54 Iowa 311-2314.
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v. Kellogg, 17 Ill. 498-1927.  
v. McClellan, 65 Me. 500-380, 383.
- McClellan v. Solomon, 23 Fla. 437-2789.
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v. Moore, 48 Tex. 355-1711.
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v. Rogers, 11 Ill. 279-1654.
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v. Kirk, 243 Pa. 319-1427, 1451.
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v. Ross, 5 Wheat. (U. S.) 116-672, 2014, 2017.
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v. Fairfield, 153 Pa. St. 411-768.  
v. Harris, 12 B. Mon. (Ky.) 261-741, 2757.  
v. Herring, 70 Mo. 18-1799, 1800.  
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v. Miller, 1 Bailey Eq. (S. C.) 107-764.

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     v. Blood, 123 Mass. 47-914.  
     v. Brillhart, 17 Ill. 354-1723.  
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     v. Bryan, 62 Pa. Super. Ct. 178-446.  
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 McCormick v. Connell, 6 Serg. & R. (Pa.) 151-293, 294.  
     v. Grogan, L. R. 4 II. L. 88-409.  
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     v. Horan, 81 N. Y. 86-1146, 1150, 1162.  
     v. Joseph, 83 Ala. 401-2220.  
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- v. Gewinner, 103 Ga. 528-379, 383, 388.
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- v. Cromwell's Ex'rs, 7 Gill & J. (Md.) 157-379.
- v. Powell, 7 Gill & J. 157-383.
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     v. Grace, 15 Ark. 468-829, 830.  
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     v. Belding, 145 U. S. 492-2209.  
     v. Black's Adm'r, 20 Ohio 185-2455, 2457.  
     v. Crandall, 43 Ill. 231-852.  
     v. Elyton Land Co., 78 Ala. 382-2754.  
     v. Finseth, 32 N. D. 400-2494.  
     v. Hambleton, 78 Tex. 628-1090.  
     v. Haulon, 79 Cal. 442 156, 157.  
     v. Huff, 77 Cal. 279-1774, 1780.  
     v. McDonald, 92 Ala. 537-374.  
     v. McDonald, 256 Pa. 304-713.  
     v. McLeod, 36 N. C. 221-2661.  
     v. May, 96 Mo. App. 236-211, 1492.  
     v. Norton, 123 Ark. 473-2185.  
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     v. Rothgeb, 112 Va. 749-1719.  
     v. Second Nat. Bank, 106 Iowa 517-2654.  
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     v. Stark, 176 Ill. 456-1878.  
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     2393.  
     v. Hiner, 133 Ill. 156-2283.  
     v. McElroy, 110 Tenn. 137-  
         444, 1074.  
     v. McLeay, 71 Vt. 396-681,  
         685, 1261, 1274, 1285,  
         1290.  
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 McElwain, Ex parte, 29 Ill. 442-  
     775.  
 McElwain v. Whitacre, 251 Pa. 279-  
     537.  
 McElwaine, In re, 18 N. J. Eq. 499-  
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     331-1136, 1143.  
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     1299.  
     v. Bamberger, 3 Lea (Tenn.)  
         576-1795.  
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         1509.  
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     919, 920, 925.  
     v. Crawford, 36 W. Va. 671-  
         912.  
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     101-498.  
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         R. Co., 49 N. J. Eq. 176-  
         2686, 2691, 2698.  
     v. Worthington, 45 Ill. 362-  
         2259.  
 McFadden's Estate, 224 Pa. 443-  
     956.  
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     167-789.  
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     388, 391, 418, 429, 1794.  
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 McFarlan v. Watson, 3 N. Y. 286-  
     173, 1515.  
 McFarland v. Chase, 73 Mass. (7  
     Gray) 462-226.  
     v. Cornwell, 151 N. C. 428-  
         2426.  
     v. Dey, 69 Ill. 419-2520.  
     v. Febiger's Heirs, 7 Ohio 194-  
         780.  
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         S. W. 229-136.  
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     484-904, 907.  
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         1481.  
 McFarlin v. Essex Co., 10 Cush.  
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     1701, 1702.  
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     (Ky.) 383-1099.  
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 v. Pickle, 16 Pa. St. 140-289, 291, 311, 314.  
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 378-196.  
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 475-691, 2259.  
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 850.  
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 1744.  
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 573.  
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 459-696, 2703.  
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 2690.  
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 108 Mich. 491-884, 885.  
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 v. Kinney, 114 Minn. 146-2136,  
 2138.  
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 2368, 2657.  
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 2746.  
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 461.  
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 2236.  
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- v. Maddox's Adm'r, 11 Gratt. (Va.) 804-284.
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 v. Lennon, 19 Minn. 67-2451, 2452.  
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     v. Cooksey, 51 Ind. 519-1701.  
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     v. Stiles, 21 Mo. 374-966, 974.  
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     v. Fletcher, 40 Ind. 575-2647.  
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     v. Rice, 108 Mass. 150-241.  
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 v. Ballard, 7 Wall. (U. S.) 290-273, 274.  
 v. Leavitt, 59 N. H. 476-2596.  
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- v. Dearing, 47 Minn. 137-366.
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- v. Dickey, 38 Mich. 41-669.
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 v. Cramer, 48 S. C. 282-1980,  
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 v. Davidson, 8 Ill. 518-418.  
 v. DeGraffenried, 43 Colo.  
     306-1693.  
 v. Donaldson, 17 Ohio 264-  
     2697.  
 v. Eastern Railway & Lum-  
     ber Co., 84 Wash. 31-  
     1129, 1140.  
 v. Edgerton, 38 Kan. 36-1631.  
 v. Emans, 19 N. Y. 385-525,  
     589.  
 v. Ewing, 6 Cush. (Mass.) 34-  
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 v. Finnegan, 26 Fla. 29-2293.  
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 v. Fleming, 18 D. C. 193-471.  
 v. Fletcher, 27 Gratt. (Va.)  
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 v. Garlock, 8 Barb. (N. Y.)  
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 v. Goodwin, 8 Gray (Mass.)  
     542-1629.  
 v. Greenwich, 62 N. J. L. 771-  
     1203.  
 v. Griffin, 102 Ala. 610-921.  
 v. Halsey, 14 N. J. L. 48-1702.  
 v. Hancock, (1893) 2 Q. B.  
     177-147.  
 v. Hennessy, 47 Misc. (N. Y.)  
     403-938.  
 v. Hepburn, 8 Bush (Ky.) 326-  
     2113.  
 v. Hester, 167 Iowa 180-  
     1163.  
 v. Hoeschler, 126 Wis. 263-  
     1287.  
 v. Holland, 84 Va. 652-2511.  
 v. Holt, 68 Mo. 584-1813.  
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         1440.  
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         1162, 1165.  
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         2540.  
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     v. Lincoln, 6 Gray (Mass.)  
         556-2439.  
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         1627.  
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     v. McCaleb, 208 Mo. 562-  
         1788, 1794.  
     v. McGuire, 18 R. I. 770-201,  
         202, 1507.  
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     v. Mainvaring, Cro. Car. 397-  
         1643.  
     v. Mann, 55 Vt. 475-1658.  
     v. Marriott, 54 Okla. 179-  
         1128.  
     v. Marx, 55 Ala. 322-856, 859.  
     v. Mattison, 105 Ark. 201-  
         2756.  
     v. Meers, 155 Ill. 284-1760,  
         1793.  
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         1018, 1025, 1029.  
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     v. Pence, 132 Ill. 149-802, 821.  
     v. Peter, 158 Mich. 336-1762, 2651, 2662.  
     v. Pettit, 127 Ky. 419-1356.  
     v. Plumb, 6 Cow. (N. Y.) 665-918.  
     v. Prescott, 163 Mass. 12-174, 213, 265, 303, 319.  
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     v. Stump, 3 Gill (Md.) 304-2757.  
     v. Sullivan, 77 Kan. 252-443.  
     v. Thompson, 34 Mich. 10-2492, 2702.  
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     v. Tipton, 6 Blackf. (Ind.) 238-2367.  
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 Milligan's Appeal, 104 Pa. 503-2513, 2669.  
 Milliken v. Bailey, 61 Me. 316-2439.  
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 Minnich's Estate, In re, 206 Pa. St. 405-2325.  
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     v. Tilton, 64 N. H. 371-388, 423, 1794.  
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     v. Bowman, 74 W. Va. 498-1354, 1357.  
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     v. Kepler, 75 Iowa 207-1683.  
     v. Ladew, 36 Mo. 526-2522, 2555.  
     v. Leavitt, 30 Conn. 587-288.  
     v. Mitchell, 40 Ga. 11-1636.  
     v. Parham, Harp. (S. C.) 3-1727.  
     v. Parks, 26 Ind. 363-2076.  
     v. Pratt, 177 Ky. 438-2050.  
     v. Prepont, 68 Vt. 613-1260.  
     v. Reid, 192 N. Y. 255-1329.  
     v. Roberts, 5 McCrary (U. S.) 425-2600, 2602.  
     v. Seipel, 53 Ind. 251-1293, 1305, 1306, 1307, 1308.  
     v. Shell, 49 Miss. 118-462.  
     v. Spence, 62 Ala. 450-1042.  
     v. Stanley, 44 Conn. 312-1711.  
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     v. Thorne, 134 N. Y. 536-1253.  
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 Moeller v. Moore, 80 Wis. 434-2472.  
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     v. Smith, 4 N. Y. 126-1470.  
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 Moffew v. S. F. & S. R. Co., 107 Cal. 587-391.  
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     v. Maness, 102 N. C. 457-2417.  
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 Monarch Laundry v. Westbrook, 109 Va. 382-922, 923.  
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     v. Vance, 92 Tex. 428-423, 2321, 2323.  
 Mondorf's Will, In re, 110 N. Y. 450-1830.  
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     v. Van Meter, 100 Ill. 347-841.  
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     v. Chadwick, 7 Iowa 114-2440.  
     v. Dorion, 6 N. H. 250-1798.  
     v. Dorion, 7 N. H. 475-2351, 2352.  
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     v. Spect, 55 Cal. 352-2387.  
     v. Spence, 23 U. C. Q. B. 39-166.  
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 Moodie v. Garnance, 3 Bulst. 153-151.  
     v. Reid, 7 Taunt. 355-1822.  
 Moody v. Fremd, 177 Ky. 5-2039.  
     v. Fulmer, 3 Grant (Pa.) 17-1071.  
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     v. King, 2 Bing. 447-770.  
     v. McClelland, 39 Ala. 45-1187, 1190, 1191.  
     v. Macumber, 159 Mich. 657-1814, 1817.  
     v. Matthews, 7 Ves. 174-728.  
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     v. Steggles, 12 Ch. 261-1255, 2037.  
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 Moore v. Alden, 80 Me. 301-789.  
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     v. Anders, 14 Ark. 630-2422, 2763.  
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     v. Beasom, 44 N. H. 215-2650.  
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     v. Boagni, 111 La. 490-2454.  
     v. Boise Land & Orchard Co., 31 Idaho 390-2571, 2696.  
     v. Bond, 75 N. C. 243-2640.  
     v. Booker, 4 N. D. 543-2487, 2489.  
     v. Boyd, 24 Me. 242-228.  
     v. Brooks, 12 Gratt. (Va.) 135-538, 541.  
     v. Bulgreen, 153 Mich. 261-2042.  
     v. Byers, 65 N. C. 240-2781.  
     v. Byrum, 10 Rich. (S. C.) 452-2370.  
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     v. Calkins, 85 Cal. 177-2722.  
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     v. Chase, 26 Misc. (N. Y.) 9-181.  
     v. Childress, 58 Ark. 510-2013.  
     v. City of New York, 8 N. Y. 110-769, 798, 803.  
     v. City of Waco, 85 Tex. 206-1594.  
     v. Collins, 15 N. C. 384-1742, 2194.  
     v. Connors (Va.), 20 S. E. 936-1902.  
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 v. Diamond, 5 R. I. 129-498, 1078, 1093, 1834.  
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 v. Dunning, 29 Ill. 130-2295.  
 v. Ellsworth, 3 Conn. 483-981.  
 v. Empire Land Co. (Ala.), 61 So. 940-1994.  
 v. Esty, 5 N. H. 479-739, 756, 761.  
 v. Farmer, 156 Mo. 33-2111.  
 v. Fisher, 3 Sneed (Tenn.) 231-430.  
 v. Fletcher, 16 Me. 63-1328.  
 v. Fowler, 58 Ore. 292-1873.  
 v. Frankensfield, 25 Minn. 540-1717.  
 v. Frost, 3 N. H. 126-802, 821.  
 v. Fuller, 6 Ore. 275-1734, 2401.  
 v. Gary, 149 Ind. 51-568.  
 v. Giles, 49 Conn. 570-1756, 1789.  
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 v. Greene, 19 How. (U. S.) 69-1956, 1957.  
 v. Griffin, 72 Kan. 164-874.  
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 v. Guardian Trust Co., 173 Mo. 218-161, 1488.  
 v. Guley, 30 Ky. L. Rep. 442-2023.  
 v. Harris, 91 Me. 616-805.  
 v. Harrisburg Bank, 8 Watts (Pa.) 138-2611, 2612.  
 v. Hazelton, 9 Allen (Mass.) 102-1740, 1741, 1751.  
 v. Hopkins, 83 Cal. 270-1733.  
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 v. Isbel, 40 Iowa 383-2715.  
 v. Jackson, 49 Cal. 109-2771.  
 v. Johnson, 162 N. C. 266-2214.  
 v. Johnston, 87 Ala. 220-1681.  
 v. Jordan, 65 Miss. 229-394, 395, 1626.  
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 v. Kime, 43 Neb. 517-2588.  
 v. Lackey, 53 Miss. 85-2762, 2763.  
 v. Lanham, 3 Hill (S. C.) 304-1701.  
 v. Littel, 41 N. Y. 66-487.  
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 v. Luce, 29 Pa. 260-2013.  
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 v. Moberly, 7 B. Mon. (Ky.) 299-2554.  
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 v. Moore, 12 B. Mon. (Ky.) 651-650.  
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 v. Moore, 38 N. H. 382-665.  
 v. Moore, 41 N. J. L. 515-241.  
 v. Moore, 35 Vt. 98-1910.  
 v. Moran, 64 Neb. 84-922, 2463.  
 v. Morris, 118 Ark. 516-2209.  
 v. Morrow, 28 Cal. 551-246.  
 v. Moye, 122 Ark. 548-1769.  
 v. Murrah, 40 Ala. 573-461.  
 v. New York, 8 N. Y. 110-800.  
 v. Norman, 43 Minn. 428-2599, 2600.  
 v. Olive, 114 Iowa 650-2666, 2673.  
 v. Ollson, 105 Ark. 241-2214.  
 v. Page, 111 U. S. 117-2332.  
 v. Parker, 63 Kan. 52-138, 144.  
 v. Parker, 91 N. C. 275-978.  
 v. Paul, 7 Rich. Eq. (S. C.) 362-536.  
 v. Pitts, 53 N. Y. 485-319.  
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 v. Rayner, 58 Md. 411-1340.  
 v. Robbins, 53 N. J. Eq. 137-448.  
 v. Rollins, 45 Me. 493-743, 744, 956, 957.  
 v. Rowlett, 269 Ill. 88-1851.  
 v. Sargent, 112 Ind. 484-2678.  
 v. Sawyer, 167 Fed. 826-2218.  
 v. Sharpe, 91 Ark. 407-314.  
 v. Shoemaker, 10 App. D. C. 6 1366, 1367.  
 v. Shurtleff, 128 Ill. 370-2509.  
 v. Sleet, 113 Ky. 600-491.  
 v. Smaw, 17 Cal. 199-872.  
 v. Smith, 56 N. J. L. 446-223.  
 v. Spellman, 5 Denio (N. Y.) 225-369.  
 v. Steljes, 69 Fed. 518-141.  
 v. Stinson, 144 Mass. 594-356.  
 v. Stovall, 2 Lea (Tenn.) 543-2487.  
 v. Thomas, 1 Ore. 201-781, 2375, 2746.  
 v. Thompson, 100 Ky. 231-2364, 2627.  
 v. Tisdale, 5 B. Mon. (Ky.) 352-775.  
 v. Titman, 44 Ill. 367-2425.  
 v. Townshend, 33 N. J. L. 284-968, 969, 971, 974, 980, 982.  
 v. Triplett, 96 Va. 603-2501.  
 v. Trott, 162 Cal. 268-1742.  
 v. Turpin, 1 Speer Law (S. C.) 32-158.  
 v. Vail, 17 Ill. 185-1699, 1701, 1704.  
 v. Valentine, 77 N. C. 88-920.  
 v. Weaver, 16 Gray (Mass.) 305-492, 1834.  
 v. Weber, 71 Pa. St. 429-141.  
 v. White, 159 Mich. 460-1347, 1357.  
 v. Wilkinson, 13 Cal. 488-1563.  
 v. Wingate, 53 Mo. 398-305.  
 v. Wood, 12 Abb. Pr. (N. Y.) 393-933, 938.  
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 Mooreland v. Houghton, 94 Mich. 548-2695.  
 Moores v. Moores, 41 N. J. Law 440 1055, 1090, 1102.  
 Moorhead v. Snyder, 31 Pa. 514-1336.  
 Moorman v. Gibbs, 75 Iowa 537-2783.  
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 v. Moran, 144 Iowa 451-281.  
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 Morancy v. Quarles, 1 McLean (U. S.) 194-2740.  
 Mordecai v. Boylan, 59 N. C. 365-1844.  
 v. Parker, 3 Dev. (N. C.) 425-366.  
 v. Schirmer, 38 S. C. 294-1071, 1101.  
 More v. Calkins, 95 Cal. 435-2402, 2718.  
 Moreau v. Detchemendy, 18 Mo. 522-1094.  
 Morehead v. Hall, 126 N. C. 213-1668.  
 v. Watkyns, 5 B. Mon. (Ky.) 228-239, 240.  
 Morehouse v. Cotheal, 21 N. J. L. 480-482, 959.  
 v. Woodruff, 218 N. Y. 494 1406, 1412.

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         St. 33-1996.  
     v. Strong, 115 Mich. 211-683,  
         2435.  
 Moreton v. Lees, Sugden, Powers,  
 480-770.  
 Morette v. Bostwick, 127 N. Y. App.  
 Div. 701-1705.  
 Morey v. Fitzgerald, 56 Vt. 487-  
 1535.  
     v. Herrick, 18 Pa. 123-401.  
     v. Hoyt, 62 Conn. 542-909, 935,  
         936, 938.  
     v. Morey, 113 Iowa 152-2737.  
     v. Sohler, 63 N. H. 507-1843,  
         1847.  
 Morford v. Dieffenbacker, 54 Mich.  
 593-1089.  
 Morgan v. Boyes, 65 Me. 124-1352,  
 1353, 1358, 1363.  
     v. Field, 35 Kan. 162-2368.  
     v. Gronow, L. R. 16 Eq. 1-1110.  
         1114.  
     v. Haley, 107 Va. 331-1702,  
         1705, 1715.  
     v. Hannibal R. Co., 63 Mo. 129-  
         1701.  
     v. Hardy, 17 Q. B. Div. 770-  
         178.  
     v. Hazlehurst Lodge, 53 Miss.  
         665-1593.  
     v. Ireland, 1 Idaho 786-1844.  
     v. Jeffreys, (1910) 1 Ch. 620-  
         2366.  
     v. King, 35 N. Y. 454-1546.  
     v. Kline, 77 Iowa 681-2551,  
         2558.  
     v. Loomis, 78 Wis. 594-328.  
     v. McCollister, 110 Ala. 319-  
         1587.  
     v. McCuin, 96 Ark. 512-2239.  
     v. Mahoney, 127 Ark. 483-2449.  
     v. Menth, 60 Mich. 238-1282,  
         1283, 1291.  
     v. Mitchell, 104 Ga. 596-2015.  
     v. Moore, 3 Gray (Mass.) 319-  
         429.  
     v. Morgan, 5 Madd. 408-831,  
         835, 840.  
     v. Morgan, 2 Wheat. (U. S.)  
         290-462.  
     v. Morgan, 10 Ga. 297-2658.  
 Morgan v. Morgan, 65 Ga. 493-892.  
     v. Morgan, 4 Gill & J. (Md.)  
         395-839.  
     v. Morgan, 20 R. I. 600-620.  
     v. Morgan, 82 Vt. 243-1758.  
     v. Perkins, 94 Ga. 353-884.  
     v. Railroad Co., 96 U. S. 716-  
         1858.  
     v. Reel, 213 Pa. 81-1911.  
     v. Robbins, 152 Ind. 362-566.  
     v. Sherwood, 53 Ill. 171-2679.  
     v. Smith, 11 Ill. 199-1685,  
         1711.  
     v. Smith, 5 Hun (N. Y.) 220-  
         1278.  
     v. Smith, 25 S. C. 337-751.  
     v. South Milwaukee Lake View  
         Co., 97 Wis. 275-2487,  
         2489.  
     v. Staley, 11 Ohio 389-714.  
     v. Tims, 44 Tex. Civ. App. 308-  
         973.  
     v. Wallbridge, 56 Vt. 405-2450.  
     v. White, 50 Tex. Civ. App.  
         318-2019.  
 Morgan's Estate, In re, 223 Pa. 228-  
 2322, 2325.  
 Morgan's Lessee v. Davis, 2 Har. &  
 McH. (Md.) 917-2589.  
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 Misc. 139-137.  
 Morgernstern v. Klees, 30 Ill. 422-  
 2677.  
 Moriarty v. Ashworth, 43 Minn. 1-  
 2461.  
 Morice v. Bishop of Durham, 9 Ves.  
 399, 10 Ves. 522-372, 373.  
 Morill v. Morill, 116 Me. 154-571.  
 Moring v. Ables, 62 Miss. 263-2010.  
     v. Dickerson, 85 N. C. 466-  
         2566.  
 Morison v. American Ass'n, 110 Va.  
 91-871, 1995.  
 Moritz v. Hoffman, 35 Ill. 553-2281,  
 2283.  
 Morlan v. Lock, 95 Kan. 716-2500.  
 Morley v. Culverwell, 7 Mees. & W.  
 174-2589.  
     v. Pinchcombe, 2 Exch. 101-  
         1519.  
     v. Pragnel, Cro. Car. 510-1124.  
     v. Rennoldson, 2 Hare 570-286.

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     v. Morrill, 138 Mich. 112-652.  
     v. Morrill, 53 Vt. 74-2746.  
     v. Skimmer, 57 Neb. 164-2372.  
     v. St. Anthony Falls Water Power Co., 26 Minn. 222-1327.  
     v. Wabash, St. L. & P. Ry. Co., 96 Mo. 174-273, 290.  
 Morris v. Alston, 92 Ala. 502-2418.  
     v. Bacon, 123 Mass. 58-2522, 2523, 2549.  
     v. Barker, 82 Ala. 272-2423.  
     v. Bean, 3 Car. & K. 307-156.  
     v. Beardsley, 54 Conn. 338-1034.  
     v. Beebe, 54 Ala. 300-214.  
     v. Beecher, 1 N. D. 130-2546, 2562, 2641.  
     v. Blunt, 35 Utah 194-1771.  
     v. Blunt, 49 Utah 243-1291, 1336, 1876, 2064.  
     v. Branchaud, 52 Wis. 187-2442.  
     v. Budlong, 78 N. Y. 555-2439.  
     v. Cairncross, 14 Ont. Law Rep. 544-969, 971, 974.  
     v. Caudle, 178 Ill. 9-1595.  
     v. Commander, 3 Ired. L. (25 N. C.) 510-2071.  
     v. Daniels, 35 Ohio St. 406-2205, 2265, 2266.  
     v. Fidelity Mortgage Bond Co., 187 Ala. 262-2491, 2731.  
     v. French, 106 Mass. 326-922.  
     v. Garland, 78 Va. 215-523.  
     v. Graham, 16 Wash. 343-1039.  
     v. Harris, 9 Gill (Md.) 19-709, 724.  
     v. Hastings, 70 Tex. 26-658.  
     v. Healy Lumber Co., 46 Wash. 686-270.  
     v. Hogle, 37 Ill. 150-2242.  
     v. Jansen, 99 Mich. 436-2426.  
     v. Keil, 20 Minn. 531-1803.  
     v. Kettle, 57 N. J. L. 218-1500.  
     v. McCarty, 158 Mass. 11-645, 646.  
     v. McClary, 43 Minn. 346-1992.  
     v. McKnight, 1 N. D. 226-2712.  
     v. Mix, 4 Kan. App. 654-2494.  
     v. Morris, 3 De Gex & J. 323-984.  
     v. Moulton, 34 N. H. 392-860.  
     v. Murray, 82 Ky. 36-2414.  
     v. Niles, 12 Abb. Pr. (N. Y.) 103-156.  
     v. Owens, 3 Strobb. (S. C.) 99-1678.  
     v. Phelps, 5 Johns. (N. Y.) 49-1679.  
     v. Potter, 10 R. I. 58-1903.  
     v. Rowan, 17 N. J. L. 304-1714, 1716.  
     v. Sargent, 18 Iowa 90-1734.  
     v. Short (Tex. Civ. App.), 151 S. W. 633-2127.  
     v. Sickly, 133 N. Y. 456-2738.  
     v. Stephens, 46 Pa. St. 200-1595.  
     v. Tillson, 81 Ill. 607-201.  
     v. Tuthill, 72 N. Y. 575-2535.  
     v. Ward, 5 Kan. 246-2703.  
     v. Wheat, 9 App. D. C. 379-2129.  
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 Morris Canal & Banking Co. v. Brown, 27 N. J. Law. 13-334.  
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 Morrison v. Bassett, 26 Minn. 235-188.  
     v. Bowman, 29 Cal. 337-1798.  
     v. Brown, 83 Ill. 562-2761.  
     v. Bucksport & B. R. Co., 67 Me. 353-1129.  
     v. Caldwell, 5 T. B. Mon. (Ky.) 426-2131.  
     v. Chadwick, 7 C. B. 266-206.

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- v. Hinkson, 87 Ill. 587-1530.
- v. Holliday, 27 Ore. 175-1940.
- v. Keen, 3 Me. 474-1658.
- v. Kelly, 22 Ill. 610-2223.
- v. King, 62 Ill. 30-1289.
- v. Linn, 50 Mont. 396-1939.
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- v. Morrison, 122 N. C. 598-990.
- v. Rice, 35 Minn. 436-799, 810.
- v. Rossignol, 5 Cal. 64-611.
- v. Sessions' Estate, 70 Mich. 297-1909.
- v. Smith, 90 Md. 76-302, 303, 304.
- v. Underwood, 20 N. H. 269-1678.
- v. Wilson, 30 Cal. 344-1578.
- Morris v. Virginia State Ins. Co., 90 Va. 370-2715.
- Morrissey v. Dean, 97 Wis. 302-2716, 2727.
- Morrow v. Baird, 114 Tenn. 552-1702.
- v. Brenizer, 2 Rawle (Pa.) 185-440, 443, 453.
- v. Cole, 58 N. J. Eq. 203-1735.
- v. Dows, 28 N. J. Eq. 463-2791, 2792.
- v. Hasselman, 69 N. J. Eq. 612-1427, 1450, 1455.
- v. Highland, etc., Co., 219 Pa. 619-1886.
- v. Jones, 41 Neb. 867-2658.
- v. Scott, 7 Ga. 535-1907.
- v. Whitney, 95 U. S. 551-1562, 1653.
- v. Willard, 30 Vt. 118-1662.
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- v. Blood, 68 Minn. 442-2310, 2311.
- Morse v. Churchill, 41 Vt. 649-1934.
- v. Copeland, 2 Gray (Mass.) 302-1206, 1257, 1382.
- v. Curtis, 140 Mass. 11-2193.
- v. Garner, 1 Strob. (S. C.) 514-1413.
- v. Goddard, 54 Mass. (13 Metc.) 177-199.
- v. Hackensack Sav. Bank, 47 N. J. Eq. 279-1102.
- v. Hayden, 82 Me. 227-277, 1883.
- v. Lorenz, 262 Ill. 115-1207, 1210.
- v. Marshall, 97 Mass. 519-1398.
- v. Martin, 34 Beav. 500-1092.
- v. Merritt, 110 Mass. 458-2685.
- v. Morse, 85 N. Y. 53-717.
- v. O'Connell, 7 Wash. 117-1008.
- v. Proper, 82 Ga. 13-490, 526, 527, 528.
- v. Ranno, 32 Vt. 600-2090.
- v. Shattuck, 4 N. H. 229-395, 1626.
- v. Stockman, 65 Wis. 36-713.
- v. Stockman, 73 Wis. 89-1667.
- v. Williams, 62 Me. 445-2042.
- v. Zeize, 34 Minn. 35-1863.
- Morsell v. First Nat. Bank of Washington, 91 U. S. 357-2775, 2780.
- Mortenson v. Morse, 153 Wis. 389-2367.
- Mortgage Trust Co. of Pennsylvania v. Moore, 150 Ind. 465-1747.
- Mortimer v. Brunner, 19 N. Y. Super. Ct. (6 Bosw.) 653-200.
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- Mortlock v. Buller, 10 Ves. 292-1106.
- Morton v. Allen, 180 Ala. 279-2380, 2390.
- v. Babb, 251 Ill. 488-1621, 1623.
- v. Barrett, 22 Me. 261-355.
- v. Blades Lumber Co., 154 N. C. 336-2529.
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     v. Morris, 27 Tex. Civ. App. 262-1635.  
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     v. Morton, 120 Ky. 251-2312.  
     v. Noble, 57 Ill. 176-777.  
     v. Onion, 46 Vt. 145-1845.  
     v. Tewart, 2 Y. & C. Ch. 67-379.  
     v. Thompson, 69 Vt. 432-1258, 1353.  
     v. Weir, 70 N. Y. 247-209.  
     v. Woodford, 13 Ky. L. Rep. 150-2392.  
     v. Woods, L. R. 3 Q. B. 658-190.  
 Morville v. Fowle, 144 Mass. 109-1076.  
 Mosby v. Leeds, 3 Call (Va.) 439-1521.  
 Mosby's Adm'r v. Mosby's Adm'r, 9 Gratt. (Va.) 584-1072.  
 Moseley v. Bogy, 272 Mo. 319-842.  
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     v. Rambo, 106 Ga. 597-2726, 2729.  
 Moseley's Trust, In re, L. R. 11 Eq. 499-595, 616.  
 Mosely v. Mosely, 87 N. C. 69-1624.  
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     v. Dibrell, 2 Tex. Civ. App. 457-1803.  
     v. Hatfield, 27 S. C. 324-2413, 2417.  
     v. Johnson, 88 Ala. 517-2764.  
     v. Loomis, 156 Ill. 392-295, 296, 302.  
     v. Old Dominion Iron & Nail Works Co., 75 Va. 95-140, 966, 981, 982.  
     v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516-1531.  
     v. Southern Pac. R. Co., 18 Ore. 385-1006.  
     Moses v. St. L. Sectional Dock Co., 84 Mo. 242 1313, 1316.  
 Mosher v. Cole, 50 Neb. 636 199.  
     v. Mosher, 32 Me. 412-506, 746, 759.  
     v. Vehue, 77 Me. 169 2460, 2463.  
 Moshier v. Norton, 100 Ill. 63 2439, 2440, 2650.  
 Mosier v. Caldwell, 7 Nev. 363-1176.  
     v. Oregon Nav. Co., 39 Ore. 256-1187.  
 Moss v. Ardrey, 260 Mo. 595 649.  
     v. Chappell, 126 Ga. 196-299, 306, 317.  
     v. Gallimore, 1 Doug. 279-151, 2446.  
     v. Helsley, 60 Tex. 426 1834.  
     v. Moss, 27 Ore. 595-690.  
     v. New York Ry. Co., 27 Abb. N. C. (N. Y.) 318-2270.  
 Moss Point Lumber Co. v. Board of Supervisors of Harrison County, 89 Miss. 448-959, 981.  
 Mosteller v. Astin, 61 Tex. Civ. App. 455-1678.  
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     v. Sawyer, 38 Me. 68-802.  
 Motley's Adm'r v. Carstairs, 114 Va. 429-2387.  
 Mott v. Ackerman, 92 N. Y. 552-1073, 1102.  
     v. American Trust Co., 124 Ark. 70-2489.  
     v. Clark, 9 Pa. St. 399 2543, 2544, 2545.  
     v. Consumers' Water Co., 188 Pa. 521 1137.  
     v. Danville Seminary, 129 Ill. 403-475, 720.  
     v. Ewing, 90 Cal. 231-2056.  
     v. Mott, 68 N. Y. 246-1666.  
     v. Newark German Hospital, 55 N. J. Eq. 722-2549.  
     v. Oppenheimer, 135 N. Y. 312-1418, 1419.  
     v. Palmer, 1 N. Y. 564 920, 923, 945, 1681.  
     v. Smith, 16 Cal. 533 2330.

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- Moulton v. Cornish, 138 N. Y. 133-2683, 2706.  
     v. Faught, 41 Me. 298-1210.  
     v. Haskell, 50 Minn. 367-2574.  
     v. Libbey, 37 Me. 472-1037, 1545.  
     v. Robinson, 27 N. H. 550-902, 1462.
- Moultrie v. Wright, 154 Cal. 520-399, 401, 402.
- Mounsey v. Ismay, 3 Hurlst. & C. 498-1224.
- Mount Hope Iron Co. v. Dearden, 140 Mass. 430-1261.
- Mount Horn Lumber Co. v. Swartwout, 30 Idaho 559-2129.
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- Mounts v. Mounts, 155 Ky. 363-1935.
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- Mowlem, In re, L. R. 18 Eq. 9-553.
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     v. Henry, 86 Cal. 471-1764.  
     v. Mowry, 137 Mich. 277-2509.
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     v. Hinman, 13 N. Y. 180-2260, 2781.  
     v. New York Cent. & H. R. Co., 88 N. Y. 351-1148.
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- Mudderspaugh's Estate, In re, 231 Pa. 376-449.
- Mudge v. Hammill, 21 R. I. 463-525, 526, 532, 1595.  
     v. Livermore, 148 Iowa 472-2779.
- Muehling v. Muehling, 181 Pa. 483-919.
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     v. Fruen, 3 Minn. 273-2030, 2035.
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- Muhlke v. Tiedemann, 177 Ill. 606-2310.
- Muir v. Berkshire, 52 Ind. 149-2728.  
     v. Bovey, 28 Wyo. 46-2782.  
     v. Cox, 110 Ky. 560-1289, 1387.  
     v. Jones, 23 Ore. 332-941.
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- Muldrow's Heirs v. Fox's Heirs, 2 Dana (Ky.) 79-1076, 1078.
- Mulherin v. Porter, 1 Ga. App. 153-1520.
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- Mulholland's Estate, 154 Pa. St. 491-742.
- Mullan v. Belbin, 130 Md. 313-2164.
- Mullaney v. Duffy, 145 Ill. 559-1000, 1002.
- Mullanphy Sav. Bank v. Schott, 135 Ill. 655-2270, 2561.
- Mullany v. Mullany, 4 N. J. Eq. 16-415, 834, 839.
- Mullen v. Stricker, 19 Ohio St. 135-1276, 2039.
- Muller v. Landa, 31 Tex. 265-1017, 1657.  
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     v. Trafford, [1901] 1 Ch. 54-178, 610.

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 Munn v. Achey, 110 Ala. 628-2231, 2232, 2757.  
     v. Worral, 53 N. Y. 44-1613.  
 Munoz v. Wilson, 111 N. Y. 295-1790, 2376.  
 Munro v. Barton, 98 Me. 250-2021, 2656, 2657.  
     v. Bowles, 187 Ill. 346-1740.  
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     v. Clark, 59 Cal. 683-2438.  
     v. Clarke, 90 Cal. 427-2439, 2452.  
     v. Ford, 17 Ind. 52-2649.  
     v. Gifford, 18 N. Y. 28-916.  
     v. Johnston, 7 Coldw. (Tenn.) 605-1102.  
     v. Leath, 10 Heisk. (Tenn.) 166-1068.  
     v. Murdock, 74 N. H. 77-832.  
     v. Waterman, 145 N. Y. 455-2516, 2518.  
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     v. Bolger, 60 Vt. 723-864, 865.  
     v. Chicago, B. & Q. R. Co., 101 Neb. 73-1171.  
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     v. Com., 187 Mass. 361-1950, 1993.  
     v. Copeland, 51 Iowa 515-1658, 1659.  
     v. Daly, 13 Ir. C. L. 239-954.  
     v. Delano, 95 Me. 229-2322.  
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     v. Price, 48 Mo. 247-1699.  
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     v. Ryan, 2 Ir. R. C. L. 143-1012, 1038.  
     v. Welch, 128 Mass. 489-1799, 2044, 2422.  
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     v. Emery, 187 Ill. 408-2516.  
     v. Green, 64 Cal. 363-2308, 2310, 2311.  
     v. Harway, 56 N. Y. 337-298, 299.  
     v. Haverty, 70 Ill. 318-687, 990, 991.  
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     v. O'Brien, 56 Wash. 361-2599, 2602.  
     v. Pennington, 3 Gratt. (Va.) 91-199.  
     v. Porter, 26 Neb. 288-2519.  
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     v. Riley, 140 Mass. 490-2476.  
     v. Shuck, 6 Bush (Ky.) 111-2293.  
     v. Stair, 2 Barn. & C. 82-1739, 1767, 1773.  
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 Murray's Will, In re, 141 N. C. 588-436.  
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 Murrill v. Palmer, 164 N. C. 50-248.  
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 Myer v. Beal, 5 Ore. 30-2620.  
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     v. McChurg, 129 Md. 112-526.  
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 Natt. In re, 37 Ch. Div. 517-1902.  
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     v. Minoock, 96 Mich. 182-653.  
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     v. Hopkins, 87 Md. 19-1864, 1866.  
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     v. Grantham, 58 Pa. 433-448.  
     v. Hoskins, 84 Me. 386-271, 273.  
     v. Lancaster, 47 Ark. 175-838, 840, 848.  
     v. Martin, 126 Ark. 1-2023.  
     v. Philadelphia, 212 Pa. 551-1315.  
     v. Wise, 44 Iowa 544-1899.  
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 Neeson v. Smith, 47 Wash. 386-2473.  
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 Neil v. Duke of Devonshire, 8 App. Cas. 135-1618.  
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     v. Keese, 5 Tex. 23-397, 399.  
     v. Neil, 1 Leigh (Va.) 6-1827.  
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 Nelson v. Brown, 164 Ala. 397-762, 765.  
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     v. Davis, 35 Ind. 474-360, 536, 1575.  
     v. Eichhoff (Okla.), 158 Pac. 370, 1505.  
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     v. Kelly, 91 Ala. 596-2393.  
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     v. Loder, 132 N. Y. 288-2602, 2674.  
     v. McEwen, 35 Ill. App. 100-1423.  
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     v. Sneed, 76 Neb. 201-2084.  
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 Nelson's Heirs v. Boyce, 7 J. J. Marsh. (Ky.) 401-2570.  
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- v. Kent, 1 Mer. 240-2742.
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 v. McLean, 41 Barb. (N. Y.) 285-2174, 2262.  
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 v. Stanley, 28 N. Y. 61-2697.  
 v. Wilson, 3 Hen. & M. (Va.) 470-1468.  
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 v. Purezell, 21 Iowa 265-855, 857.  
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 v. Aylor, 7 Leigh (Va.) 565-2066.  
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 v. Briggs, 18 S. C. 473-2410, 2620, 2623.  
 v. Cabe, 3 Head (Tenn.) 92-2585.  
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 v. Eaton, 91 U. S. 716-2317, 2320, 2322.  
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 v. Lee, 10 Mich. 526-2536, 2665.  
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 v. Luce, 24 Pick. (Mass.) 102-1298, 1301, 1306, 1307.  
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 v. Meader, 4 Sawy. (U. S.) 603-1732.  
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 v. Norton, 94 Ala. 481-856, 857.  
 v. Palmer, 142 Mass. 433-2550.  
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 v. Ray, 139 Mass. 230-369.  
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 v. Tufts, 19 Utah 470-797.  
 v. Warner, 3 Edw. Ch. (N. Y.) 106-2696.
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 O'Brien's Appeal, 11 Wkly. Notes Cas. (Pa.) 229-2043.  
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     v. Ellis, 64 Mo. 77-2741.  
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     v. Kilpatrick, 96 Ala. 421-2268.  
     v. Morton, 24 Cal. 373-672.  
     v. Robbins, 19 Ill. 545-750.  
     v. Slatter, 26 Ala. 547-773, 797.  
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     v. Green, 103 Ky. 342-2419.  
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- v. Lane, 35 N. Y. 340-712, 2312.
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         2428.  
     v. Waring, 76 N. Y. 463-2186,  
         2187.  
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     489.  
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     2780.  
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     2539.  
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     v. Schenectady, 178 N. Y. 102-  
         1528.  
 Paine v. Barnes, 100 Mass. 470-  
     1059, 1088.  
     v. Chandler, 134 N. Y. 385-  
         1236, 1275, 1282, 1283,  
         1285, 1286.  
     v. Coffin, 2 Cleve. L. Rep.  
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     v. Consumers' F. & S. Co., 71  
         Fed. 626-1665.  
     v. Dodds, 14 N. D. 189-2517.  
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         432.  
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         1992.  
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         M. 285-2388.  
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     v. Culbertson, 143 N. Y. 213-  
         1630.  
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     v. Dougherty, 33 Me. 502-1664.  
     v. East River Gas Co., 115 N.  
         Y. App. Div. 677-1875.  
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         172, 1471.  
     v. Evangelical Benevolent &  
         Missionary Soc., 166 Mass.  
         143-1619.  
     v. Farrell, 129 Pa. 162-1659.  
     v. Forbes, 23 Ill. 301-911, 1675.  
     v. Ford, 70 Ill. 369-321.  
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         Plank Road Co., 11 N. Y.  
         376-265, 310.  
     v. Hicks, 6 Johns. (N. Y.) 133-  
         1011.  
     v. Holford, 4 Russ. 403-601.  
     v. Larchmont Elec. Co., 158 N.  
         Y. 231-1527.  
     v. Locke, 15 Ch. D. 294-1079,  
         1105.  
     v. Melson, 76 Ga. 803-188.  
     v. Osborne, 115 Iowa 714-1001.  
     v. Paine, 9 Gray (Mass.) 56-  
         2180.  
     v. Palmer, 150 N. Y. 139-684,  
         1260, 1261, 1290, 1297,  
         1303, 1305, 1369, 1876.  
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     v. Bowles, 57 N. H. 491-663, 665.  
     v. Brast, 45 W. Va. 339-2172.  
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     v. Carolina Sav. Bank, 53 S. C. 583-2750.  
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     v. Child, 25 N. J. Eq. 41-2650, 2706.  
     v. Constable, 3 Wils. 25-235.  
     v. Converse, 5 Gray (Mass.) 336-424.  
     v. Coop, 60 Tex. 11-402.  
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     v. Justice, 163 Ky. 737-829, 836, 1592.  
     v. Lent, 34 N. J. Eq. 67 2199.  
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     v. Parsons, 52 Ohio St. 470-1913.  
     v. Smilie, 97 Cal. 647-320, 323.  
     v. Snider, 42 W. Va. 517-2723.  
     v. Trustees of Atlanta University, 44 Ga. 529-1875.  
     v. Welles, 17 Mass. 419-2589.  
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     v. Dykins, 28 Okla. 54-1505.  
     v. First Independent Church, 39 Md. 631-1253, 1254.  
     v. Gilbert, 15 N. Y. 601-1243, 1245, 1275, 1294, 1343, 1350, 1366.  
     v. Lyon, 67 Hun (N. Y.) 29-1342.  
     v. Luce, 36 Me. 16-1656.  
     v. Partridge, 38 Pa. St. 78-2533.  
     v. Scott, 3 Mees. & W. 220-1190.  
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 Patrick's Appeal, 105 Pa. St. 356-2550, 2553.  
 Patten v. Bartlett, 111 Me. 409-145.  
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 v. Yeaton, 47 Me. 308-1805.  
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 v. Kinsman, 17 Iowa 428-2408.  
 v. Ludington, 103 Wis. 629-577.  
 v. Moore, 16 W. Va. 428-912, 915, 920, 940.  
 v. Nixon, 33 Ore. 159-329, 2735.  
 v. Rankin, 68 Ind. 245-650, 654.  
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 v. Western Carolina Educational Co., 101 N. C. 408-1355.  
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 v. Chouteau, 14 Mo. 580-397.  
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 v. Hazleton, 37 N. J. Law 106-1037, 1203.  
 v. McPherrin, 48 Colo. 522-2174, 2257.  
 v. Nurse, 8 Barn. & C. 486-160, 184, 299, 1472.  
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 Payne v. Avery, 21 Mich. 524-2513.  
 v. Becker, 87 N. Y. 153-804, 806.  
 v. Burnham, 62 N. Y. 69-2538.  
 v. Dotson, 81 Mo. 145-794, 795.  
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     v. Payne, 11 B. Mon. (Ky.) 138-730, 835.  
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     v. Sayle, 2 Dev. & B. Eq. (22 N. C.) 455-542.  
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     v. Smith, 28 Hun (N. Y.) 104-1774.  
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 Pea v. Pea, 35 Ind. 387-918, 942.  
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     v. Nelson, 50 Mo. 256-382.  
     v. Purvis, 2 Brod. & B. 362-881.  
     v. Slinchcomb, 189 Mich. 301-2036.  
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 Pearce v. Ferris, 10 N. Y. (6 Seld.) 280-242.  
     v. Hall, 12 Bush (Ky.) 209-2411, 2413.  
     v. McClenaghan, 5 Rich. L. (S. C.) 178-1371, 1374.  
     v. Nix, 34 Ala. 183-192.  
     v. Scotcher, 9 Q. B. Div. 162-1012, 1038.  
     v. Smith, 126 Ala. 116-2187.  
     v. Wilson, 111 Pa. St. 14-2419, 2420.  
 Percy v. Greenwell, 80 Ky. 616-272, 2737.  
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     v. Douglass, 1 Baxt. (Tenn.) 151-2655.  
     v. Dryden, 28 Ore. 350-1949.  
     v. Easterling, 104 S. C. 178-541.  
     v. Easterling, 107 S. C. 265-511, 525.  
     v. Hanson, 230 Ill. 610-2323.  
     v. Hartman, 100 Pa. 84-1253.  
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     v. Carpenter, 7 Gray (Mass.) 283-675.  
     v. Cary, 27 N. Y. 9-2342.  
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     v. Clark, 142 Mass. 436-1131, 1139.  
     v. Conway, 119 Mass. 546-1426, 1429, 1439, 1443.  
     v. Denniston, 121 Mass. 17-1663, 1665.  
     v. Goodberlett, 109 N. Y. 180-1162, 1163, 1166.  
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 Penzel v. Brookmire, 51 Ark. 105-2554.  
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     v. Donohue, 70 Hun (N. Y.) 317-372.  
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     v. Kelsey, 14 Abb. Pr. (N. Y.) 372-187.  
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     v. Osborn, 84 Hun (N. Y.) 441-2089.  
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     v. Platt, 17 Johns. (N. Y.) 195-1038.  
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     v. Prescott, 3 Hun (N. Y.) 419-2715.  
     v. Railroad Com'rs, 105 N. Y. App. Div. 273-1730.  
     v. Reed, 81 Cal. 70-1869, 1870, 1877.  
     v. Richardson (Ill.), 103 N. E. 1033-2142.  
     v. Sholem, 244 Ill. 502-660.  
     v. Silberwood, 110 Mich. 103-1018.  
     v. Simon, 176 Ill. 165-2275, 2277.  
     v. Snyder, 41 N. Y. 397-1761.  
     v. Steeple Chase Park Co., 218 N. Y. 459-1008, 1010, 1011.  
     v. Stockton Savings & Loan Society, 133 Cal. 611-2349.  
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 Pepper v. O'Dowd, 39 Wis. 538-1992.  
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     v. Gregory, 87 Kan. 303-2265.  
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     v. Stockwell, 131 Mass. 529-884.  
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- v. Hilton, 55 N. H. 444-2032, 2033.
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- v. Woodbury, 76 N. H. 23-780, 851.
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- v. Garfield, 37 Vt. 304-1225, 2035, 2052, 2064.
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- v. Read, 35 Vt. 2-2186.
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- v. Snow, 165 Mass. 23 1332, 1333.
- v. Strawbridge, 209 Mo. 621-2555.
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     v. Cartier, 80 Mich. 124-2206.  
     v. Condron, 2 Serg. & R. (Pa.) 80-1802.  
     v. Devinney, 6 Up. Can. C. P. 389-1185.  
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     v. Robertson, 73 Ore. 263-2047, 2048.  
     v. State, 96 Tenn. 682-1037, 1039.  
     v. Stone, 193 Mass. 179-179, 183.  
     v. Tunell, 43 Minn. 473-2752, 2754.  
 Petersen's Estate, In re, 13 Phila. (Pa.) 265-1053.  
 Peterson v. Bisbee, 191 Mich. 439-1786, 1816.  
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     v. Clark, 15 Johns. (N. Y.) 205-986.  
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 Peterson v. Edmonson, 5 Har. (Del.) 378-1498.  
     v. Hornblower, 33 Cal. 266-2303.  
     v. Jackson, 196 Ill. 40-510.  
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     v. Laik, 24 Mo. 541-2335, 2338.  
     v. Lowry, 48 Tex. 48-1735.  
     v. McCollough, 50 Ind. 35-2040, 2052.  
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     v. Stith, 30 U. S. (5 Pet.) 485-187, 266.  
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     v. Harris, 101 U. S. 370-1066.  
     v. Mayers, 126 Cal. 549-2410.  
     v. Nowlen, 72 N. Y. 39-1180.  
     v. Phelps, 143 N. Y. 197-749, 750.  
     v. Pratt, 225 Ill. 85-1744.  
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     v. Sage, 2 Day (Conn.) 151-2589.  
     v. Sullivan, 140 Mass. 36-1601, 2529.  
 Phene v. Popplewell, 12 C. B. N. S. 334-1586.  
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 Phiher v. Giles, 159 N. C. 142-453.  
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     v. City of Stamford, 81 Conn. 408-1875.  
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     v. Cutler, 89 Vt. 233-1205, 1209, 1214.  
     v. Delany, 114 Va. 681-681.  
     v. Ditto, 2 Duv. (Ky.) 549-832.  
     v. Doelittle, 9 Mod. 345-321.  
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     v. Ferguson, 85 Va. 509-282, 284, 395, 452.  
     v. Gaither, 191 Ala. 87-1830.  
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     v. Humphrey, 7 Ired. Eq. (42 N. C.) 206-2739.  
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- v. Ryner, 90 N. C. 283-1727.
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- v. Mercer, 106 Mo. App. 689-1632.
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- v. Wadlow, 94 Md. 564-2386.
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- v. Cloud, 42 Pa. St. 102-2041.
- v. Drew, 136 Mass. 75-1529.
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- v. Emery, 32 N. H. 484, 507-12, 2369.
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- v. Georger, 103 Mo. 540-1733.
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- v. Kinney, 59 Barb. (N. Y.) 56-1153.

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 v. Lemon, 2 Houst. (Del.) 519-1122, 1311.  
 v. Milwaukee & St. P. R. Co., 24 Wis. 551-2369.  
 v. Pierce, 71 N. Y. 154-791, 792, 793.  
 v. Roberts, 57 Conn. 31-1319.  
 v. Robinson, 13 Cal. 116-2385.  
 v. Rollins, 83 Me. 172-718.  
 v. Scott, 4 Watts & S. (Pa.) 344-1520.  
 v. Shaw, 51 Wis. 316-2556.  
 v. Spafford, 53 Vt. 394-1855.  
 v. Spear, 94 Ind. 127-2783.  
 v. Taylor, 23 Me. 246-2187.  
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 v. Fisher, 48 Ore. 223-1750.  
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 v. Brown, 7 Cush. (Mass.) 133-2487, 2488.  
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 v. Goodnow, 12 Allen (Mass.) 472-2667, 2673.  
 v. Munroe, 36 Me. 309-1017, 1619, 1660, 1673.  
 v. Stephenson, 99 Mass. 188-496.  
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- Pleasant v. Benson, 14 East 234-237.
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     v. Fuller, 11 Allen (Mass.) 139-2591.
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- Plumer v. Guthrie, 76 Pa. St. 441-2380.  
     v. Johnston, 63 Mich. 65-1313, 1317, 1539.  
     v. Plumer, 30 N. H. 558-190.  
     v. Robertson, 6 Serg. & R. (Pa.) 179-2227.
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- Plunket v. Holmes, 1 Lev. 11-507.  
     v. Holmes, T. Raym. 28-510.  
     v. Penson, 2 Atk. 290-2464.
- Plyler v. Elliott, 19 S. C. 257-2407.
- Plympton v. Plympton, 6 Allen (Mass.) 178-522.
- Poad v. Watson, 6 Q. B. 606, 618-391.
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     v. Carney, 17 S. D. 436-1217, 1220.  
     v. Clark, 92 Md. 373-2140.  
     v. Faris, 9 Yerg. (Tenn.) 209-537, 543.  
     v. Stephens, 126 Ark. 159-852.  
 Pollard v. American Freehold Land Mortgage Co., 139 Ala. 183-2439, 2452.  
     v. Barnes, 2 Cush. (Mass.) 191-1255, 2060.  
     v. Coker, 19 Ala. 188-2195.  
     v. Noyes, 60 N. H. 184-754, 2507.  
     v. Rehman, 162 Cal. 633-1386, 2064, 2217.  
     v. Shaffer, 1 Dall. (Pa.) 210-140, 177, 1498.  
     v. Slaughter, 92 N. C. 72-770.  
 Pollard's Estate, In re, 3 De G. J. & Sm. 541-639.  
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 Pollock v. Booth, Jr. Rep. 9 Eq. 229-610.  
     v. Maison, 41 Ill. 516-2621.  
     v. Stacy, 9 Q. B. 1033-164, 189.  
 Pollstown Gas Co. v. Murphy, 39 Pa. St. 237-1126.  
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 Pomfret v. Ricroft, 1 Saund. 323-1297, 1348.  
 Pomroy v. Rice, 16 Pick. (Mass.) 22-2623, 2625.  
     v. Stevens, 11 Mete. (Mass.) 244-2216, 2221.  
 Pond v. Bergh, 10 Paige (N. Y.) 141-527.  
     v. Clarke, 14 Conn. 334-2627.  
     v. Douglass, 106 Me. 85-336, 337, 474.  
     v. Drake, 50 Mich. 302-2450.  
     v. Hussey, 111 Me. 297-718.  
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     v. Buffum, 3 Ore. 438-1819.  
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     v. Gerrard, 6 Cal. 71-851.  
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     v. Noyes, 2 Me. 22-802, 1687.  
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     **v. Gracie**, 58 Ala. 303-1630.  
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     **v. Magruder**, 30 Ky. L. Rep. 76-2083.  
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     **v. Ranlett**, 116 Mich. 454-1059.  
     **v. Rend**, 201 Pa. 318-1296.  
     **v. Stransky**, 48 Wis. 235-2548, 2550, 2620.  
     **v. Wheeler**, 13 Mass. 506-706, 759.  
     **v. Worley**, 57 Iowa 66-826.  
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**Powell, Ex parte**, 68 S. C. 324-2617.  
**Powell v. Allen**, 75 N. C. 450-628.  
     **v. Bagg**, 8 Gray (Mass.) 441-2066.  
     **v. Banks**, 146 Mo. 620-1644.  
     **v. Cheshire**, 70 Ga. 357-959, 982, 984.  
     **v. Dayton, S. & G. R. R. Co.**, 12 Ore. 488-460.  
     **v. Dayton, S. & G. R. Co.**, 16 Ore. 33-974, 966.  
     **v. Gosson**, 7 B. Mon. (Ky.) 401-831, 837.  
     **v. Huey**, 241 Ill. 132-2415.  
     **v. Jeffries**, 5 Ill. 387-2474.  
     **v. Jones**, 50 Ind. App. 493-1972.  
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     **v. Monson & B. Mfg. Co.**, 3 Mason (U. S.) 362-397, 751, 775, 779, 813, 814, 823.  
     **v. Morisey**, 98 N. C. 426-1621, 1636.  
     **v. Pearlstine**, 43 S. C. 403-1644.  
     **v. Powell**, 27 Ga. 36-1636.  
     **v. Powell**, 5 Bush (Ky.) 619-631.  
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     v. Hatley, 85 Ky. 671-1909.  
     v. Jenkins, 13 Md. 443-2585.  
     v. Kitching, 10 N. D. 254-1942, 1989.  
     v. Larzewells, 25 Gratt. (Va.) 786-1545.  
     v. Lester, 23 N. Y. 527-2606.  
 Powers, In re, 124 N. Y. 361-2737.  
 Powers v. Andrews, 84 Ala. 289-2694.  
     v. Clarkson, 17 Kan. 218-876, 883.  
     v. Golden Lmb. Co., 43 Mich. 468-2645.  
     v. Harlow, 53 Mich. 507-1297, 1305, 1335.  
     v. Heffernan, 233 Ill. 597-1278, 1282, 1285, 1292, 1299.  
     v. McFerran, 2 Serg. & R. (Pa.) 47-2211.  
     v. Munson, 74 Wash. 234-1625.  
     v. Patten, 71 Me. 583-2131.  
     v. Powers, 46 Ore. 479-1639.  
     v. Rude, 14 Okla. 381-1771.  
     v. Russell, 13 Pick. (Mass.) 69-1749.  
 Powers Shoe Co. v. Odd Fellows Hall Co., 133 Mo. App. 229-323, 325.  
 Poweshiek County v. Dennison, 36 Iowa 244-2693.  
 Powis v. Corbet, 3 Atk. 556-2653.  
     v. Smith, 5 Barn. & Ald. 850-1484.  
 Powles v. Jordan, 62 Md. 499-1102.  
 Pownal v. Taylor, 10 Leigh (Va.) 172-330, 375.  
 Powys v. Blagrove, 4 De Gex, M. & G. 448-974.  
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     v. Bank of Bennington, 10 Vt. 293-2525, 2619.  
     v. Brett, 2 Madd. 62-983.  
     v. Buckley, 175 Mass. 115-2606, 2666.  
     v. Churchill, 42 Me. 471-1951.  
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     v. Curtis, 2 Lowell (U. S.) 87-2282, 2283.  
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     v. Farrar, 93 Mass. (10 Allen) 519-226, 227.  
     v. H. M. Richards Jewelry Co., 69 Pa. 53-1491.  
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     v. Law, 9 Cranch (U. S.) 456-2665.  
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     v. Richards Jewelry Co., 69 Pa. 53-1492.  
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 Prescott v. Boucher, 3 Barn. & Adol. 849-1508, 1519.  
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     v. Nevers, 4 Mason (U. S.) 330-673.  
     v. Otterstatter, 85 Pa. 534-1505.  
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 Preston v. Bosworth, 153 Ind. 458-307.  
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     v. Nash, 76 Va. 1-2178, 2179, 2212.  
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 Prestwood v. McGowin, 128 Ala. 267-1719.  
 Prettyman v. Goodrich, 23 Ill. 330-1642.  
 Prevot v. Lawrence, 51 N. Y. 219-188, 193.  
 Prewitt v. Ashford, 90 Ala. 294-1774, 1780.  
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     v. Brown, 4 S. C. 144-381.  
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 v. Maxwell, 28 Pa. St. 23-1843.  
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 v. Pickett, 21 Ala. 741-888.  
 v. Pittsburg, Ft. W. & C. R. Co., 34 Ill. 13-1779, 1781.  
 v. Plainfield, 40 N. J. L. 608-1884.  
 v. Powell, 3 Hurl. & N. 341-1840.  
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 v. Price's Heirs, 6 Dana (Ky.) 107-12, 13.  
 v. Salisbury, 41 Okla. 416-2450.  
 v. Stratton, 45 Fla. 535-1322.  
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 v. Weehawken Ferry Co., 31 N. J. Eq. 31-943.  
 v. Worwood, 4 Hurl. & N. 512-303.  
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 v. Williams, 110 Ark. 632-2386.  
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 Priddy v. Griffith, 150 Ill. 560-744, 956.  
 v. Hartsook, 81 Va. 67-2731.  
 Pridgeon v. Excelsior Boat Club, 66 Mich. 326-201, 202.  
 Priest v. Cummings, 20 Wend. (N. Y.) 338-2351.  
 v. Foster, 69 Vt. 417-140.  
 v. McFarland, 262 Mo. 229-1064.  
 v. Murphy, 103 Ark. 464-329.  
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 v. Rice, 1 Pick. (Mass.) 164-2215.  
 v. Wheelock, 58 Ill. 114-2622.  
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 v. Welbourn, 1 Rich. L. (S. C.) 58-2054.  
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 Pringle v. Dunkley, 14 Smedes & M. (Miss.) 16-286.  
 v. Dunn, 37 Wis. 449-2182, 2185, 2199, 2200.  
 v. Pringle, 59 Pa. St. 281-2534.  
 v. Witten's Ex'rs, 1 Bay (S. C.) 256-1680.  
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 v. Swartz, 62 Conn. 132-1022, 1026.  
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 v. Brown, 4 N. H. 397-398.  
 v. Kalamazoo College, 82 Mich. 587-2619.

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 v. Libby, 110 Me. 39-998.  
 Proctor v. Bishop of Bath & Wells, 2 H. Bl. 358-594, 615.  
 v. Ferebee, 1 Ired. Eq. (N. C.) 143-440, 446.  
 v. Gilson, 49 N. H. 62-947.  
 v. Hodgson, 10 Exch. 824-1369.  
 v. Jennings, 6 Nev. 83-1147.  
 v. Keith, 12 B. Mon. (Ky.) 252-140.  
 v. Thrall, 22 Vt. 262-2383.  
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 v. Marshall, 225 Pa. 570-2199, 2201.  
 v. Mather, 49 Vt. 425-2129.  
 v. Price, 50 Barb. (N. Y.) 344-2580.  
 v. Prouty, 5 How. Pr. (N. Y.) 81-229.  
 v. Roby, 15 Wall. (U. S.) 471-179, 185.  
 v. Tilden, 164 Ill. 163-1960.  
 v. Wiley, 28 Mich. 164-2339.  
 Providence County Sav. Bank v. Hall, 16 R. I. 154-248, 258.  
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 v. Miller Mfg. Co., 117 Va. 129-1018, 1657.  
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Edw. III, 3-533.
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Mo. 256-2164.
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- Prugh v. Portsmouth Sav. Bank, 48  
Neb. 414-2304.
- Pruitt v. Ellington, 59 Ala. 454-900,  
1004.  
v. Pruitt, 91 Ind. 595-2756.  
v. Pruitt, 57 S. C. 155-381.
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1769, 1773, 1778.
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v. Stone, 19 Tex. 371-2296.  
v. Wood, 31 Pa. 142-2520, 2542,  
2696.
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106 Me. 234-933.
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App. 318-2019.  
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v. Morgan, 158 N. C. 344-539.
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865.
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128-1010.
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938.  
v. Fairmont Gold & Silver Min.  
Co., 112 U. S. 238-2468,  
2470.  
v. Good, 3 Watts & S. (Pa.)  
56-2782.  
v. Highley, 152 Ind. 252-2259.  
v. Holt, 27 Miss. 401-2696.  
v. Wheeler, 19 N. C. 50-1155.
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494-230, 237, 239, 240.
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592, 609, 1111.
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Co., Fed. Cas. No. 11, 462-  
2434.  
v. Stallman, 76 N. J. Law 10-  
1191.
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Co., 13 Wall. (U. S.) 166-2161.
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536-2747.
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93-2465.
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v. Lang, 97 Iowa 610-766, 810,  
825.  
v. Wilson, 4 Gratt. (Va.) 16-  
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v. Huntington, 42 N. Y. 334-  
2546, 2619.  
v. Purdy, 18 N. Y. App. Div.  
310-713.
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380-510, 555, 646.
- Purinton v. Security, etc., Co., 72  
Me. 22-1801.
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887.
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1204, 1221.
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1000.
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1415.
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Omaha, 70 Neb. 353-233,  
257.  
v. Sipps, 56 Pa. Super. Ct. 121-  
1494.
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2338, 2340.
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454-2667.  
v. Pere Marquette R. R. Co.,  
174 Mich. 246-1622.  
v. Putnam, 8 Pick. (Mass.)  
433-735.

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 v. Summerlin, 168 Ala. 390-2392, 2748.  
 v. Tuttle, 10 Gray (Mass.) 48-1614.  
 v. Wise, 1 Hill (N. Y.) 234-898.  
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 v. Dresser, 2 Metc. (Mass.) 586-635, 636.  
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 v. Jones, 76 Ill. 231-1192, 1193, 2033.  
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 v. Wickman, 233 Ill. 39-615.  
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     145-2214, 2565.  
 Quint v. Little, 4 Me. 495-2655.  
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     1362.  
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     64 Miss. 483-1122.  
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     1755.  
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     1404, 1466.  
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     1159, 1390, 1543.  
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     481-1885.  
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     376-2184, 2373.  
 Radburn v. Fir Tree Lumber Co.,  
     83 Wash. 643-1147.  
     v. Jervis, 3 Beav. 450-13.  
 Radcliff's Ex'rs v. City of Brook-  
     lyn, 4 N. Y. 195-1121, 1193,  
     1534.  
 Radcliffe, In re, (1892) 1 Ch. 227-  
     1105.  
 Radey v. McCurdy, 209 Pa. 306-  
     939.  
 Radford v. Folsom, 58 Iowa 473-  
     2378.  
 Radican v. Hughes, 86 Conn. 536-  
     215, 225, 907, 921.  
 Radley v. Radley, 78 N. J. Eq. 170-  
     823, 824.  
 Raffel v. Clark, 87 Conn. 567-2486.  
 Rafferty v. Central Trac. Co., 147  
     Pa. 579-1533.  
 Ragland v. Huntingdon, 23 N. C.  
     561-1827.  
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     C.) 429-189.  
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     108-1865.  
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     448-1147.  
 Railton v. Taylor, 20 R. I. 279-  
     147, 148.  
 Rain v. Roper, 15 Fla. 121-461,  
     774.  
 Raines v. Walker, 77 Va. 95-2126,  
     2181, 2185.  
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     Co., 91 Miss. 690-2185.  
 Raisin Fertilizer Co. v. Bell, 107  
     Ala. 261-2648.  
 Raiser v. Lyons, 172 Ky. 314-  
     1354.  
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     451-489.  
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     172-268, 272.  
 Rait v. Clifford, 224 Mass. 58-  
     1314.  
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     407-821.  
 Ralph v. Lomer, 3 Wash. St. 401-  
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     v. Lower, 98 Ind. 255-2129, 2270.  
     v. McLaughlin, 10 Allen (Mass.) 366-1286.  
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     v. Hardy, 43 Ohio St. 157-2221, 2224, 2266.  
     v. McMullen, 5 Abb. N. Cas. (N. Y.) 246-2498.
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- Ransom, In re, 17 Fed. 331-749.
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- Ratliff's Ex'rs v. Comm., 31 Ky. L. Rep. 154-2328.
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**Rawlins v. Buttlet**, 1 Houst. (Del.) 224-795.  
**Rawson v. Bell**, 46 Ga. 19-1264, 1265, 1266.  
     *v. Inhabitants of School Dist. No. 5, in Uxbridge*, 7 Allen (Mass.) 125-271, 273.  
     *v. Plaisted*, 151 Mass. 71-2466.  
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     *v. Gold, Moore*, 635-583.  
**Raymond v. Holden**, 2 Cush. (Mass.) 270-2123.  
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     *v. Raymond*, 10 Cush. (Mass.) 134-1680.  
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     *v. Burley, Cro. Eliz.*, 596-1521.  
     *v. Lawuse*, 2 Dyer 212b-1467.  
     *v. Read*, 5 Call (Va.) 207-2143.  
     *v. Robinson*, 6 Watts & S. (Pa.) 329-1794.  
     *v. Toledo Loan Co.*, 68 Ohio St. 280-1730.  
     *v. Tuttle*, 35 Conn. 25-301, 309.  
     *v. Williams*, 125 N. Y. 560-448.  
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**Readfield Tel. & T. Co. v. Cyr**, 95 Me. 287-906.  
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     v. Dickerman, 12 Pick. (Mass.) 146-787.  
     v. Earnhart, 10 Ired. (N. C.) 516-1922.  
     v. Garnett, 101 Va. 47-2066.  
     v. Hackney, 69 N. J. L. 27-2022, 2023.  
     v. Hatch, 55 N. H. 327-289, 291.  
     v. Hazard, 187 Mo. App. 547-1447.  
     v. Inhabitants of Northfield, 13 Pick. (Mass.) 94-2079.  
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 v. McConnell, 5 Ill. 117-2204.  
 v. McGill, 41 Neb. 206-899.  
 v. Marble, 10 Paige (N. Y.) 409-2701.  
 v. Merrifield, 10 Mete. (Mass.) 155-1219.  
 v. Money, 115 Ark. 1-1921.  
 v. Nunn, 80 C. C. A. 215-2251, 2253.  
 v. Painter, 145 Mo. 341-2004.  
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 v. Prop. of Locks & Canals, on Merrimac River, 8 How. (U. S.) 274-1651.  
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 v. Reed, 48 Me. 388-225, 241.  
 v. Reed, 109 Md. 690-656.  
 v. Reed, 3 Head (Tenn.) 491-836.  
 v. Reynolds, 37 Conn. 469-1488.  
 v. Robertson, 45 Mo. 580-719.  
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 v. Stonffer, 56 Md. 236-337.  
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 Reed's Ex'rs v. Reed, 16 N. J. Eq. (1 C. E. Green) 248-955.  
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 v. Purdy, 41 Ill. 279-255, 256.  
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 v. Sayre, 70 N. Y. 180-889, 892, 894.  
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 v. Zinn, 103 Fed. 97-219.  
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 v. Chamberlains, 9 Adol. & E. 444-1388.  
 v. Chorley, 12 Q. B. 515-1380, 1381.

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 v. Howe, 121 Mass. 424-1741, 1778, 1795.  
 v. Keyes, 204 Mass. 294-1193.  
 v. Luthy, 16 Daly (N. Y.) 413-975.  
 v. Williams, 185 Mo. 620-2501.  
 Reggio v. Braggiotti, 7 Cush. (Mass.) 166-1715.  
 Register v. Elder, 231 Mo. 321-565, 747.  
 Regnart v. Porter, 7 Bing. 451-1518.  
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 v. Bonshall, 107 N. C. 345-1078, 1079.  
 v. Burns, 13 Ohio St. 49-327.  
 v. Corrigan, 143 Ill. 402-2738.  
 v. Garnett, 101 Va. 47-2053, 2054.  
 v. Gordon, 35 Md. 183-359, 1104.  
 v. Gorman, 37 S. D. 314-1788, 2781.  
 v. King, 158 N. C. 85-1246, 1386.  
 v. McGowan, 28 S. C. 74-2778.  
 v. McMillan, 189 Ill. 411-2686.  
 v. Sprague, 72 N. Y. 457-2545.  
 v. Stanley, 6 Watts & S. (Pa.) 369-243.  
 v. Sycks, 27 Ohio St. 285-1689.  
 v. Walbach, 75 Md. 205-510.  
 v. Weissner & Sons Brewing Co., 88 Md. 243-160, 299.  
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 v. Strite, 54 Md. 298-445, 446.  
 Reilly v. Bates, 40 Mo. 468-813.  
 v. Booth, 44 Ch. D. 12-1260.  
 v. City of Racine, 51 Wis. 526-1862, 1878.  
 v. Cullen, 159 Mo. 322-2363, 2381.  
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v. Johnson, 5 N. H. 520-1660.  
v. Joliffe, 2 Term. Rep. 95-1351.  
v. Montagu, 4 B. & C. 598-1007.  
v. St. Pancras Assessment Committee, 2 Q. B. D. 581-1255.  
v. Thomas, 7 El. & Bl. 399-1867.  
v. Yarborough, 3 B. & C. 91-2093.
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v. Cook, 83 Va. 817-868, 2118.  
v. Gaertner, 117 Mich. 532-1613.  
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     v. Meridith, 6 Lea (Tenn.) 605-860.  
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     v. Canfield, 8 Paige (N. Y.) 545-2561.  
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     v. Seidel, 139 Mich. 608-138, 141.  
 Rhoads v. Davidheiser, 133 Pa. St. 226-1165.  
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     v. Town of Brightwood, 145 Ind. 21-1854, 1867, 1872.  
     v. Walker (Ky.), 115 S. W. 257-1627.  
     v. Whitehead, 2 Drew. & S. 532-556, 1133, 1146, 1381, 2032, 2055.  
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 Ricard v. Williams, 7 Wheat. (U. S.) 59-1922, 1935, 1981, 2152.  
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     v. Boston & W. R. Corporation, 12 Allen (Mass.) 141-272, 316.  
     v. Brown, 77 Ill. 549-366.  
     v. Cary, 170 Cal. 748-1813.  
     v. Dudley, 65 Ala. 68-201, 202, 1587.  
     v. Ford (Ky.), 120 S. W. 288-1351, 1352.  
     v. Groves, 70 Hun (N. Y.) 74-2404.  
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     v. Minn. & N. W. R. Co., 1 Black (U. S.) 358-1554.  
     v. Norfolk & C. R. Co., 130 N. C. 375-1165.  
     v. Peet, 15 Johns. (N. Y.) 503-1571.  
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2485, 2500.
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- v. Wilburn, 31 Ark. 108-2468.
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234, 235.
- v. Doane, 35 Vt. 125-2389.
- v. Downs, 81 Kan. 43-2210.
- v. Gilkey, 73 Me. 595-1838.
- v. Naffziger, 255 Ill. 98-1969.
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- v. Delbridge, L. R. 18 Eq. 11  
376, 383.
- v. Talbird, Rice Eq. (S. C.)  
158-2585.
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1362.
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Co., 153 Mass. 120-1376.
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Mass. 401-2084.
- v. Chace, 2 Gray (Mass.) 383-  
852.
- v. Cincinnati, 31 Ohio St. 506-  
1883.
- v. Delbridge, L. R. 18 Eq. 11  
384.
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2759.
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Church, 32 Barb. (N. Y.)  
42-1253, 1254.
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Co., 222 Mo. 149-476.
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1621, 1622.
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1275, 1294.
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2263.
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617-2584.
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2702.
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973.
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900, 902.
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19 S. D. 595-2549.
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339-1261.
- v. Atlantic Coast Lmb. Co., 93  
S. C. 254-2131.
- v. Bailey, 77 N. H. 184-2735.
- v. Bigelow, 15 Gray (Mass.)  
154-1275.
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118-2587.
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1000, 1002.
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1267.
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536-941.
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190-1088.
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729.
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1373.
- v. Hadsall, 106 Ill. 476-2703.
- v. Harrison, 16 Q. B. D. 85-  
531.
- v. Langridge, 4 Tannt. 128-  
232, 234, 235.
- v. Manson, 101 Mass. 482-662.
- v. Palmer, 38 N. H. 212-1606,  
1613.
- v. Penicks, 1 App. D. C. 261-  
496.
- v. Pond, 15 Gray (Mass.) 387-  
1255, 1256.
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1191.
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1089.
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506.
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642.
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1825.

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 Piner v. Fallis, 176 Ky. 575-336.  
 Ring v. Burt, 17 Mich. 465-859.  
     v. Mayberry, 168 N. C. 563-1403.  
     v. Walker, 87 Me. 550-1224, 1226, 1228, 1267, 1268, 1607.  
 Ring's Estate, In re, 132 Iowa 216-237, 877.  
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 Ripka v. Sergeant, 7 Watts & S. (Pa.) 9-1147.  
 Ripley v. Armstrong, 159 N. C. 158-1059.  
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 Ripple v. Ripple, 1 Rawle (Pa.) 386-2735, 2740.  
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 Ritchey v. Risley, 3 Ore. 184-2773.  
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 Ritchie v. Griffiths, 1 Wash. 429-2199, 2201.  
     v. Kansas, N. & D. Ry. Co., 55 Kan. 36, 290, 297, 306.  
 Ritger v. Parker, 8 Cush. (Mass.) 145-1371, 1372.  
 Ritt v. Dodge, 20 R. I. 133-804, 805.  
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     v. Hickey, 1 McAr. (D. C.) 83-1386.  
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     v. Watson, 5 Mees. & W. 255-1484.  
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     v. Hacher, 2 Lea (Tenn.) 633-2669.  
     v. Karr, 18 Kan. 529-1638, 2220.  
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- v. Eaton, 6 Me. 89-2340.
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- v. Farwell, 193 Pa. 37-887.
- v. Kinzie, 45 Ill. 354-776.
- v. Larson, 69 Minn. 436-2545, 2592, 2593, 2594, 2595.
- v. Magee, 76 Ind. 381-1643.
- v. Masteller, 147 Ind. 122-2760.
- v. Moore, 129 Ill. 30-2559.
- v. Rascoe, 120 N. C. 79-1741, 1754, 1757, 1790.
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- v. Webb, 68 Ala. 393-1405, 1409, 1413.
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- Robert v. Robertson, 53 Vt. 690-1613.
- v. Thompson, 16 N. Y. Misc. 638-1377.
- Robert's Appeal, 92 Pa. St. 407-380.
- Robert's Estate, In re, 84 Wash. 163-1900.
- Roberts v. Atlanta Cemetery Ass'n, 146 Ga. 490-2703.
- v. Barker, 1 Comp. & M. 808-948.
- v. Bourne, 23 Me. 165 2186, 2187, 2787.
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- v. Cooper, 20 How. (U. S.) 467-2289.
- v. Cox, 259 Ill. 322-2018.
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- v. Fleming, 53 Ill. 196-2425, 2452.
- v. Geis, 2 Daly (N. Y.) 535-323.
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- v. Halstead, 9 Pa. St. 32-2636, 2639.
- v. Herron, 78 S. C. 115-712.
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- v. Jones, 71 S. C. 404-918.
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- v. Levy, 3 Abb. Pr. Rep. N. S. (N. Y.) 311-1686.
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 v. Porter, 100 Ky. 130-1443.  
 v. Richards, 50 L. J. Ch. 297-1238.  
 v. Roberts, 131 Ark. 90-762.  
 v. Roberts, 176 Iowa 610-2400.  
 v. Roberts, 102 Md. 131-492.  
 v. Roberts, 2 McCord L. (S. C.) 268-2024, 2025.  
 v. Robinson, 49 Neb. 717-2303.  
 v. Sims, 64 Miss. 597-1468.  
 v. Sliffe, 41 Ohio St. 225-845.  
 v. Stevens, 40 Ill. App. 138-1336.  
 v. Stevens, 84 Me. 325-2320, 2323, 2324.  
 v. Thorn, 25 Tex. 728-693.  
 v. Trujillo, 3 N. M. 87-1358.  
 v. Walker, 82 Mo. 200-778.  
 v. Wallace, 100 Minn. 359-711.  
 v. Welch, 8 Ired. Eq. (N. C.) 287-2681.  
 v. Whiting, 16 Mass. 186-845.  
 v. Wiggin, 1 N. H. 73-2335.  
 v. Wilcoxon, 36 Ark. 355-732.  
 Roberts' Trustee v. Terry, 161 Ky. 397-2373, 2642.  
 Robertson v. Bates, 3 Mete. (Mass.) 40-781.  
 v. Biddell, 32 Fla. 304-196.  
 v. Corsett, 39 Mich. 777-915.  
 v. De Brulatour, 188 N. Y. 301-371.  
 v. Gaines, 2 Humph. (Tenn.) 367-1069, 1075, 1077.  
 Lemon, 2 Bush (Ky.) 302-1714, 1715.  
 v. Lieber, 56 Ind. App. 152-1618.  
 v. Meadows, 73 Ind. 43-982.  
 v. Mowell, 66 Md. 530-2670.  
 v. Norris, 1 Giff. 421-2723.  
 v. Norris, 11 Q. B. 916-726, 727.  
 v. Read, 52 Ark. 381-2449.  
 v. Robertson, 191 Ala. 297-1619.  
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 v. Skelton, 12 Beav. 260-458.  
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 v. Stevens, 36 N. C. 247-831.  
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 v. Wampler, 104 Va. 380-1595.  
 v. Wilson, 38 N. H. 48-525, 526.  
 v. Wood, 15 Tex. 1-2012.  
 v. Youghiogheny River Coal Co., 172 Pa. St. 566-1243.  
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 Robeson v. Cochran, 225 Ill. 355-526, 528.  
 v. Robeson, 50 N. J. Eq. 465-2541.  
 v. Shotwell, 55 N. J. Eq. 318-1070.  
 Robidoux v. Cassilegi, 10 Mo. App. 516-672.  
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 v. Flanders, 33 N. H. 524-804.  
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 Robins v. Coryell, 27 Barb. (N. Y.) 559-1819.  
 v. Hobart, 133 Minn. 49-1642.  
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 v. Allison, 74 Ala. 254-1076, 1078, 1970, 2022, 2339, 2340.  
 v. Amateur Literary, etc., Ass'n, 14 S. C. 148-2724, 2725.  
 v. Appleton, 124 Ill. 276-461, 2759, 2764.  
 v. Baker, 47 Mich. 619-855.  
 v. Bates, 3 Mete. (Mass.) 40-777.  
 v. Bazoon, 79 Tex. 524-1965, 1971.  
 v. Black Diamond Coal Co., 57 Cal. 412-1142.  
 v. Brewster, 140 Ill. 649-1818.  
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 v. Cahalan, 91 Ala. 479-2727.  
 v. Clapp, 65 Conn. 365-896, 1277, 1285, 2207.

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 v. Eagle, 29 Ark. 202-650.  
 v. Fife, 3 Ohio St. 551-2021, 2652, 2653, 2656.  
 v. Gebauer, 98 Neb. 196-1866.  
 v. Glass, 94 Ind. 211-1638.  
 v. Govers, 138 N. Y. 425-812, 822.  
 v. Harbour, 42 Miss. 795-2765.  
 v. Harrison, 235 Pa. 613-928.  
 v. Heil, 128 Md. 645-141.  
 v. Hillman, 36 Dist. Col. App. 241-1279, 1285, 1288, 1311.  
 v. Holt, 39 N. H. 575-2281.  
 v. Ingram, 126 N. C. 327-269.  
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 v. Lincoln Sav. Bank, 85 Tenn. 363-2394.  
 v. Litton, 3 Atk. 209-988.  
 v. Lowe, 66 W. Va. 665-1990.  
 v. Lowery, 52 S. C. 464-2666.  
 v. McDiarmid, 87 N. C. 455-395, 1833.  
 v. McDonald, 11 Tex. 385-659, 688.  
 v. Manlin, 11 Ala. 977-1802, 1803.  
 v. Miller, 2 B. Mon. (Ky.) 284-757.  
 v. Miller, 1 Mon. (Ky.) 88-815.  
 v. Missisquoi R. Co., 59 Vt. 426-1260.  
 v. Myers, 67 Pa. St. 9-1664.  
 v. Noel, 49 Miss. 253-1725.  
 v. Nordman, 75 Ark. 593-1960.  
 v. Ostendorf, 38 S. C. 66-1072.  
 v. Palmer, 90 Me. 246 487, 489, 493, 510.  
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 Robinson v. Payne, 58 Miss. 690-1621, 1622.  
 v. Perry, 21 Ga. 183-159, 179.  
 v. Pierce, 118 Ala. 273-390, 391, 419, 2004, 2005.  
 v. Queen, 87 Tenn. 445-732.  
 v. Randolph, 21 Fla. 629-2319.  
 v. Reynolds (Mo.), 176 S. W. 3 2008.  
 v. Roberts, 31 Conn. 145-700.  
 v. Ryan, 25 N. Y. 320-2534, 2650, 2728.  
 v. Sampson, 23 Me. 388-2611.  
 v. Sampson, 121 N. C. 99-2583.  
 v. Schley, 6 Ga. 515-1815.  
 v. Shanks, 118 Ind. 125-1129.  
 v. Sherwin, 36 Vt. 69-700.  
 v. Thornton, 102 Cal. 675-2009.  
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 v. Webb, 68 Ala. 397-1431.  
 v. Wheeler, 25 N. Y. 252-978, 986.  
 v. Williams, 22 N. Y. 380-2411, 2567, 2568.  
 v. Wilson, 15 Kan. 595-2301.  
 v. Wood, 27 Law J. Ch. 726-588.  
 v. Wright, 9 D. C. 54-931.  
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 Robisson v. Miller, 158 Pa. 177-707.  
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 Roby v. Bismark Nat. Bank, 4 N. D. 156-853, 2563, 2564.  
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 Rockford v. Hackman, 9 Hare 475-2314.  
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 Rockland Water Co. v. Tillson, 75 Me. 170-1335.  
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     v. Blair Sav. Bank, 31 Neb. 128-2489.  
     v. Hobby, 2 Sandf. Ch. (N. Y.) 9-2750.  
     v. Morgan, 13 N. J. Eq. 389-743, 809.  
     v. Rockwell, 81 Mich. 493-758.  
     v. Swift, 59 Conn. 289-629.  
 Rockwood v. St. John, 10 Okla. 476-857.  
 Rodda v. Needham, 78 Wash. 636-2653, 2660.  
 Roddy v. Brick, 42 N. J. Eq. 218-915.  
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     v. Fitzgerald, 6 H. L. Cas. 823-536, 541, 1099.  
 Rodefer v. Pittsburg, etc., R. Co., 72 Ohio St. 272-1210.  
 Rodemeier v. Brown, 169 Ill. 347-1759.  
 Roderick v. Sanborn, 106 Me. 159-904, 906, 914.  
 Rodgers v. Beckel, 172 Mich. 544-2011.  
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     v. Parker, 136 Cal. 313-2586, 2594.  
     v. Parker, 9 Gray (Mass.) 445-1314.  
 Rodgers v. Turpin, 105 Iowa 183-2225.  
 Rodman v. Quick, 211 Ill. 546-2703, 2706.  
     v. Sanders, 44 Ark. 504-2669, 2759.  
 Rodney v. McLaughlin, 97 Mo. 426-2015.  
 Rodriguez v. Haynes, 76 Tex. 225-1644.  
 Rodwell v. Phillips, 9 Mees. & W. 501-876, 877.  
 Roe v. Barker, 82 N. Y. 431-2496.  
     v. Cato, 27 Ga. 637-2257.  
     v. Howard County, 75 Neb. 448-2056.  
     v. Lovick, 8 Fred. Eq. (N. C.) 88-1769.  
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     v. Strong, 107 N. Y. 350-1945.  
     v. Tranmer, 2 Wils. 75, 3 Smith, Lead. Cas. (9th Ed.) 1780-349, 551.  
     v. Vingut, 117 N. Y. 204-1059.  
     v. Walsh, 76 Wash. 148-1276, 1286, 1386.  
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 Roepke v. Nutzmann, 95 Neb. 589-1790.  
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213 N. Y. 246-969, 975,  
978.  
v. Babcock, 139 Mich. 94-  
1505.  
v. Bailey, 78 N. J. Eq. 589-  
566.  
v. Ballinger, 59 Ark. 12-1313,  
1316.  
v. Barnes, 169 Mass. 179-  
2711, 2729.  
v. Benton, 39 Minn. 39-2362,  
2433, 2657, 2687.  
v. Blackwell, 49 Mich. 192-  
2344.  
v. Boynton, 57 Ala. 501-199.  
v. Bracken's Adm'r, 15 Tex.  
564-1799.  
v. Brooks, 30 Ark. 612-727.  
v. Clark, 5 Sneed (Tenn.)  
665-454.  
v. Cox, 96 Ind. 157-1205, 1216.  
v. Davis, 91 Iowa 730-2388,  
2392.  
v. Diamond, 13 Ark. 474-1828.  
v. Dockstader, 90 Kan. 189-  
1587.  
v. Donellan, 11 Utah 108-402.  
v. Eagle Fire Co., 9 Wend.  
(N. Y.) 611-549, 551.  
v. Elliott, 59 N. H. 201-876,  
881.  
v. Flick, 144 Ky. 844-2044.  
v. Gillinger, 30 Pa. St. 185-  
918, 940.  
v. Golson (Tex. Civ. App.),  
31 S. W. 200-1717.  
v. Gosnell, 58 Mo. 589-2498.  
v. Grider, 1 Dana (Ky.) 242-  
645.  
v. Heads Iron Foundry, 51  
Neb. 52-1789, 1792.  
v. Hedemark, 70 Minn. 441-  
2481.  
v. Heron, 92 Ill. 583-2367.  
v. Herren, 92 Ill. 583-2441,  
2662.  
v. Hill, 3 Ind. T. 562-217.  
v. Hinton, 62 N. C. 101-1107.  
v. Holyoke, 14 Minn. 220-  
2706.  
v. Hosegood, [1900] 2 Ch.  
388 1440, 1415, 1436.  
v. Houston, 94 Tex. 403-2262.
- Rogers v. Humphreys, 4 Adol. & E.  
299-213.  
v. Hurd, 4 Day (Conn.) 57-  
2335.  
v. Hussey, 36 Iowa 664-2228.  
v. Johnson, 259 Mo. 173-1957.  
v. Jones, 8 N. H. 264-2222,  
2237.  
v. Peckham, 120 Cal. 238-  
2595.  
v. Pettus, 80 Tex. 425-2267.  
v. Potter, 32 N. J. Law 78-  
804.  
v. Powers, 204 Mass. 257-  
1371.  
v. Rogers (Miss.), 43 So. 946-  
1815.  
v. Rogers, 111 N. Y. 228-371,  
372.  
v. Rogers, 20 R. I. 400-394.  
v. Rogers, 2 Head (Tenn.)  
660-1099.  
v. Sawin, 10 Gray (Mass.)  
376-1122.  
v. Sebastian, 21 Ark. 440-  
270.  
v. Sinsheimer, 50 N. Y. 646-  
1244, 1294.  
v. Sisters of Charity of St. Jo-  
seph 97 Md. 550-347,  
360, 1567.  
v. Smith, 146 Ga. 373-2259.  
v. Southern Pine Lumber Co.,  
21 Tex. Civ. App. 48-  
2442.  
v. Teager, 170 Iowa 604-307.  
v. Town of Aitkin, 77 Minn.  
539-2084.  
v. Tucker, 94 Mo. 346-2565.  
v. Turley, 4 Bibb (Ky.) 356-  
709.  
v. Walker, 6 Pa. St. 371-2344.  
v. White (Tex. Civ. App.),  
194 S. W. 1001-2244.  
v. Wiley, 14 Ill. 65-2264.  
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422-860.  
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(Tenn.) 142-736.  
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307-1356, 1360, 1361, 2050.  
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2258, 2547, 2645.

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v. Harris, 2 Price 206-322.
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v. Rea, 50 N. J. L. 264-2240, 2242, 2778.
- Rolle v. Whyte, L. R. 3 Q. B. 286-1256.
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- Rolley v. Rolley, 109 Va. 449-571, 573.
- Rollins v. Blackden, 112 Me. 459-1236, 2036, 2046, 2049, 2051, 2064, 2067.  
v. Davis, 96 Ga. 107-551.  
v. Ebbs, 137 N. C. 355-1598.  
v. Henry, 78 N. C. 342-2268.  
v. Rice, 59 N. H. 493-1053.  
v. Riley, 44 N. H. 9-261, 305, 327, 1576.
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v. Johnson, 96 Vt. 64-1235.
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v. Petry, 22 Ont. L. Rep. 101-1929.
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v. Davis, 49 Tex. 463-2763.  
v. Hopkins, 33 N. Y. 81-161.
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v. Com., 98 Pa. St. 170-2084, 2085.  
v. Crock, 7 Pa. 378-2118.  
v. Wheeler, 12 Abb. Pr. (N. Y.) 294-2727.
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v. Roper, 3 Ch. Div. 714-789.  
v. Williams, Turn. & R. 18-1453.
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v. Buscher, 80 Md. 225-898.  
v. Elizabethtown, 275 Ill. 167-1874, 1877, 1879.  
v. Fletcher, 83 Wash. 623-996.  
v. Hawley, 118 N. Y. 502-290.  
v. Hawley, 141 N. Y. 366-291.  
v. Nolan, 166 Ky. 336-2089.  
v. Provident Savings, Loan & Inv. Ass'n, 28 Ind. App. 25-2561.  
v. Rose, 63 N. C. 391-766.  
v. Rose, 6 Heisk. (Tenn.) 533-774.  
v. Ware, 115 Ky. 420-2019.  
v. Watson, 10 H. L. Cas. 672-2765.  
v. Wynn, 42 Ark. 257-135.
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- Roseville Alta Min. Co. v. Iowa Gulch Min. Co., 15 Colo. 29-907.
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- Roshnagel v. Northern Pac. Ry. Co., 69 Wash. 243-1165.
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- v. Blair, Meigs (Tenn.) 525-2290.
- v. Boardman, 22 Hun (N. Y.) 527-2661, 2683.
- v. Butler, 19 N. J. Eq. 294-1124, 1125, 1126.
- v. Campbell, 9 Colo. App. 38-933.
- v. Clark, 225 Ill. 326-2754.
- v. Clark, 126 Ill. App. 460-2755.
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- v. Ferree, 95 Iowa 604-1002.
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- v. Howard, 31 Wash. 393-2380.
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 741.  
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 2689.  
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 2225.  
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 916.  
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     Minn. 148-291.  
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     143 Ga. 756-1991, 2187.  
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     1357.  
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 1329, 1332.
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     297.  
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 1453, 1457.  
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     v. Jordan, 58 Colo. 445-1911.  
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     v. Napier, 80 Ga. 77-1362, 1369.  
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     v. Peoples' Ice Co., 82 Minn. 43-1031.  
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     v. Woodman, 5 Cush. (Mass.) 36-321, 323.  
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     v. Ellington, 77 N. C. 255-892, 894.  
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     v. Hartzog, 6 Rich. (S. C.) 479-1575.  
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v. Stoddard, 27 Ohio St. 478-215, 224, 225, 233, 234.
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v. Wall, 26 Gratt. (Va.) 354-377.
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     v. Bryan, 194 Pa. St. 41-1082, 1083, 1084.  
     v. Buchanan, 11 Humph. (Tenn.) 468-2337.  
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     v. Childs, 64 N. H. 566-2655.  
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     v. Delaney, 87 Ill. 146-1753.  
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     v. Dillingham, 12 Mass. 358-1823.  
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     v. Hanks, 14 Ohio St. 298-2298.  
     v. Hayt, 37 Conn. 406-2064.  
     v. King, 91 Ga. 577-1650.  
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     v. Putnam, 102 Mass. 5-616.  
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     v. Fitzgerald, 141 Mass. 401-602, 615.  
     v. Lewis, 14 Mass. 83-2737.  
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     v. Drake, 62 N. H. 393-2140, 2141.  
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560-1224, 1348.
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2041.  
v. Armytage, Holt, N. P. 197-  
894.
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2248.
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2610, 2616.
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& I. Co. v. Tennessee, etc., R.  
Co., 131 Tenn. 221-1991.
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304, 308.  
v. Steinberger, 2 Ohio 305-652.
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1092.
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823.
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653, 654.
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(Miss.) 130-1570, 2290.
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559.
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2282.
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v. Slingluff, 57 Md. 537 1818.  
v. Underhill, 127 N. Y. App.  
Div. 92-457, 460.
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1041.
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183, 1402, 1405, 1407, 1414, 1415
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2434, 2435, 2437.  
v. Carley, 147 Ill. 269-193.  
v. Chicago Storage Co., 129 Ill.  
318-160, 170, 172.  
v. Elizabeth, 169 N. C. 385  
1868, 2182.  
v. Holt, 91 Kan. 26-2042.
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1681, 1706, 1707.
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1595.  
v. Darrow, 31 Vt. 122-2411,  
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2625.  
v. Freer, 8 Wall. (U. S.) 202-  
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v. Mackay, 126 Ill. 341-2472,  
2474.  
v. McKinstry, 106 N. Y. 230-  
2238, 2752, 2757.  
v. Watson, 5 Blackf. (Ind.)  
555-917.
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Minn. 179-1404.
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542.  
v. Hall, 69 Ill. 212-284, 294.  
v. Stockton, 6 B. Mon. (Ky.)  
390-2654.  
v. Washburn, 180 Ala. 168-  
1847.
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549, 552, 2342.
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2787.
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851.
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588.
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323 329.  
v. Smith, 7 Har. & J. (Md.)  
67-1358.

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     v. McCall, (1903) 1 Ir. 179-1081.  
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     v. Lovejoy, 8 Gray (Mass.) 204-301.  
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 Shaughnessy v. Leary, 162 Mass. 108-1387, 2036, 2049, 2063.  
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     v. Beveridge, 3 Hill (N. Y.) 26-1251, 1359.  
     v. Bowman, 91 Pa. 414-894.  
     v. Boyd, 5 Serg. & R. (Pa.) 309-791.  
     v. Carpenter, 54 Vt. 155-2420.  
     v. Chambers, 48 Mich. 355-444, 451.  
     v. City of Allegheny, 115 Pa. St. 46-2792.  
     v. Crandon State Bank, 145 Wis. 639-2555.  
     v. Crawford, 10 Johns. (N. Y.) 236-1856.  
     v. Eckley, 169 Mass. 119-477, 489.  
     v. Etheridge, 3 Jones L. (48 N. C.) 300-1274.  
     v. First Ass'n Reformed Church, 39 Pa. St. 226-2775.  
     v. Ford, 7 Ch. Div. 669-577, 2310.  
     v. Foster, L. R. 5 H. L. 321-459, 463.  
     v. Gilmore, 81 Me. 396-2370.  
     v. Hearsey, 5 Mass. 521-650.  
     v. Heisey, 48 Iowa 468-2693, 2706.  
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     v. Hoffman, 25 Mich. 172-333.  
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     v. Kirby, 93 Wis. 379-2295.  
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     v. Partridge, 17 Vt. 626-167.  
     v. Proffitt, 57 Ore. 192-1214, 1218.  
     v. Robinson, 42 S. C. 342-532, 543.  
     v. Russ, 14 Me. 432-775.  
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     v. Wallace, 25 N. J. L. 453-869.  
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     v. Shearer, 98 Mass. 107-666, 668, 671.  
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 v. Willett, 42 N. Y. 146-877, 879, 2436.  
 v. Williams, 113 Mass. 481-1652.  
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 v. Clark, 14 Ga. 429-641.  
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 v. Lozear, 34 N. J. L. 496-186, 2423, 2426, 2589, 2590, 2599, 2600, 2604.  
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 v. Smith, 8 Bush (Ky.) 600-1072.  
 v. Taylor, 25 Miss. 13-2596.  
 v. Titus, 46 Ohio St. 528-1228, 1386.  
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 v. Taylor, 28 Ark. 523-2781.  
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 v. Fink, 102 Md. 219-1214, 1221, 1257.  
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     v. Ayres, 14 Ohio St. 307-1769, 1779, 1780.  
     v. Burch, 16 Ore. 83-2375.  
     v. Crabb, 138 Ind. 200-1364, 1369.
- Shirras v. Craig, 7 Cranch (U. S.) 34-2413, 2567, 2568.
- Shirtz v. Shirtz, 5 Watts (Pa.) 255-822.
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     v. Piper, 4 Har. (Del.) 181-986.  
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- Simar v. Canaday, 53 N. Y. 298-802.
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     v. Burlington, C. R. & N. R. Co., 159 U. S. 278-2659.  
     v. Cloonan, 81 N. Y. 557-1275, 1288.  
     v. Cornell, 1 R. I. 519-1537, 1872.  
     v. Defiance Box Co., 153 N. C. 261-1991.  
     v. Hendricks, 8 Fred. (43 S. C.) 84-719.  
     v. Hutchinson, 81 Miss. 351-2185.
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     v. Jarman, 122 N. C. 195-258, 264.  
     v. Johnson, 14 Wis. 523-1651.  
     v. Leonard, 91 Tenn. 183-1823.  
     v. McKinlock, 98 Ga. 738-1071.  
     v. Nahant, 3 Allen (Mass.) 316-1940.  
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     v. Norton, 7 Bing. 640-954, 961.  
     v. Patterson, 60 N. J. Eq. 385-1132.  
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- Simons v. Diamond Match Co., 159 Mich. 241-1683, 1688, 1689, 1720, 1722.  
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     v. Houston, 78 N. C. 408-785, 821.  
     v. White, 93 Tex. 50-536, 541, 2220.  
 Simpkin v. Ashurst, 3 Tyrw. 781-242.  
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 Simplot v. Chicago, M. & St. P. Ry. Co., 16 Fed. 350-1977.  
 Simpson v. Adams, 127 Ky. 790-559.  
     v. Applegate, 75 Cal. 342-224, 225.  
     v. Bathurst, L. R. 5 Ch. 193-1104.  
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     v. Yocum, 172 Ky. 449-1789, 2134.  
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     v. De Graffenreid, 4 McCord (S. C.) 253-2290.  
     v. Eastland, 3 Head (Tenn.) 368-1971.  
     v. Everhardt, 102 U. S. 300-2334, 2336, 2338, 2339.  
     v. Field, 66 Mo. 111-2422, 2727.  
     v. Georgetown College, 1 App. D. C. 72-541, 542.  
     v. Price, 123 Ga. 97-1518.  
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 Siter's Appeal, 29 Pa. 71-457.  
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     v. Furnas, 82 Ore. 414-772.  
     v. Great Northern Ry. Co., 129 Minn. 113-1146.  
     v. Hale, 76 Conn. 223-2026, 2606.  
     v. Harker, 23 Colo. 333 2512.  
     v. Hettrick, 73 N. C. 53-1038.  
     v. Miller, 5 Litt. (Ky.) 84-2646.  
     v. Newberry, 51 Ill. 203-1817.  
     v. Reynick, 10 Neb. 323 2571.  
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     v. Wynne, 2 Jones Eq. (N. C.) 41-1913.  
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     2352.  
     v. Price, 96 S. C. 245-2045.  
     v. Rawson, 1 Mete. (Mass.)  
     450-1719.  
     v. Rawson, 6 Mete. (Mass.)  
     439 1683.  
     v. Rudderforth, 25 App. Cas.  
     (D. C.) 497-2335.  
 Slattery v. Wason, 151 Mass. 268-  
 2323, 2324.  
 Slaughter v. Bernards, 97 Wis.  
 184-1804.  
     v. Cunningham, 24 Ala. 260-  
     2333.  
     v. Meridian Light & R. Co.,  
     95 Miss. 251-1533.  
 Slauson v. Goodrich Transp. Co.,  
 94 Wis. 642-1015, 1018.  
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 404-2538.  
     v. Laconia, 60 N. H. 201-1652,  
     1658.  
 Slegel v. Lauer, 148 Pa. St. 236-  
 335, 337.  
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 Slicer v. Bank of Pittsburg, 16  
 How. (U. S.) 571-2656.  
 Sloan v. Biemiller, 34 Ohio St. 492-  
 1018, 1544, 2055.  
     v. Campbell, 71 Mo. 387-  
     2758.  
     v. Cantrell, 45 Tenn. (5 Cold.)  
     571-209, 269.  
     v. Coolbaugh, 10 Iowa 31-  
     2724.  
     v. Frothingham, 72 Ala. 589-  
     2728.  
     v. Holliday, 20 Law Times  
     (N. S.) 757-2072.  
     v. Klein, 23 Pa. 132-2492.  
     v. Lawrence Furnace Co., 29  
     Ohio St. 568-867, 1615.  
     v. Rice, 41 Iowa 465-2623.  
     v. Whitman, 5 Cush. (Mass.)  
     532-819.  
 Sloane v. Lucas, 37 Wash. 348-  
 2450, 2662, 2663.  
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 138-887.
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 805, 857, 858.  
 Sloss-Sheffield Steel & Iron Co. v.  
 McCullough, 177 Ala.  
 272-2023.  
     v. Sampson, 158 Ala. 590-  
     1194, 1243.  
     v. Taft, 178 Ala. 382-2225.  
     v. Wilson, 183 Ala. 411-1185.  
 Small v. Clark, 97 Me. 304-318.  
     v. Clifford, 38 Me. 213-672,  
     673.  
     v. Small, 90 Md. 550-489.  
     v. Stagg, 95 Ill. 39-2224,  
     2566.  
     v. Thompson, 92 Me. 539-  
     1081.  
     v. Thompson, 28 Can. Sup.  
     Ct. 219-2486.  
     v. Wicks, 82 Iowa 744-858.  
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     2420.  
 Smalley v. Ranken, 85 Iowa 612-  
 2677, 2678.  
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 841-751.  
 Smallwood v. Bilderback, 16 N. J.  
 L. 497-803.  
 Smart v. Allegaert, 14 Phila. (Pa.)  
 179-1490.  
     v. Town of Durham, 77 N.  
     H. 56-2312.  
     v. Whaley, 6 Smedes & M.  
     (Miss.) 308-735.  
 Smaw v. Young, 109 Ala. 528-487.  
 Smiddy v. Grafton, 163 Cal. 16-  
 2588.  
 Smiley v. Fries, 104 Ill. 416-1678,  
 1761, 2120.  
     v. Smiley, 114 Ind. 258-1785.  
     v. Van Winkle, 6 Cal. 605-  
     171.  
     v. Wright, 2 Ohio 506-796.  
 Smilie v. Bifle, 2 Pa. St. 52-2004.  
 Smith, In re, 144 Pa. 428-377.  
 Smith, Ex parte, 1 Swans. 337-  
 1480.  
 Smith v. Abbott, 221 Mass. 326-  
 198.  
     v. Adams, 6 Paige (N. Y.)  
     435-2062.  
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     406-814.

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 v. Altick, 24 Ohio St. 369-2461, 2463.  
 v. Andrews, [1891] 2 Ch. 678-2545.  
 v. Ankrim, 13 Serg. & R. (Pa.) 39-1498.  
 v. Ashton, 1 Ch. Cas. 263-1092.  
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 v. Aude, 46 Mo. App. 631-154.  
 v. Austin, 9 Mich. 465-2649.  
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 v. Badura, 70 Ore. 58-1932, 1942.  
 v. Baker, 1 Y. & Col. C. C. 223-2121.  
 v. Barham, 17 N. C. 420-878.  
 v. Barnes, 101 Mass. 275-1339.  
 v. Barre R. Co., 64 Vt. 21-1006.  
 v. Barrie, 56 Mich. 314-289.  
 v. Bayright, 34 N. J. Eq. 424-455.  
 v. Beattie, 31 N. Y. 542-2466.  
 v. Bell, 44 Minn. 524-248, 250.  
 v. Benson, 9 Vt. 138-679.  
 v. Berry, 155 Ky. 686-2389.  
 v. Blake, 96 Mich. 542-913.  
 v. Blanpied, 62 N. H. 652-1286.  
 v. Block, 29 Ohio St. 488-489, 494, 528.  
 v. Booth Bros., etc., Granite Co., 112 Me. 297-2522.  
 v. Boutwell, 101 Ala. 373-855, 856.  
 v. Bowe, 38 Md. 463-1093.  
 v. Brinker & Rippey, 17 Mo. 148-165, 181.  
 v. Burgess, 133 Mass. 513-2240.  
 v. Burnham, 3 Sumn. (U. S.) 435-664.  
 v. Butler, 15 Dist. Col. App. 345-719.  
 v. Catlin Land & Imp. Co., 117 Mo. 438-1653.  
 v. Chapin, 31 Conn. 531-1972, 3 R. P.—63.  
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 v. Chenault, 48 Tex. 456-2298.  
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 v. City of Rochester, 92 N. Y. 463-1546.  
 v. City of Rome, 19 Ga. 89-955, 982.  
 v. City of Seattle, 18 Wash. 484-1188, 1194.  
 v. City of Sedalia, 152 Mo. 283-1234, 2063.  
 v. Clark, 100 Iowa 605-1730, 1735.  
 v. Claxton, 4 Madd. 484-448, 450.  
 v. Coffman, 224 Pa. 411-565.  
 v. Collins, 17 R. I. 432-488.  
 v. Columbia Ins. Co., 17 Pa. St. 253-2457, 2458, 2459.  
 v. Commercial Nat. Bank, 7 S. D. 465-2695.  
 v. Conner, 65 Ala. 371-2661.  
 v. Cooke, 3 Atk. 378-984.  
 v. Cooley, 65 Cal. 46-868, 1396.  
 v. Cornelius, 41 W. Va. 59-1856.  
 v. Corporation of Washington, 20 How. (U. S.) 135-1534.  
 v. Cowles, 81 N. Y. App. Div. 328-671.  
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 v. Davis, 90 Cal. 25-1794.  
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 v. De Russy, 29 N. J. Eq. 407-2125.  
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 v. Dierks Lmb. & Coal Co., 130 Ark. 9 884, 885.  
 v. Dixon, 27 Ohio St. 477-1698, 1706.

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     v. Dyer, 16 Mass. 18-2521.  
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     v. Faught, 45 Up. Can. Q. B. 484-2309.  
     v. Floyd, 18 Barb. (N. Y.) 522-1396, 1544.  
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     v. Folsom, 80 Ohio St. 218-2665.  
     v. Fonda, 64 Miss. 551-1546.  
     v. Fonche, 55 Ga. 120-2794.  
     v. Fuller, 138 Iowa 91-768.  
     v. Furbish, 68 N. H. 123-1268, 1609, 1615.  
     v. Fyler, 2 Hill (N. Y.) 648-1518.  
     v. Gaines, 38 N. J. Eq. 65-713.  
     v. Gale, 144 U. S. 509-2224, 2269.  
     v. Garbe, 86 Neb. 94-1228, 1229, 1231.  
     v. Gatewood, Cro. Jac. 152-1543.  
     v. Gibson, 15 Minn. 89-2224.  
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     v. Graham, 217 N. Y. 655-1426, 1439.  
     v. Green, 109 Cal. 228-1195.  
     v. Griffin, 14 Colo. 429-1307.  
     v. Hall, 67 N. H. 200-2647.  
     v. Hamilton, 20 Mich. 433-1000.  
     v. Hanson, 89 Kan. 792-443.  
     v. Hardesty, 88 Md. 387-1061.  
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     v. Hoff, 23 N. D. 37-2378, 2390.  
     v. Hogg, 52 Ohio St. 527-2782, 2790.  
     v. Holden, 58 Kan. 535-1821.  
     v. Hope Min. Co., 18 Mont. 432-2058.  
     v. Horlock, 7 Taunt. 129-580.  
     v. Horn, 70 Fla. 484-1538, 1661.  
     v. Hornback, 4 Litt. (Ky.) 232-1956, 1957.  
     v. Houblon, 26 Beav. 482-1105.  
     v. Howell, 53 Ark. 279-798, 799.  
     v. Howell, 11 N. J. Eq. 349-1723.  
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     v. Hunt, 32 R. I. 326-1585, 1586.  
     v. Hunter, 23 Ind. 580-568.  
     v. Hutchinson, 104 Tenn. 394-1654.  
     v. Ingles, 2 Ore. 43-2780.  
     v. Jackman, 115 Mich. 192-2741, 2742.  
     v. Jackson, 2 Edw. Ch. (N. Y.) 28-668.  
     v. Jefts, 44 N. H. 482-1712.  
     v. Jewett, 40 N. H. 530-309, 313, 961.  
     v. Jones, 103 Tex. 632-1932, 1943.  
     v. J. R. Newberry Co., 21 Cal. App. 432-2262.  
     v. Keeley, 146 Iowa 660-1702, 1704.  
     v. Kelley, 27 Me. 237-2523, 2526, 2530, 2532, 2650, 2651.  
     v. Kelley, 56 Me. 64-1408, 1409, 1411.  
     v. Kellogg, 46 Vt. 560-179.



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   v. King County, 80 Wash. 273-1870.  
   v. Lackor, 23 Minn. 454-2564.  
   v. Ladd, 41 Me. 314-1229, 1231, 1616.  
   v. Lane, 1 Leon. 170-1626.  
   v. Langewald, 140 Mass. 205-1352, 1384.  
   v. Leavenworth, 101 Miss. 238-2112.  
   v. Lee, 14 Gray (Mass.) 473-1239.  
   v. Leighton, 38 Kan. 544-878.  
   v. Lind, 29 Ill. 24-2786.  
   v. Lindsay, 37 Pa. Super. Ct. 171-1620.  
   v. Littlefield, 51 N. Y. 539-246.  
   v. Lockwood, 100 Minn. 221-1255, 1276.  
   v. Lord Camelford, 2 Ves. Jr. 698-1061.  
   v. Lowenstein, 50 Ohio St. 346-464.  
   v. Lynch, 61 Kan. 609-2352.  
   v. McCann, 24 How. (U. S.) 398-2147.  
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   v. McConnell, 17 Ill. 135-1043.  
   v. McCorkle, 105 Mo. 135-999, 1976.  
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   v. McIntyre, 37 C. C. A. 177, 95 Fed. 585-1059, 1073, 1090, 1101.  
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   v. Mapleback, 1 Term. Rep. 441-1468, 1581.
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   v. Maxey, 186 Mich. 151-1627.  
   v. May, 3 Penn. (Del.) 233-1739.  
   v. Miller, 105 Iowa 688-2102.  
   v. Miller, 49 N. J. L. 521-301.  
   v. Miller, 63 Tex. 72-2237.  
   v. Monmouth Fire Co., 50 Me. 96-2379.  
   v. Montes, 11 Tex. 24-2009.  
   v. Moore, 26 Ill. 392-934.  
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   v. Morse, 9 Wall. (U. S.) 76-1800.  
   v. Musgrove, 32 Mo. App. 241-1154, 2077.  
   v. Myers, 56 Neb. 503-2238.  
   v. Neilson, 13 Lea (Tenn.) 461-2183.  
   v. Nelson, 110 Mo. 552-1667.  
   v. Noble, 174 Ky. 151-2180.  
   v. Nofsinger, 86 Neb. 834-2088, 2090.  
   v. North Canyon Water Co., 16 Utah 194-2064.  
   v. Odum, 63 Ga. 499-943.  
   v. Orton, 21 How. (U. S.) 241-2591.  
   v. Osborne, 86 Ill. 606-694, 695.  
   v. Osborne, 33 Mich. 410-2687.  
   v. Owen, 35 Law J. Ch. 317-1122.  
   v. Owens, 63 W. Va. 60-2181.  
   v. Packhurst, 3 Atk. 135-491, 509.  
   v. Parsons, 33 W. Va. 644-1715.  
   v. Patten, 12 W. Va. 541-2747.  
   v. Pearce, 85 Ala. 264-851.  
   v. Pears, 24 Ont. App. 82-2500.  
   v. Pendall, 19 Conn. 107-525.  
   v. Pendergast, 26 Minn. 318-1584.  
   v. People's Natural Gas Co., 257 Pa. 396-264.  
   v. Perkins, 148 Ky. 387-786.  
   v. Phillips, 9 Okla. 297-2239.  
   v. Piper, 231 Pa. 378-559.  
   v. Ponsford, 184 Ind. 53-2045, 2050.

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 v. Provin, 4 Allen (Mass.) 516-852, 856.  
 v. Pure Strains Farm Co., 180 N. Y. App. Div. 703-2266.  
 v. Putnam, 3 Pick. (Mass.) 221-161.  
 v. Putnam, 62 N. H. 369-2035, 2045, 2050.  
 v. Ramsay, 116 Va. 530-884, 885.  
 v. Rateliff, 66 Miss. 683-2304.  
 v. Reber, 1 Grant (Pa.) 217-2454.  
 v. Reeder, 21 Ore. 541-254, 256.  
 v. Rice, 56 Ala. 417-899.  
 v. Rice, 130 Mass. 441-489, 529.  
 v. Richards, 155 Mass. 79-1700, 1719.  
 v. Roath, 238 Ill. 247-1371, 1374, 2035.  
 v. Roberts, 91 N. Y. 470-2618.  
 v. Rochester, 92 N. Y. 463-1158.  
 v. Rowland, 243 Pa. 306-1327, 1351, 1353.  
 v. Rumsey, 33 Mich. 183-2303.  
 v. Runkle (N. J.), 97 Atl. 296-1852.  
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 v. Savage, (1906) 1 Ir. Rep. 469-635.  
 v. Seanlan, 106 Ky. 572-186.  
 v. Searbrough, 61 Ark. 104-1761.  
 v. Schultz, 89 Cal. 526-898.  
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 v. Sedalia, 152 Mo. 283-1935, 2034, 2046, 2051.  
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 v. Spencer, 81 N. J. Eq. 389-1427, 1452, 1455.  
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 v. State, 92 Md. 518-137.  
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 v. Tennyson, 219 Mass. 508-200, 203.  
 v. Thomas' Heirs., 11 Lea (Tenn.) 324-2794.  
 v. Thompson, 55 Md. 5-1251.  
 v. Tinslow, 84 N. Y. 660-2484.  
 v. Towers, 69 Md. 77-2320, 2322.  
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 v. Woods, 4 Watts & S. (Pa.) 192-1576, 1626.
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 Spring Garden Bank v. Hulings  
     Lumber Co., 32 W. Va. 357-1745,  
     1779, 1781.  
 Springer v. Berry, 47 Me. 330-732.  
     v. Bigford, 160 Ill. 495-2284.  
     v. Bradley (Mo.), 188 S. W.  
     175-711, 2628.  
     v. Chicago Real Estate Loan &  
     Trust Co., 202 Ill. 17-  
     160, 300.  
     v. Ford, 189 Ill. 430-147.  
     v. McIntyre, 9 W. Va. 196-  
     1331.  
     v. Sheets, 115 N. C. 370-2699.  
     v. Young, 14 Ore. 280-2026.  
 Springfield Co. v. Jenkins, 62 Mo.  
     App. 74-1180.  
 Springfield Engine & Thresher Co.  
     v. Donovan, 120 Mo. 423-2728.  
 Springfield Homestead Ass'n v.  
     Roll, 137 Ill. 205-2238.  
 Springfield Southwestern R. Co. v.  
     Schweitzer, 246 Mo. 122-8.  
 Springfield & N. E. Traction Co. v.  
     Warrick, 249 Ill. 470-324.  
 Springs v. Schenck, 99 N. C. 551-  
     266.  
 Sprinkle v. Spainhour, 149 N. C.  
     223-632, 705.  
 Sproul v. Atchison Nat. Bank, 22  
     Kan. 336-2331.  
 Sprow v. Boston & A. R. Co., 163  
     Mass. 330-2084, 2085, 2086.  
 Spruance v. Darlington, 7 Del. Ch.  
     111-1043.  
 Spruhen v. Stout, 52 Wis. 517-912.  
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 Spurgin v. Adamson, 62 Iowa 661-  
     2648.  
 Spurlock v. Spurlock, 161 Ky. 248-  
     698.  
     v. Sullivan, 36 Tex. 511-2248.  
 Spurr v. Andrew, 6 Allen (Mass.)  
     358-1686, 1691.  
 Spyve v. Topham, 3 East 115-1594.  
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     930.  
 Squire v. Harder, 1 Paige (N. Y.)  
     494-394.  
     v. Larned, 196 Mass. 134-162.  
 Squire v. Mudgett, 61 N. H. 149-847,  
     861.  
     v. Mudgett, 63 N. H. 71-2296.  
 Staak v. Sigelkow, 12 Wis. 231-  
     1593.  
 Staats v. Ten Eyck's Ex'rs, 3  
     Caines (N. Y.) 141-1707, 1711.  
 Stabler v. Cowman, 7 Gill & J.  
     (Md.) 284-1403.  
 Stableton v. Ellison, 21 Ohio St.  
     527-1099.  
 Stacey v. Vermont Cent. R. Co., 27  
     Vt. 39-2164.  
 Stack v. Brown, 12 Wis. 572-2654,  
     2701, 2702.  
 Stackpole v. Curtis, 32 Me. 383-  
     2062.  
     v. Healy, 16 Mass. 33-1525.  
 Stackpoole v. Stackpoole, 4 Dr. &  
     War. 347-1952.  
 Stacy v. Bostwick, 48 Vt. 192-  
     1999.  
     v. Miller, 14 Mo. 478-1863.  
     v. Smith, 9 S. D. 137-2725.  
 Stafford v. Buckley, 2 Ves. Sr. 170-  
     473.  
     v. Coyney, 7 Barn. & C. 257-  
     1882.  
     v. Pearson, 26 La. Ann. 658-  
     2794.  
     v. Van Rensselaer, 9 Cow. (N.  
     Y.) 316-2560.  
     v. Woods, 144 Ill. 203-860,  
     2298.  
 Stafford's Estate, In re, 250 Pa.  
     595-430.  
 Stager v. Crabtree, 177 Ill. 59-2241.  
 Stagg v. Eureka Tanning & Curry-  
     ing Co., 56 Mo. 317-188.  
     v. Jackson, 1 N. Y. 206-445.  
 Staggs Co. v. Frankfort Modes Glass  
     Works, 175 Ky. 330-2052.  
 Staggers v. White, 121 Ark. 328-  
     1793.  
 Stahl v. Stahl, 114 Ill. 375-757.  
 Staines v. Burton, 17 Utah 331-  
     435, 437.  
 Stake v. Mobley, 102 Md. 408-443.  
 Stall v. Jones, 47 Neb. 706-2474.  
     v. Wilbur, 77 N. Y. 158-878.  
 Stallard v. Cushing, 76 Cal. 472-  
     1360.  
 Stallings v. Hullum, 89 Tex. 431-  
     852.

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     v. Smith, 23 Ohio St. 584-1680, 1686.  
     v. Stambaugh, 135 Pa. 585-2324.  
 Stamey v. McGinnis, 145 Ga. 226-2308, 2311.  
 Stamper v. McNabb, 172 Ky. 255-1298.  
     v. Venable, 117 Tenn. 557-1050, 1070, 1811.  
 Stanbrough v. Cook, 83 Iowa 705-2436.  
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 Standlift v. Norton, 11 Kan. 218-2678.  
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     v. Slye, 164 Cal. 435-178, 211, 1588, 2186.  
 Standen v. Christmas, 10 Q. B. 135-176.  
     v. Standen, 2 Ves. Jr. 589-1085.  
 Standiford v. Goudy, 6 W. Va. 364-1283, 1291.  
 Standing v. Bowring, 31 Ch. D. 286-1789, 2535.  
 Standish v. Lawrence, 111 Mass. 111-1420, 1421, 1422.  
 Standly v. Perry, 3 Can. Sup. Ct. 356-2106.  
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 St. Andrews Church Appeals, 67 Pa. St. 512-1405, 1426.  
 Standfill v. Johnson, 159 Ala. 546-2342.  
 Stanford v. Mangin, 30 Ga. 355-1657.  
 Stanhope v. Dodge, 52 Md. 483-2215, 2396, 2397.  
 Stanhope's Estate, In re, 184 Pa. St. 414-2483.  
 Staniels v. Whichter, 72 N. H. 451-2567.  
 Stanislaus Water Co. v. Bachman, 152 Cal. 716-1131.  
 Stanley v. Bonham, 52 Ark. 354-847.  
     v. Colt, 5 Wall. (U. S.) 119-265, 268, 272, 275, 2313.  
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     v. Greenwood, 24 Tex. 224-2293.  
     v. Schwalby, 147 U. S. 508-1953.  
     v. Schwalby, 162 U. S. 255-2209.  
     v. Snyder, 43 Ark. 429-2294.  
     v. Stenbridge, 140 Ga. 750-246.  
     v. Stocks, 16 N. C. 314-2508.  
     v. True, 114 Me. 503-2629.  
     v. Valentine, 79 Ill. 544-1771.  
     v. White, 14 East 338-882.  
     v. White, 160 Ill. 605-1764.  
 Stansbury v. Hubner, 73 Md. 228-2313.  
     v. Inglehart, 9 Mackey (D. C.) 134-713, 969.  
 Stansel v. Hahn, 96 Miss. 616-2324.  
 Stansell v. Roberts, 13 Ohio 148-2565.  
 St. Anthony Falls Water-Power Co. v. Minneapolis, 41 Minn. 270-1151.  
 Stanton v. Helms, 87 Miss. 287-2002.  
     v. Miller, 58 N. Y. 192-1769, 1770, 1778.  
 Stantons v. Thompson, 49 N. H. 272-2610, 2611, 2612, 2672.  
 Stanwood v. Dunning, 14 Me. 290-739.  
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 Staples v. Cornwall, 114 N. Y. App. Div. 596-1308.  
     v. Emery, 7 Me. 201-947.  
     v. Staples, 20 R. I. 264-2681.  
     v. Staples, 24 Gratt. (Va.) 225-1089.  
     v. White, Handley & Co., 88 Tenn. 30-2269.  
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- Starcher v. Duty, 61 W. Va. 373-597, 607.
- Stark v. Boynton, 167 Mass. 443-2531.
- v. Brown, 12 Wis. 572-2700.
- v. Kirkley, 129 Mo. App. 353-2746.
- v. Mercer, 3 How. (Miss.) 377-2679, 2732.
- v. Meriwether, 98 Kan. 10-2111.
- v. Starr, 94 U. S. 477-1801.
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- v. Sikes, 8 Gray (Mass.) 609-684.
- Starkweather v. American Bible Soc., 72 Ill. 50-2349.
- v. Jenner, 216 U. S. 524-695.
- Starnes v. Hill, 112 N. C. 1-487, 489.
- Starr v. Bartz, 219 Mo. 47-705, 2173.
- v. Leavitt, 2 Conn. 243-682.
- v. Moulton, 97 Ill. 525-1065.
- v. Starr Methodist Church, 112 Md. 171-587, 617.
- v. Wright, 20 Ohio St. 97-2333.
- Starrett v. Baudler (Iowa), 165 N. W. 216-1190, 1282, 1293, 1297.
- Staser v. Gaar-Scott & Co., 168 Ind. 131-759.
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- v. Akers, 92 Kan. 169-1013.
- v. Atherton, 16 N. H. 203-1872, 1874.
- v. Auchard, 22 Mont. 14-2081, 2084, 2086, 2089, 2090.
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- v. Barker, 37 Utah 345-1141.
- v. Birmingham, 74 Iowa 407-1864, 1867.
- State v. Black River Phosphate Co., 32 Fla. 82-1008, 1012.
- v. Blount, 85 Mo. 543 1036.
- v. Bodden, 166 Wis. 219 927.
- v. Bonham, 18 Ind. 231 931.
- v. Bradbury, 40 Me. 151 1875.
- v. Brown, 73 Md. 481 2432.
- v. Brown, 109 N. C. 802 1535.
- v. Burke, 66 Me. 127 1674.
- v. Burt, 64 N. C. 619-867.
- v. Campbell, 5 S. D. 636-2692.
- v. Cipra, 71 Kan. 714-2087.
- v. City of Elizabeth, 35 N. J. L. 359-1874.
- v. City of Newark, 42 N. J. L. 38 2792.
- v. Cleveland & P. R. Co., 94 Ohio 61-1018, 1020, 1024, 1026.
- v. Dana, 59 Wash. 30-1761.
- v. Dickinson, 129 Mich. 221 1922.
- v. Dry Fork R. Co., 50 W. Va. 235-2088, 2089.
- v. Elliot, 11 N. H. 540-911, 937.
- v. Evans, 99 Minn. 220-870.
- v. Evans, 176 Mo. 310-2692.
- v. Excelsior Powder Mfg. Co., 259 Mo. 254-1119.
- v. Fisher, 117 N. C. 733-2083, 2085.
- v. George, 34 Ohio St. 657-196.
- v. Georgia Medical Society, 38 Ga. 608, 626-12.
- v. Gerbing, 23 L. R. A. (N. S.) 337-1008.
- v. Gilmanton, 9 N. H. 461 1657.
- v. Gimmill, 1 Houst. (Del.) 9-876.
- v. Goodnow, 80 Mo. 271-940.
- v. Green, 41 Iowa 693-1862, 2085, 2086, 2089.
- v. Griftner, 61 Ohio St. 201-2166.
- v. Hamilton, 109 Tenn. 276-1322, 1874.
- v. Heaphy, 88 Vt. 428 1936.
- v. Herold, 76 W. Va. 537 1655, 1668.
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 v. Johanson, 26 Wash. 668-366.  
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 v. Kent County Com'rs, 83 Md. 377-2088.  
 v. Klein (N. J. L.), 27 Atl. 902-678.  
 v. Korrer, 127 Minn. 60 1012, 1018, 1019, 1020, 1024.  
 v. Laverack, 34 N. J. L. 201-1530.  
 v. Lewis, 134 Ind. 250-1036.  
 v. Livingston, 164 Iowa 31-1017, 2101.  
 v. Lloyd, 133 Wis. 408-2080.  
 v. Longfellow, 169 Mo. 109-1025.  
 v. Lorenz, 22 Wash. 289 1635.  
 v. Lucas, 124 N. C. 804-2081, 2089.  
 v. Macy, 72 Mo. App. 427-2068.  
 v. Maine, 27 Conn. 641-1539.  
 v. Mallory, 73 Ark. 236-1035, 1036.  
 v. Martin, 14 Lea (Tenn.) 92-165, 177, 185.  
 v. Mason, 88 Mo. 222-2297, 2298.  
 v. Mathis, 149 N. C. 546-1004.  
 v. Matthews, 44 Kan. 596-1601, 1602, 2559.  
 v. Meagher, 44 Mo. 356-417.  
 v. Morgan, 52 Ark. 150-1561, 1563.  
 v. Morse, 50 N. H. 9-2091.  
 v. Mount, 85 Mo. 543-1039.  
 v. Muncie Pulp Co., 119 Tenn. 47-1015, 2101, 2102, 2107, 2115.  
 v. Mutual Life Ins. Co. (Ind.), 93 N. E. 213-2136.  
 v. Nolegs, 46 Okla. 479-1012, 1014, 1015.  
 v. Nudd, 23 N. H. 327-1862.  
 v. Pacific Guano Co., 22 S. C. 50-1007, 1008.  
 v. Pettis, 7 Rich. (S. C.) 399 1385.  
 v. Pitts, 51 Mo. 133-2301.  
 v. Plaisted, 43 N. H. 413-2335.
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 v. Pottmeyer, 33 Ind. 402-1030, 1032.  
 v. Probate Court, 40 Minn. 296-2151.  
 v. Probate Court, 129 Minn. 442-785.  
 v. Roberts, 59 N. H. 256-1037, 1039.  
 v. Roden Coal Co., 197 Ala. 407-868.  
 v. Rodman, 86 S. C. 154-2083.  
 v. Sargent, 45 Conn. 358-1007.  
 v. Shannon, 36 Ohio St. 423-1036, 1038, 1547.  
 v. Shaw, 67 Ohio St. 157-1037.  
 v. Sioux City & P. R. Co., 7 Neb. 357-1563.  
 v. Southern Sand & Material Co., 113 Ark. 149-1013.  
 v. South Penn. Oil Co., 42 W. Va. 80-875.  
 v. Spokane St. Ry. Co., 19 Wash. 518-1883.  
 v. Steamship Co., 111 La. 120-1861.  
 v. Stevenson, 6 Idaho 367-2351.  
 v. Sturtevant, 76 Wash. 158-1025, 2106.  
 v. Sunapee Dam Co., 70 N. H. 458-1023.  
 v. Superior Ct. for Cowlitz County, 84 Wash. 252-1657.  
 v. Suttle, 115 N. C. 784-1235, 1384, 1385.  
 v. Teeters, 97 Iowa 458-2085.  
 v. Theriault, 70 Vt. 617-1038, 1545.  
 v. Thomas, 173 Iowa 408-1018.  
 v. Titus, 17 Wis. 241-2511, 2513.  
 v. Travis County, 85 Tex. 435-1855, 1887.  
 v. Tucker, 36 Iowa 485-2081.  
 v. Walker, 88 Mo. 279-1056.  
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 v. Westfall, 85 Minn. 437-2275.

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127 Tenn. 575-1018.  
v. Whitener, 93 N. C. 590-  
935.  
v. Wilson, 42 Me. 9-1011, 1547,  
1613, 1859, 1866.  
v. Woodward, 23 Vt. 92-1862.  
v. Yates, 104 Me. 360-2108.  
State Bank v. Evans, 15 N. J. L.  
155-1769.  
v. Tweedy, 8 Blackf. (Ind.)  
447-2555.  
State Bank of Decatur v. Sanders,  
114 Ark. 440-2781.  
State Bank of Iowa Falls v. Brown,  
142 Iowa 190-2758.  
State Bank of O'Neill v. Mathews,  
45 Neb. 659-2380, 2386, 2554.  
State Bank of St. Louis v. Frame,  
112 Mo. 502-2250.  
State Bank of Syracuse v. Light-  
hall, 46 N. Y. App. Div. 396-  
2416.  
State Bank of Trenton v. Evans,  
15 N. J. L. 158-1773.  
State Land Co. v. Mitchell, 162  
Ala. 469-2402.  
State Mut. Building & Loan Ass'n  
of New Jersey v. New Jersey &  
Millville Improvement Co., 74 N.  
J. Eq. 721-2418, 2452.  
State Sav. Bank v. Kercheval, 65  
Mo. 683-906, 907, 912, 919, 2461.  
State University v. Brown, 23 N.  
C. 387-1903.  
v. Joslyn, 21 Vt. 52-1489.  
Staton v. Bryant, 55 Miss. 261-  
2135.  
Staub v. Hampton, 117 Tenn. 706-  
1651.  
Staubitz v. Lambert, 71 Minn. 11-  
1902.  
Stavers v. Philbrick, 68 N. H. 379-  
2627.  
Stayton v. Morris, 4 Har. (Del.)  
224-1518.  
St. Bede College v. Weber, 168 Ill.  
324-996.  
St. Charles County v. Powell, 22  
Mo. 525-1977.  
St. Clair v. Marquell, 161 Ind. 56-  
1624.  
v. Morris, 9 Ohio 15-779.  
v. Sedwick, 39 Neb. 562-983.  
St. Croix L. & L. Co. v. Ritchie, 73  
Wis. 409-2201.  
Steacy v. Rice, 27 Pa. St. 75-356.  
Stead v. Grosfield, 67 Mich. 289-  
2374.  
v. Newdigate, 2 Mer. 521-442.  
Steamboat Magnolia v. Marshall,  
39 Miss. 109-1547.  
Stearns v. City of Richmond, 88 Va.  
992-1190, 1193.  
v. Gaffold, 56 Ala. 544-884.  
v. Hendersass, 9 Cush. (Mass.)  
497-2128.  
v. Hollenbeck, 38 Iowa 550-  
2452.  
v. Jones, 12 Allen (Mass.) 582-  
2043.  
v. Jewell, 27 Colo. App. 390-  
1680.  
v. Kennedy, 94 Minn. 439-457.  
v. McHugh, 35 S. D. 185-  
1670.  
v. Mullen, 4 Gray (Mass.) 151-  
1231.  
v. Porter, 46 Conn. 313-2415.  
v. Quincy Ins. Co., 124 Mass.  
61-2456.  
v. Sampson, 59 Me. 568-256.  
Stearns C. & L. Co. v. Boyatt, 168  
Ky. 111-1990.  
Stebbins v. Demorest, 138 Mich.  
297-1222.  
v. Miller, 94 Mass. 591-2578.  
v. Petty, 209 Ill. 291-328,  
331.  
v. Wolf, 33 Kan. 765-1714,  
1715.  
Stedman v. Fortune, 5 Conn. 462-  
804.  
v. Gassett, 18 Vt. 346-2447.  
v. McIntosh, 26 N. C. (4 Ired.  
law) 291-207, 210.  
Steed v. Hinson, 76 Ala. 298-1470.  
v. Preece, L. R. 18 Eq. 192-  
454.  
Steedman v. Weeks, 2 Strobb. Eq.  
(S. C.) 149-711.  
Steel v. De May, 102 Mich. 274-  
2234.  
v. Frick, 56 Pa. 172-134, 136,  
897.  
v. Sioux Valley Bank, 79 Iowa  
339-2205.

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     v. Fisher, 1 Edw. Ch. (N. Y.) 435-788.  
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     v. La Frambois, 68 Ill. 456-758.  
     v. Mansell, 6 Rich. L. (S. C.) 543-2195.  
     v. Sanchez, 72 Iowa 65-1017, 2094.  
     v. Spencer, 1 Pet. (U. S.) 552-2203.  
     v. Steele's Adm'r, 64 Ala. 438-785, 788, 789.  
     v. Sullivan, 70 Ala. 589-1863.  
     v. Waller, 28 Beav. 466-385.  
     v. Walter, 204 Pa. 257-2481, 2578, 2666.  
 Steen v. Steen, 169 Iowa 264-1625.  
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 Steenerson v. Fontaine, 106 Minn. 225-1538.  
 Steeple v. Downing, 60 Ind. 478-1959.  
 Steere v. Steere, 5 Johns. Ch. (N. Y.) 1-382, 402.  
     v. Tiffany, 13 R. I. 568-1381.  
 Steers v. City of Brooklyn, 101 N. Y. 51-2106.  
 Stees v. Kranz, 32 Minn. 313-174, 213, 319, 2241.  
 Stefanick v. Fortuna, 222 Mass. 83-1653.  
 Steffens v. Earl, 40 N. J. L. 128-207, 236, 240.  
 Steffian v. Milmo Nat. Bank, 69 Tex. 513-1743, 1744, 2249, 2250.  
 Steffy v. Carpenter, 37 Pa. 41-2045.  
 Stegall v. Stegall, 2 Brock. (U. S.) 256-794.  
 Steger v. Traveling Men's Bldg., etc., Ass'n, 208 Ill. 236-1730.  
 Stehr v. Raben, 33 Neb. 437-1423.  
 Steidl v. Link, 246 Ill. 345-1002.  
 Steifel v. Clark, 9 Baxt. (Tenn.) 470-1065.  
 Steiff v. Seibert, 128 Iowa 746-572.  
 Steiger v. Hillen, 5 Gill & J. (Md.) 121-821, 822.  
 Stein v. Bernsford, 108 Minn. 177-1344.  
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     v. Burden, 29 Ala. 127-1133, 1138.  
     v. Dahm, 96 Ala. 481-1377, 1382.  
     v. Kann, 244 Ill. 32-2623.  
     v. McGrath, 128 Ala. 175-2270.  
     v. Stein, 80 Md. 306-812, 816.  
     v. Stely (Tex. Civ. App.), 32 S. W. 782-1467.  
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     v. Marks, 172 Pa. St. 400-295, 296.  
     v. Peterman, 71 N. J. Eq. 101-1255.  
 Steinfield v. Omega Copper Co., 16 Ariz. 230-867.  
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 Stephens v. Anthony, 37 Ark. 571-2738.  
     v. Bichnell, 27 Ill. 444-2683.  
     v. Boyd, 157 Iowa 570-1276, 1284, 1288.  
     v. Bridges, 6 Madd. & Gel. 66-212.  
     v. Clay, 17 Colo. 489-2394, 2395, 2509, 2510.  
     v. Dedham Institution, 129 Miss. 547-2021.  
     v. Evans, 30 Ind. 39-489.  
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     v. Hume, 25 Mo. 249-828, 829.  
     v. Illinois Mut. Fire Ins. Co., 43 Ill. 327-2455.  
     v. James, 4 Sim. 499-2317.  
     v. Keating (Tex.), 17 S. W. 37-2791.  
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     v. Leonard, 122 Mich. 125-750.  
     v. Rinehart, 72 Pa. St. 434-1769, 1774, 1788.  
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     v. Stephens, 108 Ark. 53-1752.  
     v. Stephens, temp. Talb. 228-553, 561, 581, 599.  
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 Stephenson v. Boody, 139 Ind. 60-2122.  
     v. Dee, 8 Blackf. (Ind.) 508-1991.  
     v. Hagan, 15 B. Mon. (Ky.) 282-538, 539.  
     v. Kilpatrick, 166 Mo. 262-2262.  
     v. Osborne, 41 Miss. 119-778.  
     v. Van Blokland, 60 Ore. 247-1658.  
 Stepp v. Lowe, 167 Ky. 631-960.  
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 Sterling v. Baldwin, 42 Vt. 306-879, 882.  
     v. Huntley, 139 Ga. 21-559.  
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     v. Park, 129 Ga. 309-1592.  
     v. Peulington, 7 Vin. Abr. 150-831, 837.  
     v. Sterling, 43 Ore. 200-719.  
     v. Warden, 51 N. H. 217-255, 1202, 1205, 1206, 1215, 1216.  
 Sterling Fire Ins. Co. v. Beffrey, 48 Minn. 9-2458.  
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 Sterling's Appeal, 111 Pa. St. 35-1530.  
 Stern v. Lee, 115 N. C. 426-2297.  
 Sternberg's Estate, In re, 94 Iowa 305-1843.  
 Sternberger v. Hanna, 42 Ohio St. 305-2478, 2507, 2511, 2692.  
     v. Ragland, 57 Ohio St. 148-2187, 2259.  
     v. Sussman, 69 N. J. Eq. 197-2514, 2675.  
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     v. Eastman, 84 Me. 366-1833.  
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 Stevens v. Bosch, 54 N. J. Eq. 59-366.  
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     v. Cooper, 1 Johns. Ch. (N. Y.) 425-2515.  
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 v. Goodenough, 26 Vt. 676-2668.  
 v. Hampton, 46 Mo. 404.  
 v. Hatch, 6 Minn. 64-1740.  
 v. Hollingsworth, 74 Ill. 202-2296.  
 v. Holman, 112 Cal. 345-1634.  
 v. Hulin, 53 Mich. 93-2239.  
 v. Kelly, 78 Me. 445-1030, 1031, 1351, 1352.  
 v. King, 76 Me. 197-1657.  
 v. Myers, 62 Ore. 372-1852, 1853.  
 v. Nashua, 46 N. H. 192-1876, 2088.  
 v. Orr, 69 Me. 323-1285, 1286, 1291.  
 v. Owen, 25 Me. 94-745, 780, 1592.  
 v. Pantlind, 95 Mich. 145-140, 978.  
 v. Paterson & N. R. Co., 34 N. J. L. 532-1023, 1024, 1027.  
 v. Pendregon, 106 Tex. 576-1926.  
 v. Pillsbury, 57 Vt. 205-324.  
 v. Reynolds, 143 Ind. 167-693, 698.  
 v. Rose, 69 Mich. 259-969, 978, 979.  
 v. Salomon, 39 N. Y. Misc. 159-1278.  
 v. Shannahan, 160 Ill. 330-2714, 2715.  
 v. Smith, 4 J. J. Marsh. (Ky.) 64-746, 749, 774.  
 v. Stevens, 96 Ga. 374-804.  
 v. Stevens, 21 Ky. Law Rep. 1315-622.  
 v. Stevens, 11 Mete. (Mass.) 251-1220.  
 v. Taft, 3 Gray (Mass.) 487-1542.  
 v. Taylor, 58 Iowa 664-300.  
 v. Thompson, 17 N. H. 103-687, 689.  
 v. Velde, 138 Minn. 59-1932, 1946.  
 v. Wait, 112 Ill. 544-672, 2020.  
 Stevens v. Winship, 1 Pick. (Mass.) 318-1089, 2012.  
 Stevens' Heirs v. Stevens, 3 Dana (Ky.) 371-808, 809.  
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 v. Boyd, 153 Cal. 630-698.  
 v. Brasher, 90 Ky. 23-1729.  
 v. Cofferin, 20 N. H. 151-698.  
 v. Crapnell, 114 Ill. 19-393.  
 v. Dana, 166 Mass. 163-2725.  
 v. Hancock, 72 Mo. 612-155.  
 v. Lambard, 2 East 575-184, 1485, 1511, 1512.  
 v. Loehr, 57 Ill. 509-1695.  
 v. Martin, 11 Bush (Ky.) 485-1913.  
 v. Mayor of Liverpool, L. R. 10 Q. B. 81-396.  
 v. Polk, 71 Iowa 278-1979, 2423.  
 v. Stewart, 7 Phila. (Pa.) 293-1337, 1352.  
 v. Texas & P. Ry. Co., 105 U. S. 703-2260, 2791.  
 v. Wallace, 27 Gratt. (Va.) 77-1294, 1365.  
 Steward v. Wolveridge, 9 Bing. 60-1471.  
 Stewart v. Anderson, 59 Ind. 375-1765.  
 v. Babington, 27 L. R. Ir. 551-1115.  
 v. Berry, 84 Ga. 177-2782.  
 v. Brady, 3 Bush (Ky.) 623-2312.  
 v. Brand, 23 Iowa 477-858, 2305.  
 v. Brumley (Ky.), 119 S. W. 798-2045.  
 v. Cage, 59 Miss. 558-1646.  
 v. Childs Co., 86 N. J. L. 648-201, 1505.  
 v. Conley, 122 Ala. 179-1875.  
 v. Coshow, 238 Mo. 662-592.  
 v. Crosby, 50 Me. 130-2588, 2589, 2590.  
 v. Davis, 63 Me. 539-1670.  
 v. Doughty, 9 Johns. (N. Y.) 108-881, 889, 893.  
 v. Drake, 9 N. J. L. 139-1698, 1702.



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     v. Fellows, 128 Ill. 480-399,  
         2392.  
     v. Finkelstone, 206 Mass. 28-  
         1427, 1452, 1454, 1455,  
         2461.  
     v. Flint, 59 Vt. 144-2342.  
     v. Frink, 94 N. C. 487-2080,  
         2082, 2089.  
     v. Garrett, 119 Ga. 386-1254.  
     v. Gregg, 42 S. C. 392-152.  
     v. Harriman, 56 N. H. 25-1825.  
     v. Hartman, 46 Ind. 331-1301.  
     v. Harvard College, 12 Allen  
         (Mass.) 58-147.  
     v. Hollins, 47 Miss. 708-2794.  
     v. Johnson, 30 Ohio St. 24-  
         2704.  
     v. Jones, 219 Mo. 614-712.  
     v. Kenower, 7 Watts & S. (Pa.)  
         288-531.  
     v. Krenzer, 127 Md. 1-1979.  
     v. Lawson (Mich.), 165 N. W.  
         716-196.  
     v. Long Island R. Co., 102 N.  
         Y. 601-170, 171, 1471.  
     v. McArthur, 77 Iowa 162-  
         1631.  
     v. McSweeney, 14 Wis. 468-  
         2290.  
     v. Matheny, 66 Miss. 21-2240.  
     v. Mathews, 19 Fla. 752-1075.  
     v. May, 119 Md. 10-1377.  
     v. Murrell, 65 Ark. 471-240.  
     v. Neely, 139 Pa. St. 309-525,  
         526.  
     v. Pearson, 4 S. C. 4-813.  
     v. Preston, 1 Fla. 11-2519,  
         2522.  
     v. Ross, 50 Miss. 776-838, 841,  
         845, 846, 848.  
     v. Russell, 91 N. Y. App. Div.  
         310-2352.  
     v. Smith, 36 Minn. 82-2563,  
         2566, 2786.  
     v. Stewart, 171 Ala. 485-1575.  
     v. Stewart, 5 Conn. 317-767,  
         1788.  
     v. Stewart, 56 N. J. Eq. 664-  
         1827.  
     v. Stewart, 90 Wis. 516-688,  
         691.  
     v. Stork, 181 Mich. 408-1453.
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         650.  
     v. Wheeling & L. E. Ry. Co.,  
         53 Ohio St. 151-2271,  
         2779.  
     v. White, 128 Ala. 202-2042,  
         2052.  
 Stewart's Appeal, 98 Pa. 377-2243.  
 Stewart's Estate, In re, 253 Pa.  
     277-427, 428.  
 St. Helen's Smelting Co. v. Tipping,  
     11 H. L. Cas. 642-1124, 1125, 1126.  
 Stichter v. Cox, 52 Neb. 532-2500.  
 Stickley v. Mulrooney, 36 Colo. 242-  
     687.  
     v. Sodus Tp., 131 Mich. 510-  
         2082, 2084, 2086, 2089.  
 Stickney's Will, In re, 85 Ind. 79-  
     268, 275, 603, 2349.  
 Stidham v. Matthews, 29 Ark. 650-  
     781.  
 Stieglitz v. Migatz, 182 Ind. 549-  
     2591.  
 Stier v. Nashville Trust Co., 158  
     Fed. 601-431.  
 Still v. Cobb, 126 Ala. 361-2026.  
 Stiles v. Hooker, 7 Cow. (N. Y.)  
     266-2071.  
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     Co., 64 Wash. 606-1144.  
     v. Ruby, 35 Pa. St. 373-371.  
 Stilley v. Folger, 14 Ohio 610-790,  
     791, 792.  
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     2283.  
 Stillman v. Flenniken, 58 Iowa 450-  
     915, 918, 923.  
     v. Hamer, 7 How. (Miss.) 424-  
         917.  
     v. Looney, 3 Cold. (Tenn.) 20-  
         2419.  
     v. Olean, 210 N. Y. 168-1860.  
     v. Stillman, 21 N. J. Eq. 126-  
         2666, 2667.  
     v. White Rock Mfg. Co., 3  
         Woodb. & M. (U. S.) 538-  
         2055, 2066.  
 Stillwater Water Co. v. Farmer, 92  
     Minn. 230-1178, 1179.  
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     1286, 1306.  
     v. Leavy, 84 Ky. 379-2005.

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- Stimpson v. Batterman, 5 Cush. (Mass.) 153-634.
- v. Murch, 197 Mass. 381-565.
- Stinson v. Brookline, 197 Mass. 568-1130, 1147.
- Stinchfield v. Emerson, 52 Me. 465-2139.
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- Stinson v. Connecticut Mut. Life Ins. Co., 174 Ill. 125-2453.
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- v. Palmer, 5 Hill (N. Y.) 599-1699, 1703.
- v. Quitzow, 72 Ill. 334-186, 196.
- v. Sinclair, 108 Minn. 274-887, 1210, 1222.
- St. Johnsbury v. Morrill, 55 Vt. 165-2178, 2180.
- St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co., 135 Mo. 173-170, 171.
- St. Louis v. Laclede, 96 Mo. 197-1861.
- v. Meier, 77 Mo. 13-1883.
- v. Priest, 103 Mo. 652-2680.
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- v. Ramsey, 53 Ark. 314-1014, 1015, 2093.
- v. Walker, 89 Ark. 556-1148.
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- v. Martin, 104 Ark. 274-1977.
- v. Morris, 35 Ark. 622-1148.
- v. Nugent, 152 Ill. 119-1928.
- St. Martin v. Skamania Boom Co., 79 Wash. 393-2046, 2051, 2056, 2067.
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     v. Hudson Iron Co., 107 Mass. 290-868, 1397, 1398.  
 Stockdale v. Young, 3 Strob. L. (S. C.) 501-1922.  
 Stocker v. Foster, 178 Mass. 591-1066, 1097.  
 Stockett v. Howard, 34 Md. 121-183, 2779.  
     v. Watkins' Adm'rs, 2 Gill & J. (Md.) 326-1515.  
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 Stockley v. Cissna, 119 Fed. 812-2096, 2107, 2113.  
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     v. Hunter, 52 Mass. (11 Mete.) 448-214, 1498.  
     v. McHenry, 107 Pa. St. 237-2201.  
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     v. Phelps, 34 N. Y. 363-895.  
     v. Shalit, 204 Mass. 270-1782.  
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 Stoddard v. Emery, 128 Pa. 436-157.  
     v. Gibbs, 1 Summ. (U. S.) 263-828, 836.  
     v. Hart, 23 N. Y. 556-2418.  
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     v. Whiting, 46 N. Y. 627-2290, 2471.  
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 Stoever v. Stoever, 9 Serg. & R. (Pa.) 434-2731.  
     v. Whitman's Lessee, 6 Binn. (Pa.) 416-2289.  
 Stoff v. McGinn, 178 Ill. 46-1057, 1058.  
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 Stokeley v. Flanders (Ky.), 128 S. W. 608-691.  
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     v. Murray, 95 S. C. 120-1932, 1935.  
     v. Norwood, 44 S. C. 424-788.  
     v. Payne, 58 Miss. 614-1064.  
     v. Pillow, 64 Ark. 1-784.  
     v. Riley, 121 Ill. 166-2179.  
     v. Sprague, 110 Iowa 89-376.  
     v. State, 46 Ga. 412-2791.  
     v. Stokes, 66 Miss. 456-1051.  
     v. Van Wyck, 83 Va. 724-498.  
 Stokoe v. Upton, 40 Mich. 581-928, 934.  
 Stoleup v. Stoleup, 137 N. C. 305-647.  
 Stoll v. Smith, 129 Md. 164-1954.  
 Stoller v. Doyle, 257 Ill. 369-548.  
 Stollinwerck v. Marks & Gayle, 188 Ala. 587-2387.  
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 Stone, In re, 138 Mass. 476-424.  
 Stone v. Augusta, 46 Me. 127-1659.  
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     v. Boston Steel & Iron Co., 9 Gray (Mass.) 523-1033.

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     v. Forbes, 189 Mass. 163-1080, 1086, 1111, 1113.  
     v. Framingham, 109 Mass. 303-608.  
     v. Hackett, 12 Gray (Mass.) 227-383, 1050.  
     v. Haskell, 212 Mass. 283-2721.  
     v. Hooker, 9 Cow. (N. Y.) 157-1704.  
     v. Kansas City & W. B. R. Co., 261 Mo. 61-1961.  
     v. King, 7 R. I. 358-386, 1795.  
     v. Lane, 10 Allen (Mass.) 74-2418.  
     v. Livingston, 222 Mass. 192-915.  
     v. Marshall, 52 Wash. 375-695.  
     v. Minter, 111 Ga. 45-1630.  
     v. Missouri Guarantee, etc., Ass'n, 58 Ill. App. 78-2691.  
     v. New England Box Co., 216 Mass. 8-1795.  
     v. Nicholson, 27 Gratt. (Va.) 1-597.  
     v. Patterson, 19 Pick. (Mass.) 476-2446.  
     v. Sledge, 87 Tex. 49-1592.  
     v. Stone, 141 Iowa 438-1610, 1616.  
     v. Stone, 116 Mass. 279-1670.  
     v. Tilley, 100 Tex. 487-2451.  
     v. Vandermark, 146 Ill. 312-785.  
     v. Westcott, 18 R. I. 685-2322.  
     v. Wood, 7 Cow. (N. Y.) 453-1798.  
 Stonebraker v. Ault (Okla.), 158 Pac. 570-1704.  
     v. Zollickoffer, 52 Md. 154-536.  
 Stonecipher v. Kear, 131 Ga. 688-2136.  
 Stonegap Colliery Co. v. Hamilton, 119 Va. 271-1178, 1243.  
 Stonehewer v. Thompson, 2 Atk. 440-2648.  
 Stonehill v. Hastings, 202 N. Y. 115-1785, 1787.  
 Stoner v. Patten, 132 Ga. 178-1176.  
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     v. Wunderlich, 198 Pa. 158-558.  
     v. Zucker, 148 Cal. 516-1209.  
 Stones v. Heurtly, 1 Ves. Sr. 165-635.  
 Stonestreet v. Doyle, 75 Va. 356-1836.  
 Stonley v. Bracebridge, 1 Leon. 6-1575.  
 Stoolfoos v. Jenkins, 8 Serg. & R. (Pa.) 175-828, 829.  
 Stoppelkamp v. Mangeot, 42 Cal. 316-258.  
 Storer v. Freeman, 6 Mass. 435-1659.  
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 Storms v. Storms, 3 Bush (Ky.) 77-2415.  
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 Story v. Black, 5 Mont. 26-2140.  
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- v. Whyback, 204 Mo. 341-1626, 2247, 2251, 2252.
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- v. Mangham, 138 La. 437-873.
- Strothers v. Woodcox, 142 Iowa 648-307, 309, 313, 327.
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     v. Stuckey, 30 N. J. Eq. 546-394.  
 Stuckman v. Roose, 147 Ind. 402-2672.  
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 Studebaker v. Beek, 83 Wash. 260-1609.  
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     v. Chambers, 18 R. I. 799-347.  
     v. Eddy, 154 Ill. 199-1610, 1612, 1755.  
     v. Ellison, 20 S. C. 481-1520.  
     v. Enders, 33 Ky. (3 Dana) 66-223, 224, 235.  
     v. Flynn, 20 Dist. Col. 396-2343, 2344.  
     v. Foley, 112 Mich. 1-1831.  
     v. Garesche, 229 Mo. 496-284, 482, 496, 529, 554, 580, 587.  
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 Summers v. Babb, 13 Ill. 483-781, 805, 814, 823.  
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     v. Donnell, 7 Heisk. (Tenn.) 565-812.  
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     v. Conant, 10 Vt. 9-2330.  
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     v. Hampson, 8 Ohio, 331-760.  
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     v. Head, 86 Ky. 156-1405, 1431.  
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     v. N. B. Australian Co., 2 Hurlst. & Colt. 175-1602.  
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     v. Myers, 3 S. D. 324-935.  
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 Sweezy v. Vallette, 37 R. I. 51-1369, 1380.  
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 Swift, In re, 137 N. Y. 771-444.  
 Swift v. Agnes, 33 Wis. 228-2022.  
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     v. Coker, 83 Ga. 789-1362.  
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- v. Palmer, 106 Ill. App. 432-2486.
- v. Swisher, 157 Iowa 55-371.
- Switzer v. Hank, 89 Ind. 73-776.
- v. Knapps, 10 Iowa 72-1725.
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- v. Ward, 185 Mo. 316-1933.
- Sword v. Low, 122 Ill. 487-920, 922, 923.
- Syek v. Hellier, 140 Ky. 388-775, 2333, 2338.
- Sykes v. Sykes, 49 Miss. 190-756.
- Syler's Lessee v. Eckert, 1 Binn. (Pa.) 378-2140.
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- Szathmary v. Adams, 166 Mass. 145-146.
- Taafe v. Conmee, 10 H. L. Cas. 78-635.
- Tabb v. Baird, 3 Call. (Va.) 481-2289.
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- v. Dimond, 16 R. I. 584-383.
- v. Morse, 4 Mete. (Mass.) 523-272, 2739.
- v. Stevens, 3 Gray (Mass.) 504-2124.
- v. Stoddard, 142 Mass. 515-2585, 2653.
- v. Taft, 59 Mich. 185-1747, 1769, 1774, 1779, 1780, 1782.
- Taggart v. Blair, 215 Ill. 339-2655.
- v. Jaffrey, 75 N. H. 473-1130, 1154, 2077.
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- v. Stewart, 39 Cal. 602-1803.
- v. Talbert, 97 S. C. 136-2539.
- Talbot v. Armstrong, 14 Ind. 354-736.
- v. Joseph, 79 Ore. 309-1224, 1234.
- v. Roe, 171 Mo. 421-2763.
- v. Smith, 56 Ore. 117-1001.
- v. Snodgrass, 124 Iowa 681-440.
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- Talbott v. Barber, 11 Ind. App. 1-382.
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- v. Grace, 30 Ind. 389-1543.

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v. Thom, 91 Ky. 417-2034, 2043,  
2063.
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113-1193.  
v. Draper, 61 Ill. 56-847.
- Taliaferro v. Barnett, 37 Ark. 511-  
2747.  
v. Burwell, 4 Call. (Va.) 321-  
832, 834.  
v. Butler, 77 Tex. 578-1992.  
v. Gay, 78 Ky. 496-2362.  
v. Stevenson, 58 N. J. L. 165-  
2774.
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1065.
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S. W. 542-2400.
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34-1107, 1426, 1432, 1447, 1448,  
1451.
- Tallman v. Ely, 6 Wis. 244-2428,  
2431.  
v. Murphy, 120 N. Y. 345-204,  
1503, 1504.  
v. Wood, 26 Wend. (N. Y.) 89-  
415, 545.
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L. 212-1330.  
v. Hoboken, 59 N. J. L. 383-  
1882.
- Talmage v. Hunting, 29 N. Y. 447-  
2090.
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587-755.
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37 Fla. 586-1128, 1133, 1181.
- Tanguay v. Felthousen, 45 Wis. 30-  
2483.
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v. Livingstone, 12 Wend. (N.  
Y.) 83-1682, 1707.  
v. Mutual Bldg. Ass'n, 95 Ga.  
528-2306.  
v. Stratton, 44 Utah 253-1001.  
v. Van Bibber, 2 Duvall (Ky.)  
550-297.
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693, 695, 697.
- Tansel v. Smith, 49 Ind. App. 263-  
1793, 1810.
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2568, 2570.
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1122.
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157 Mass. 24-1032, 1033.
- Tappan's Appeal, In re, 52 Conn.  
412-275.
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575.  
v. Tarbell, 10 Allen (Mass.)  
278-793.  
v. Tarbell, 60 Vt. 486-1716.  
v. West, 80 N. Y. 280-2183,  
2188, 2211.
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386.
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1413, 1431.
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1752.
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143.
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797.
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2088.
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149.
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1747.
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239-1726.
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918, 919, 934.  
v. Clement, 176 Pa. St. 550-  
1804.  
v. Field, 56 N. J. Eq. 35-2462.  
v. Fratt, 112 Cal. 613-1244,  
1340.  
v. Jay, 31 Ark. 579-737, 773.  
v. Johnson, 148 N. C. 267-1653.  
v. Lawrence, 11 Heisk. (Tenn.)  
503-1727.  
v. Pensacola Gulf, Land & De-  
velopment Co., 37 Fla.  
439-2221, 2223, 2224.  
v. Sanders, 245 Mo. 186-2260.  
v. Security Trust Co., 63 N. J.  
Eq. 559-2543, 2544.  
v. Tate, 1 Dev. & B. Eq. (21  
N. C.) 22-763, 765.

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     v. Agricultural & Mechanical Ass'n, 68 Ala. 229-1798, 1801.  
     v. Allen, 131 Ga. 416-1704, 1715.  
     v. Allen, 60 Pa. Super. Ct. 503-1701.  
     v. American Nat. Bank of Pensacola, 63 Fla. 631-2410.  
     v. Armstrong, 24 Ark. 102-1665.  
     v. Atwood, 47 Conn. 498-388.  
     v. Bell, 158 Pa. 651-1059.  
     v. Benham, 5 How. (U. S.) 270-400, 421, 422, 1055.  
     v. Blake, 109 Mass. 513-718.  
     v. Boulware, 17 Tex. 74-2297, 2305.  
     v. Bradley, 39 N. Y. 129-897, 899.  
     v. Caldwell, 3 Best & S. 826-1203.  
     v. Capehart, 128 N. C. 292-2764.  
     v. Cedar Rapids & St. P. R. Co., 25 Iowa 371-305.  
     v. Central Pac. R. Co., 67 Cal. 615-2224.  
     v. Cladwin, 40 Mich. 232-1358.  
     v. Cleary, 29 Gratt. (Va.) 448-539.  
     v. Cohn, 47 Ore. 538-1207.  
     v. Cole, 1 H. Bl. 555-255.  
 Taylor v. Collins, 51 Wis. 123-920.  
     v. Commonwealth, 102 Va. 759-1015.  
     v. Coney, 101 Ga. 655-901.  
     v. Corporation of St. Helens, 6 Ch. Div. 264-1236, 1266.  
     v. Crisp, 8 Ad. & El. 779-294.  
     v. Crook, 136 Ala. 354-444.  
     v. Danbury Public Hall Co., 35 Conn. 430-1932.  
     v. Debar, 1 Ch. Cas. 274-2121.  
     v. Debus, 31 Ohio St. 468-167, 176, 1471, 1511.  
     v. Dillenburgh, 168 Ill. 235-2663.  
     v. Dugger, 66 Ala. 444-2012.  
     v. Dunn, 108 Tex. 337-1960.  
     v. Dyches, 69 Ga. 455-1227.  
     v. Eatman, 92 N. C. 601-1666, 1083.  
     v. Fickas, 64 Ind. 167-1168, 1174.  
     v. Finnegan, 189 Mass. 568-1505.  
     v. Fomby, 116 Ala. 621-1653.  
     v. Fowler, 18 Ohio 567-773, 774.  
     v. Frohock, 85 Ill. 584-334.  
     v. Gerrish, 59 N. H. 569-1220, 2043.  
     v. Gilman, 25 Vt. 411-1691.  
     v. Glaser, 2 Serg. & R. (Pa.) 502-1726.  
     v. Godfrey, 62 W. Va. 677-2640.  
     v. Grange, 13 Ch. D. 223-717.  
     v. Hampton, 4 McCord (S. C.) 96-1377, 1378.  
     v. Hargous, 4 Cal. 268-853.  
     v. Hargous, 4 Cal. 272-2302.  
     v. Harrison, 47 Tex. 454-1578.  
     v. Haskell, 178 Pa. 106-1097.  
     v. Hill, 10 Leigh (Va.) 457-672.  
     v. Holter, 1 Mont. 688-1715, 1716.  
     v. Hunt, 118 N. C. 168-270.  
     v. Indiana & Michigan Elec. Co., 184 Mich. 578-1150.  
     v. Interstate Investment Co., 75 Wash. 490-457, 2764.  
     v. Kearn, 63 Ill. 339-751.  
     v. Kelly, 56 N. C. (3 Jones) 240-1996, 2002.

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     v. London Bank, (1901) 2 Ch. 231-2175, 2179.  
     v. McConnell, 53 Mich. 587-2462.  
     v. McCowen, 154 Cal. 798-549.  
     v. McLoughlin, 120 Ga. 703-669, 671.  
     v. Maris, 5 Rawle (Pa.) 56-2203, 2506.  
     v. Marshall, 255 Ill. 545-160, 171, 210.  
     v. Mason, 9 Wheat. (U. S.) 325-276.  
     v. Meadows, 169 N. C. 124-700.  
     v. Meads, 4 De Gex, J. & S. 597-731.  
     v. Millard, 118 N. Y. 244-1386, 1397.  
     v. Mitchell, 58 Kan. 194-2181, 2242.  
     v. Morris, 163 Cal. 717-408.  
     v. Murphy, 148 Pa. St. 337-2769.  
     v. Owen, 2 Blackf. (Ind.) 301-179, 1413, 1431.  
     v. Page, 6 Allen (Mass.) 86-2539.  
     v. Preston, 79 Pa. St. 436-1403, 2486, 2491.  
     v. Russell, (1893) App. Cas. 244-2174.  
     v. Sample, 51 Ind. 423-810.  
     v. Sanford, 108 Tex. 340-1796.  
     v. Short's Adm'r, 27 Iowa, 361-2515.  
     v. Shum, 1 Bos. & P. 21-184, 185.  
     v. Smith, 54 Miss. 50-835, 847.  
     v. Stephens, 165 Ind. 200-559.  
     v. St. Helens Corp., 6 Ch. D. 264-1619.  
     v. Stibbert, 2 Ves. Jr. 437-150.  
     v. Sutton, 15 Ga. 103-276.  
     v. Swofford, 122 Tenn. 303-2121.  
     v. Tarr, 84 Mo. 420-2665.  
     v. Taylor, 3 De G., M. & G. 190-451.  
     v. Taylor, 144 Ill. 436-793.  
     v. Taylor, 118 Iowa 407-2147, 2172.  
     v. Taylor, 93 N. C. 418-795.  
     v. Taylor, 2 Nott & Me. (S. C.) 482-1851.  
     v. Taylor, 63 Pa. St. 481-481, 482, 511, 569, 612.  
     v. Tolen, 38 N. J. Eq. 91-2739.  
     v. Townsend, 8 Mass. 411-1306.  
     v. Underhill, 40 Cal. 471-2109.  
     v. Wallace, 20 Colo. 211-1717.  
     v. Warnaky, 55 Cal. 350-1297, 1301, 1304.  
     v. Watkins, 62 Ind. 511-916.  
     v. Watkins, 26 Tex. 688-1921.  
     v. Weston, 77 Cal. 534-2176.  
     v. Whitehead, 2 Doug. 745-1199, 1335, 1535.  
     v. Whitmore, 35 Mich. 97-2485.  
     v. Wing, 84 N. Y. 471-2561.  
     v. Wright, 76 N. J. Eq. 121-1255, 1279, 1282, 1285, 1292.  
 Taylor Sands Fishing Co. v. State Land Board, 56 Ore. 157-1009.  
 Taylor's Estate, In re, 175 Pa. St. 60-789.  
 Tazewell v. Smith's Adm'r, 1 Rand. (Va.) 313-447.  
 Tea v. Millen, 257 Ill. 624-1915.  
 Teachout v. Capital Lodge, etc., 128 Iowa 384-1230, 1250, 1252, 1268.  
     v. Duffus, 141 Iowa, 466-1279, 1285, 2422.  
 Teaff v. Hewitt, 1 Ohio St. 511-906, 910, 913, 915, 916.  
 Teagarden v. R. B. Godley Lumber Co., 105 Tex. 616-2262, 2265.  
 Teague v. Downs, 69 N. C. 280-841.  
     v. Sowder, 121 Tenn. 132-1621, 2241, 2242.  
     v. Whaley, 20 Ind. App. 26-1716.  
 Teal v. Richardson, 160 Ind. 119-537.  
     v. Scandinavian, etc., Bank, 114 Minn. 435-2222, 2238.  
     v. Walker, 111 U. S. 242-151, 2378, 2407, 2433, 2447.  
 Teasley v. Stanton, 136 Ala. 641-1313, 1315.  
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- Telfair v. Howe, 3 Rich. Eq. (S. C.) 235-630, 631, 636.
- Telford v. Garrels, 132 Ill. 550-2665.
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- Telschow v. Quiggle, 74 Ore. 105-1600, 1602, 1603.
- Temperance House v. Fowle, 20 Ore. 163-778.
- Temple, Ex parte, 1 Gl. & J. 216-2434.
- Temple v. Ferguson, 110 Tenn. 84-357, 390.  
v. Osburn, 55 Ore. 506-2250.  
v. Scott, 143 Ill. 290-487.
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v. Voshloe, 72 Ind. 134-1163, 1164.
- Tenant v. Goldwin, 1 Salk. 360-945, 946, 1182, 1183, 1349.
- Tenbrook v. Jessup, 60 N. J. Eq. 234-806.
- Teneick v. Flagg, 29 N. J. L. 25-339.
- Ten Eyck v. Casad, 15 Iowa, 524-2438, 2663, 2706.  
v. Craig, 62 N. Y. 406-2425, 2454.  
v. Sleeper, 65 Minn. 413-1481.  
v. Whitbeck, 156 N. Y. 341-1790, 2247, 2251, 2252.
- Tennant v. John Tennant Memorial, 167 Cal. 570-1811.  
v. Watson, 58 Ark. 252-2259, 2788.
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v. Wheeler, 125 Ala. 538-1757.
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v. Simpson, 37 Kan. 579-383.
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v. Elberson, 3 N. J. L. 533-878.  
v. Oldis, 44 N. J. Eq. 146-2376.
- Terre Haute & I. R. Co. v. Scott, 74 Ind. 29-1862.
- Terrell v. Andrew County, 44 Mo. 309-2199, 2200.  
v. Hurst, 76 Ala. 588-2306.  
v. McCown, 91 Tex. 231-1068.  
v. Prestel, 68 Ind. 86-2780.  
v. Weymouth, 32 Fla. 255-2338.
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v. Deegan, 3 Mont. 82-1537.
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v. Chandler, 16 N. Y. 354-997.  
v. Davenport, 185 Ind. 561-2002, 2003.  
v. Glover, 235 Mo. 544-1740, 1811.  
v. McClung, 104 Va. 599-1875.  
v. Rodahan, 79 Ga. 278-1083, 1085.  
v. Wiggins, 47 N. Y. 512-571, 1081.
- Terry's Ex'r v. Drabenstadt, 48 Pa. 400-1715.
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     v. Tewkesbury, 222 Mass. 595-1742, 1812, 1816.  
 Tewksbury v. Howard, 138 Ind. 103-1979.  
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 Tharaldson v. Everts, 87 Minn. 168-1769, 1779.  
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     v. Jamison, 154 Iowa 77-1641.  
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     v. Omans, 3 Pick. (Mass.) 521-360.  
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 Thaw v. Gaffney, 75 W. Va. 229-611.  
 Thawayters v. Dye, 2 Vern. 80-1062.  
 Thaxter v. Turner, 17 R. I. 799-1322.  
 Thayer v. Arnold, 4 Mete. (Mass.) 589-1004.  
     v. Finnegan, 134 Mass. 62-2738.  
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     v. Kennedy, 169 Ill. 360-489.  
     v. McClellan, 23 Me. 417-1924.  
     v. McGee, 20 Mich. 195-337.  
     v. Mann, 19 Pick. (Mass.) 532-2620.  
     v. Payne, 2 Cush. (Mass.) 327-1274, 1286.  
     v. Spear, 58 Vt. 327-280.  
     v. Thayer, 69 Ore. 138-2140.  
     v. Thayer, 14 Vt. 107-762, 767, 802.  
     v. Wellington, 9 Allen (Mass.) 283-389, 1837.  
     v. Wright, 4 Den. (N. Y.) 180-916.  
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- Thielen v. Richardson, 35 Minn. 509-2128.
- Thielman v. Carr, 75 Ill. 385-2772.
- Thierman v. Bodley, 23 Ky. L. Rep. 756-2232.
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     v. Langley Mfg. Co., 12 S. C. 465-767, 822.  
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     v. Emery, 17 N. H. 536 2128.  
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 v. Little, 109 U. S. 504, 2231.  
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 v. Walley, Moore, 341-1042, 1045.  
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 v. Salisbury Mfg. Co., 7 Gray (Mass.) 393-2347.  
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 617.  
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 Church, 174 Ala. 380-692.  
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     1357.  
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     Slaughter, 31 Ky. L. Rep. 913-  
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     Lynch, 70 N. Y. 440-1426, 1427,  
     1429, 1435, 1441.  
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     64 N. H. 106-2421, 2424.  
 Trustees of East Hampton v. Kirk,  
     68 N. Y. 459-1660.  
 Trustees of Hocking County v.  
     Spencer, 7 Ohio 143-1511, 1512.  
 Trustees of Hopkins Academy v.  
     Dickinson, 4 Cush. (Mass.) 544-  
     2105, 2115, 2116.  
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     v. Lehigh Valley Coal Co., 241 Pa.  
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     Fisher, 34 Me. 172-2289.  
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     Ill. 509-1018.

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- v. Munson, 77 Pa. St. 250-2361, 2424.
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 Tunstall v. Christian, 80 Va. 1-1187, 1190, 1192, 1240, 1243, 1275, 1294.  
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 Turk v. Funk, 68 Mo. 18-2563, 2564.  
 Turley v. Massengill, 7 Lea (Tenn.) 352-2306.  
     v. Turley, 11 Ohio St. 173-622.  
 Turman v. Bell, 54 Ark. 273-2380, 2562.  
 Turnbull v. Mann, 99 Va. 41-2681.  
     v. Rivers, 3 McCord (S. C.) 131-1307, 1308, 2042, 2046.  
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     v. Barnes, 2 Best. & S. 435-225.  
     v. Bernheimer, 95 Ala. 241-852.  
     v. Boger, 126 N. C. 300-2733.  
     v. Butler, 253 Mo. 202-1831.  
     v. Cameron, L. R. 5 Q. B. 30-1515.  
     v. Cochran, 94 Tex. 480-2195, 2263.  
     v. Cook, 36 Ind. 129-1821, 1822.  
     v. Creech, 58 Wash. 439-1001.  
     v. Davis, 41 Ark. 270-440, 443.  
     v. Dawson, 80 Va. 841-455.  
     v. Field, 44 Mo. 382-1726.  
     v. Flinn, 72 Ala. 532-2641.  
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     v. Hallowell Sav. Inst., 76 Me. 527-2315, 2083.  
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     v. Ivie, 5 Heisk. (Tenn.) 222-542.  
     v. James Canal Co., 155 Cal. 82-1134, 1157.  
     v. Johnson, 95 Mo. 431-2448.  
     v. Kuehule, 71 N. J. Eq. 466-742, 802.  
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     v. Meyers, 1 Hagg. Consist. 414-828.  
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- v. Davis, 61 Tex. 674-187, 192.
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 Upjohn v. Richland Bd. of Health, 46 Mich. 542-1183.  
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 Vance's Estate, In re, 141 Pa. 201-521, 522.  
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     v. Vanmeter, 3 Gratt. (Va.) 148-2413.  
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     v. Dennison, 35 N. Y. 393-1473.  
     v. Gallup, 5 Denio (N. Y.) 454-171.  
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     v. Strosnider, 67 W. Va. 39-1190, 1192.  
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v. Bright, 1 Jac. & W. 494-462.  
v. Hinds, 70 Mass. (4 Gray)  
256 165, 167, 928, 929.  
v. Meilke, 89 Minn. 232-1635.  
v. Pfanschmidt, 265 Ill. 180-  
2354.  
v. Pittsburg Harbor Co., 152  
Pa. St. 427-1547.  
v. Salt Lake City (Utah), 168  
Pac. 766-1977.  
v. Stimpson, 83 Conn. 407-233.  
v. United States Min. Co., 239  
Fed. 90 1384.  
v. Wall, 30 Miss. 91-1050, 1589,  
1740, 1811.  
v. Wall, 142 N. C. 387-1657.
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209.  
v. Berdell, 97 N. Y. 13-1751,  
1760.  
v. Blair, 1 Grant (Pa.) 75-2618.  
v. Bowem, 28 Vt. 638-405.  
v. Campbell, 53 Tex. 229-2321.  
v. Clifton Land Co., 92 Ohio St.  
349-1447.  
v. Columbia, etc., R. Co., 34 S.  
C. 62-1148.  
v. Driver, 61 Ark. 429-2101,  
2102, 2107.  
v. Duffield, 2 Serg. & R. (Pa.)  
521-402.  
v. Elm Grove Coal Co., 58 W.  
Va. 449-867, 1996.  
v. Fletcher, 30 N. H. 434-2030,  
2049, 2052, 2068.  
v. Follansbee, 131 Ill. 147-526.  
v. Foxwell, 250 Ill. 616-1076,  
2324.  
v. Harmstad, 44 Pa. St. 492-  
1643, 1644.  
v. Harris, 32 Mich. 380-852.  
v. Johnstone, 129 U. S. 58-  
2390.  
v. Meeks, 99 Ark. 350-1627.  
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1719.
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v. Smith, 155 Pa. St. 78 2385,  
2387.  
v. Stevens, 61 Me. 225-2510.  
v. St. John, 119 Wis. 585-651.  
v. Wallace, 137 Iowa 169-763.  
v. Winfield, 96 Kan. 35-2035.  
v. Winfield, 98 Kan. 651 1131.
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2738.
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922.  
v. Mardus, 29 Mo. 25-806.  
v. Martin, 106 Tenn. 311-834.  
v. Oglesby, 85 Tenn. 321-2519.  
v. Pollit, 104 Md. 172-535.  
v. River Forest, 259 Ill. 223-  
1538.  
v. Staples, 107 Iowa 738-2522.  
v. Tate, 4 B. Mon. (Ky.) 529-  
2468.  
v. Todd, 3 Dana (Ky.) 503-  
2465.  
v. Waller's Adm'r, 33 Gratt.  
(Va.) 83-752.
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C.) 2, 10-2653.  
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v. Scott (Ind.), 96 N. E. 481-  
444.
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v. Harrison, 4 Mees. & W. 538-  
1218.  
v. Wallis, 114 Mass. 510-1843.
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1000.
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v. Endel, 20 Fla. 86-2381,  
2382.  
v. State, 140 Ind. 16-2242,  
2244.
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115-919, 929.
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164-918.
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2350.  
v. Bymes, 39 Minn. 527-2283.  
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334-1534.

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 v. Wala, 10 Neb. 123-2697.  
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 v. Defenbaugh, 90 Ill. 241-2467.  
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 v. Northern Coal Min. Co., 5 De Gex, M. & G. 629-180.  
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     v. Bennett, 31 Conn. 468-272, 307, 309, 313.  
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     v. Trustees of Norwegian Cemetery, 139 Iowa 115-814.  
     v. Van Alstyne, 3 Paige (N. Y.) 513-2757.  
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     v. Lilley, 4 Pick. (Mass.) 145-1544, 1545.  
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     v. Bioren, 1 Serg. & R. (Pa.) 227-1347.  
     v. Black, 16 Q. B. D. 270-669.  
     v. Board of Com'rs of Adams Co., 38 Wash. 662-2083, 2086.  
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     v. Chicago, etc., R. Co., 46 Minn. 321-1858.  
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     v. Cressey, 79 Me. 381-493, 524.  
     v. Crutcher, 56 Ark. 44-1667.  
     v. Dodd, 68 Ill. 430-2148.  
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     v. Edwards, 105 Cal. 70-2473.  
     v. French, 112 Me. 371-1307.  
     v. Gardner, 119 Ill. 312-2751.  
     v. Gray, 12 Ch. Div. 192-1340.  
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     v. O'Hern, 6 Watts (Pa.) 362-871.  
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     v. Wolff Goldman Realty Co., 95 Ark. 18-984, 986, 987.  
     v. Wyman, 161 Mass. 96-2589.  
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     v. Trapp, 2 Rich. Law (S. C.) 136-2060.  
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     v. Watts, L. R. 17 Eq. 219-462, 463.  
     v. Welman, 2 N. H. 458-1688, 1689.  
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     v. Stebbins, 47 Mich. 296-668.  
 Wayman v. Follansbee, 253 Ill. 602-424.  
     v. Ringold, 1 Bradf. (N. Y. Surr.) 40-1419.  
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 Weare v. Chase, 93 Me. 264-2075.  
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 Weatherford v. King, 119 Mo. 51-856, 857.  
 Weaver v. Barden, 49 N. Y. 286-2248.  
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     v. Gregg, 6 Ohio St. 547-759, 801.  
     v. Love, 146 N. C. 414-1971.  
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     v. Spurr, 56 W. Va. 95-372.  
     v. Sturtevant, 12 R. I. 537-803.  
     v. Wible, 25 Pa. St. 270-698.  
 Weaver Mercantile Co. v. Thurmand, 68 W. Va. 530-1184, 1185.  
 Webb v. Archibald, 128 Mo. 299-1808.  
     v. Bailey, 41 W. Va. 463-2254, 2255.  
     v. Bird, 13 C. B. (N. S.) 841-1128.  
     v. Crouch, 70 W. Va. 580-2531, 2653, 2669.  
     v. Demopolis, 95 Ala. 116-1869.  
     v. Haeffer, 53 Md. 187-2720.  
     v. Hardaway (Ky.), 121 S. W. 669-2134, 2138.  
 Webb v. Hearing, Cro. Jac. 415-481.  
     v. Hoselton, 4 Neb. 308-2362, 2395, 2539.  
     v. Jiggs, 4 Maule & S. 113-1509.  
     v. Jones, 163 Ala. 637-1229, 1268, 1609.  
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     v. Mullins, 78 Ala. 111-1605, 1641.  
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     v. Peet, 7 La. Ann. 9-657.  
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     v. Portland Mfg. Co., 3 Sumn. (U. S.) 189-1135.  
     v. Rice, 6 Hill (N. Y.) 219-2381.  
     v. Richardson, 42 Vt. 465-1992.  
     v. Ritter, 60 W. Va. 193-2187.  
     v. Robbins, 77 Ala. 176-2217.  
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     v. Russell, 3 Term. R. 393-211, 1410, 1492.  
     v. Sadler, 8 Ch. App. 419-543.  
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 v. Vogel, 159 Pa. 235-1274, 1332.  
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 v. Lowell, 142 Mass. 324-2051, 2054, 2059, 2065, 2087.  
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 Weisinger v. Murphy, 2 Head (Tenn.) 679-2020.  
 Weiss v. Alling, 34 Conn. 60-2654.  
     v. Binnian, 178 Ill. 241-1684, 1686.  
     v. Borough of South Bethlehem, 136 Pa. 294-1863.  
     v. Heitkamp, 127 Mo. 23-1626.  
     v. John, 37 N. J. L. 93-1521.  
 Weiss v. Kohlhausen, 58 Ore. 144-1191.  
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     v. Beers, 8 Allen (Mass.) 151-2509.  
     v. Browning, 115 Iowa 690-1015.  
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     v. Caldwell, 226 Ill. 488-436.  
     v. Crowe, 278 Ill. 244-566.  
     v. Dutton, 79 Ill. 466-1577.  
     v. Farmers' Loan & Trust Co., 165 Fed. 561-2754.  
     v. Greenalge, 2 Heisk. (Tenn.) 209-2717.  
     v. Henshaw, 170 Mass. 409-386, 389.  
     v. Hover-Schiffner Co., 75 Wash. 130-458.  
     v. Howard, 227 Mass. 242-498.  
     v. McKenzie, 66 Ark. 251-667.  
     v. Priest, 8 Allen (Mass.) 165-2532, 2549.  
     v. Sackett, 12 Wis. 243-1789, 1792, 1795.  
     v. Wilcox, 101 Mass. 162-1354, 1355.  
 Welch v. Johnson, 27 Okla. 518-195.  
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     v. Sabin, 20 N. H. 53-2448, 2669.  
 Weldon v. Tallman, 67 Fed. 986-2588, 2635.  
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- v. Brown, 160 Cal. 515-264, 270, 1270.
- v. Fidelity, etc., Co., 23 Ky. L. Rep. 1136-1689.
- v. Kolb, 128 Md. 221-423, 498.
- v. McCormick, 52 N. J. L. 470-1525.
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- v. Caywood, 3 Colo. 487-2331.
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- v. Estes, 151 Mo. 291-2716.
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- v. Kingston-upon-Hull, L. R. 10 C. P. 402-1203.
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- v. McCall, 64 Pa. St. 207-2320.
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- v. Van Dyke, 109 Pa. St. 330-2449.
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     v. Shaw, 61 Wash. 227-1218.  
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- v. John L. Roper Lumber Co., 162 N. C. 165-724.
- v. Sampson, 8 Cush. (Mass.) 347-1037.
- v. Second Orthodox Congregational Church, 77 N. H. 576-1059.
- v. Stoddard, 137 N. Y. 119-720.
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- v. Dunn, 36 Cal. 147-2268.
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- Wetherington v. Williams, 134 N. C. 276-1641.
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- v. Robinson, 2 Conn. 529-1358.
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- v. Manley, 68 W. Va. 328-258.
- v. Schneider, 281 Ill. 557-2134, 2232.
- Whaler v. Ahl, 29 Pa. St. 98-1144.
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     v. Clutterbuck, 52 N. Y. 67-1903.  
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     v. Earle, 5 Cush. (Mass.) 31-265.  
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     v. Single, 62 Wis. 380-1761, 1805.  
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     v. Winn, 53 Pa. 122-1926.  
     v. Wood, 25 Me. 287-217, 242.  
     v. Wood, 30 Vt. 242-1616.  
     v. Young, 76 Conn. 44-2131.  
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 Wheelwright v. Wheelwright, 2 Mass. 447-1773, 1779, 1780.  
 Wheelless v. Wheelless, 92 Tenn. 293-445, 446.  
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 v. Dutton, 89 Me. 212-999, 1000.  
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 v. Starkey, 63 N. H. 607-181.  
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 v. Bailey, 14 Conn. 271-1767.  
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 v. Bass, 7 Hurl. & N. 722-1292.  
 v. Bogart, 73 N. Y. 256-2777.  
 v. Bower, 56 Colo. 575-1825, 1826.  
 v. Bradley, 66 Me. 254-1233, 1276, 1875.  
 v. Britton, 75 S. C. 428-269, 273, 305, 307.  
 v. Brocaw, 14 Ohio St. 339-707, 2122.  
 v. Brooks, 43 N. H. 402-900.  
 v. Brown, 2 Cush. (Mass.) 412-2458.  
 v. Burnely, 20 How. (U. S.) 235-1924.  
 v. Campbell, 5 Humph. (Tenn.) 38-475.  
 v. Casten, 46 N. C. 197-1839.  
 v. Chapin, 12 Allen (Mass.) 516-1166, 1236, 2036, 2039, 2045.  
 v. City of Marion, 139 Iowa 479-1613.  
 v. Clark, 7 T. B. Mon. (Ky.) 641-807.  
 v. Clawson, 79 Ind. 188-1974.  
 v. Cutler, 17 Pick (Mass.) 248-960, 988.  
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 v. Eagle & Phenix Hotel Co., 68 N. H. 38-1329, 1348.  
 v. East Lake Land Co., 96 Ga. 415-1133.  
 v. Elwell, 48 Me. 360-1216.  
 v. Espey, 21 Ore. 328-2778.  
 v. Flannigan, 1 Md. 525-1316.  
 v. Foster, 102 Mass. 375-882, 883, 887, 2242.  
 v. Gay, 9 N. H. 126-1651.  
 v. Glover, 59 Ill. 459-1054, 1066.  
 v. Godfrey, 97 Mass. 472-1661.  
 v. Grand Hotel, (1913) 1 Ch. 113-1346.  
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 v. Hooper, 6 Jones (N. C.) 152-461.  
 v. Huber Drug Co., 190 Mich. 212-161.  
 v. Interstate Bldg. Ass'n, 106 Ga. 146-2194.  
 v. Jefferson, 110 Minn. 276-1661, 1665.  
 v. Kauffman, 66 Md. 89-2739.  
 v. King, 87 Mich. 107-883, 887, 968, 1217.  
 v. Knapp, 8 Paige (N. Y.) 173-2643.  
 v. Luning, 93 U. S. 514-1654.  
 v. McGregor, 92 Tex. 556-2187, 2191, 2192.  
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 v. Manhattan Ry. Co., 139 N. Y. 19-1382.  
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 v. Moffett, 108 Ark. 490-1804, 2215, 2241, 2257.  
 v. Nassau Trust Co., 168 N. Y. 149-1025, 1189.  
 v. New York & N. E. R. Co., 156 Mass. 181-1607, 1617.  
 v. Northwestern N. C. R. Co., 113 N. C. 610-1528, 1530, 1531, 1532.  
 v. Parker, 1 Bing. (N. C.) 573-356.  
 v. Patten, 24 Pick. (Mass.) 324-2125, 2131.  
 v. Pickering's Lessee, 12 Serg. & R. (Pa.) 435-699.  
 v. Polleys, 20 Wis. 505-2675.  
 v. Pulley, 27 Fed. 436-2436.  
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 v. Rittenmeyer, 30 Iowa 268-2421, 2422, 2697, 2702.  
 v. Secor, 58 Iowa 533-2697.  
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 v. Sohn, 63 W. Va. 80-257.  
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 v. Summers, (1908) 2 Ch. 256-555, 557, 582.  
 v. Tidewater Oil Co., 50 N. J. Eq. 1-1313, 1315, 1321, 1323.  
 v. Town of Edenton, 171 N. C. 21-2083.  
 v. Trustees of British Museum, 6 Bing. 310-1822.  
 v. Tucker, 52 Miss. 145-1713.  
 v. Wager, 25 N. Y. 328-2331.  
 v. Wagner, 4 Har. & J. (Md.) 373-974, 975, 976.  
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 v. Wheelan, 71 Ga. 533-2300.  
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 v. White, 16 Gratt. (Va.) 264-816.  
 v. Whitney, 3 Mete. (Mass.) 81-2421, 2422, 2446.  
 v. Whitney Mfg. Co., 60 S. C. 254-1134, 1135.  
 v. Wiley, 59 Hun (N. Y.) 618-1535, 2084.  
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 v. Morrill, 108 N. C. 65-2552, 2556.  
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 v. Parks, 2 Hurl. & N. 370-1328.  
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 v. Woodruff, 11 Bush (Ky.) 209-2790.  
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     v. Richardson, 59 Hun (N. Y.) 601-1259.  
     v. Swett, 22 N. H. 10-223, 256.  
     v. Union R. Co., 11 Gray (Mass.) 359-310, 1425, 1432, 1452.  
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     v. Trammell, 86 Ark. 251-327, 329.  
 Whittmore v. Baxter Laundry Co., 181 Mich. 564-1119.  
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- v. Lusk, 12 Ill. 132-1753.
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- Wigglesworth v. Dallison, 1 Doug. (Mich.) 201-893-894.
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- Wike v. Garner, 179 Ill. 257-2298.
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- v. Follansbee, 97 Wis. 577-147.
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- Wilcke v. Wilcke, 102 Iowa 173-2352, 2353.
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- v. Campbell, 106 N. Y. 325-2501.
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- v. Montour Iron & Steel Co., 147 Pa. St. 540-257.
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- v. Miller, 49 Cal. 194-2783.
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- v. Wilder, 82 Vt. 123-2665.
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- v. Wiles, 3 Md. 1-728.
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 Wilkes v. Bodington, 2 Vern. 599-2178.  
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     v. Harper, 2 Barb. Ch. (N. Y.) 338-2175.  
     v. Holmes, 9 Mod. 485-1092.  
     v. Lion, 2 Cow. (N. Y.) 333-563, 569.  
     v. Miller, 156 N. C. 428-2625, 2628.  
     v. Spooner, [1911] 2 K. B. 473-1440.  
 Wilkins v. Anderson, 11 Pa. 399-2262.  
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     v. French, 20 Me. 111-2421, 2423.  
     v. Irvine, 33 Ohio St. 138-1204, 1218, 1257.  
     v. Jewett, 139 Mass. 29-1246, 1311.  
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 Wilkins v. Somerville, 80 Vt. 48-1768, 1780.  
     v. Young, 144 Ind. 1-628, 639.  
 Wilkinson v. Brandon, 92 Ala. 530-804, 805.  
     v. Buist, 124 Pa. St. 253-1101.  
     v. Calvert, 3 C. P. Div. 360-239.  
     v. Duncan, 30 Brev. 111-1114.  
     v. Flowers, 37 Miss. 378-2680.  
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     v. Hall, 3 Bing. (N. C.) 508-236.  
     v. Haygarth, 12 Q. B. 837-990.  
     v. Hutzel, 142 Mich. 674-2049.  
     v. May, 69 Ala. 33-2756.  
     v. Merrill, 87 Va. 513-2294.  
     v. Proud, 11 Mees. & W. 33-866, 1396.  
     v. Scott, 17 Mass. 249-1627.  
     v. Wilkinson, L. R. 12 Eq. 604-280, 290.  
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 Wilks v. Burns, 60 Mo. 64-1079, 1093, 1100.  
 Will of Root, 81 Wis. 263-2741.  
 Willamette Real Estate Co. v. Hendrix, 28 Ore. 485-1992, 1993.  
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     v. Harvey, 5 N. H. 252-214, 2599.  
     v. Higdon, 123 Md. 477-879.  
     v. Tillman, 2 Hill (N. Y.) 274-1473.  
     v. Twitchell, 1 N. H. 177-1683.  
     v. Willard, 145 U. S. 116-710, 714.  
     v. Worsham, 76 Va. 392-2498, 2499.  
 Willard Parker Hospital, In re, 217 N. Y. 1-1977.  
 Wilcox v. Foster, 132 Mass. 320-2541, 2637, 2640.  
     v. Hines, 100 Tenn. 538-138, 139, 144.  
 Willet v. Andrews, 106 La. 319-2180.  
     v. Beatty, 12 B. Mon. (Ky.) 172-810.  
     v. Brown, 65 Mo. 138-667, 669, 760.

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 Willey v. Hodge, 104 Wis. 81-1636.  
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     v. Norfolk Southern R. Co., 96 N. C. 408-1377, 1380, 2162.  
     v. Portsmouth, 35 N. H. 303-2080.  
     v. Thwing, 68 Vt. 128-1298.  
 Willhite v. Berry, 232 Ill. 331-2633.  
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 Williams, In re, 62 Mo. App. 339-1913.  
 Williams v. Angell, 7 R. I. 145-307, 483, 506.  
     v. Apothecaries Hall Co., 80 Conn. 503-234, 258.  
     v. Armstrong, 130 Ala. 389-1761.  
     v. Baker, 41 Md. 523-2108.  
     v. Baker, 62 N. J. Eq. 563-2466.  
     v. Ballance, 23 Ill. 193-1993.  
     v. Beeman, 2 Dev. L. (13 N. C.) 483-1717.  
     v. Bosanquet, 1 Brod. & B. 238-177, 181, 2424.  
     v. Brown, 14 Ill. 200-2223.  
     v. Brown, 127 N. C. 51-2687.  
     v. Burrell, 1 C. B. 402-1676.  
     v. Carskadden, 36 Ohio St. 664-1734.  
     v. Chicago, S. F. & C. Ry. Co., 112 Mo. 463-2771.  
     v. Chitty, 5 Ves. 544-587.  
     v. Cincinnati First Presbyterian Church, 1 Ohio St. 478-2002.  
     v. Cleaver, 4 Houst. (Del.) 453-897.  
     v. Clyatt, 53 Fla. 987-695.  
     v. Coombs, 88 Me. 183-690.  
     v. Council, 49 N. C. 206-2290.  
 Williams v. Cox, 3 Edw. Ch. (N. Y.) 178-747, 768.  
     v. Dakin, 22 Wend. (N. Y.) 209-299.  
     v. Daubner, 103 Wis. 521-1786.  
     v. Day, 2 Ch. Cas. 32-979, 2690.  
     v. Deriar, 31 Mo. 13-235.  
     v. Deskins, 179 Ky. 61-2044.  
     v. Dickerson, 66 Iowa 105-2650.  
     v. Dickson, 122 Minn. 49-147.  
     v. Donnell, 2 Head (Tenn.) 695-1921.  
     v. Dorris, 31 Ark. 466-2295.  
     v. Earle, L. R. 3 Q. B. 739-177.  
     v. Elliott, 246 Ill. 548-571.  
     v. Ely, 13 Wis. 1-2520.  
     v. Esten, 179 Ill. 267-525.  
     v. First Presbyterian Soc., 1 Ohio St. 478-1857, 1888, 2002, 2005.  
     v. Fitch, 18 N. Y. 546-409.  
     v. Forbes, 47 Ill. 148-458.  
     v. Fulmer, 151 Pa. 405-1132.  
     v. Gibson, 84 Ala. 228-871, 1296, 1390.  
     v. Green, 246 Ill. 548-571.  
     v. Groucott, 4 Best & S. 199-1350.  
     v. Haile Gold Min. Co., 85 S. C. 1-1142, 2056.  
     v. Hassell, 73 N. C. 174-462.  
     v. Hayward, 1 El. & El. 1040-1470, 1510.  
     v. Hensman, 1 Johns. & H. 546-638.  
     v. Hewitt, 128 Tenn. 689-1946.  
     v. Hewitt, 57 Wash. 62-1686, 1712.  
     v. Hilton, 35 Me. 547-2416, 2417, 2450, 2451, 2452, 2650, 2697.  
     v. Hollingsworth, 1 Strob. Eq. (S. C.) 103-397.  
     v. Hyde, 98 Mich. 152-883.  
     v. Jackson, 107 U. S. 478-2635, 2638.  
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     v. Johnson, 149 Kv. 409-1664.

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 v. Keyes, 90 Mich. 290-2594, 2597.  
 v. Kidd, 170 Cal. 631-1786, 1816.  
 v. Kierney, 6 N. Y. St. Rep. 560-751.  
 v. Ladew, 161 Pa. St. 283-1176.  
 v. Ladew, 171 Pa. St. 369-241, 248, 252.  
 v. Lambe, 3 Brown Ch. 264-768, 2171.  
 v. Lane, 62 Mo. App. 66-935.  
 v. Lanier, 44 N. C. 30-847, 974.  
 v. Latham, 113 Mo. 165-1719, 1787.  
 v. Lewis, 100 N. C. 142-566.  
 v. Lewis, 158 N. C. 571-2175.  
 v. Lobban, 206 Mo. 399-443, 447.  
 v. Los Angeles Ry. Co., 150 Cal. 592-1534.  
 v. McClanahan, 3 Metc. (Ky.) 420-1951.  
 v. McConico, 36 Ala. 22-357.  
 v. Mayfield, 57 Tex. 364-1654.  
 v. Mellor, 12 Colo. 1-2790.  
 v. Meridian Light & Ry. Co., 110 Miss. 174-1528.  
 v. Mershon, 57 N. J. L. 242-207.  
 v. Michigan Central R. Co., 2 Mich. 260-1005.  
 v. Michigan Cent. R. Co., 133 Mich. 448-211, 1492.  
 v. Miles, 68 Neb. 463-1843, 1850.  
 v. Moniteau Nat. Bank, 72 Mo. 292-2411, 2416.  
 v. Moody, 95 Ga. 8-2500.  
 v. Morrison, 32 Fed. 177-1397.  
 v. Neff, 52 Pa. St. 326-1836.  
 v. Nelson, 23 Pick. (Mass.) 141-1235, 2035.  
 v. New Orleans, M. & T. R. Co., 60 Miss. 689-2164, 3 R. P.—68
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 v. Nichol, 47 Ark. 254-2742.  
 v. Nisly, 2 Serg. & R. (Pa.) 507-2311.  
 v. Norton, 139 Ala. 402 2661.  
 v. O'Donnell, 225 Pa. 321-1698.  
 v. Otey, 8 Humph. (Tenn.) 563-422, 1954, 1955.  
 v. Paine, 169 U. S. 55-2330.  
 v. Paysinger, 15 S. C. 171-2594.  
 v. Peabody, 8 Hun (N. Y.) 271-987.  
 v. Pott, L. R. 12 Eq. 149-2007.  
 v. Purcell, 45 Okla. 489-2386, 2475.  
 v. Roger Williams Ins. Co., 107 Mass. 377-2457.  
 v. Rogers, 110 Mich. 418-898.  
 v. Roper Lumber Co., 174 N. C. 229-885.  
 v. Safford, 7 Barb. (N. Y.) 309-1335, 1535.  
 v. Sapiela, 94 Tex. 430-2343, 2346.  
 v. Schatz, 42 Ohio St. 47-1786.  
 v. Scott, 122 N. C. 545-1961.  
 v. Shackelford, 97 Mo. 322-2354.  
 v. Silliman, 74 Tex. 626-2404.  
 v. Sorrell, 4 Ves. 389-2595.  
 v. Smith, 128 Ga. 306-2182, 2266.  
 v. South Penn. Oil Co., 52 W. Va. 188-872.  
 v. Sprigg, 6 Ohio St. 585-2227.  
 v. Starr, 5 Wis. 534-2410, 2623.  
 v. Teachey, 85 N. C. 402-2528, 2529, 2530.  
 v. Terrell, 54 Ga. 462-2689.  
 v. Thatcher, 186 Mass. 293-424.  
 v. Thomas, [1909] 1 Q. B. 713-814.  
 v. Thomas, 65 Iowa 183-2023.  
 v. Townsend, 31 N. Y. 411-2454.  
 v. Vanderbilt, 145 Ill. 238-270, 302, 303, 319, 320, 943, 944, 1587, 2770.  
 v. Wadsworth, 51 Conn. 277-1136.  
 v. Wager, 64 Vt. 326-401.

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     v. Washington, 40 S. C. 457-2728.  
     v. Waters, 14 Mees & W. 166-357.  
     v. Watkins, 92 Va. 680-2303.  
     v. Westcott, 77 Iowa 332-759.  
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     v. Gay, 48 Tex. 463-2758.  
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     v. Perry, 92 Iowa 297-1177.  
     v. Roberts, 48 Me. 257-2742.  
     v. Smith, 66 Tex. 31-1064, 2646.  
     v. Terry, 15 Ky. L. Rep. 753-2578.  
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     v. Watkins, 3 Pet. (U. S.) 43-165, 266, 1998, 2002.  
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763-2179.
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Wis. 86-1038, 1548.
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v. Cooper, 25 N. J. L. 137-421,  
427, 432.  
v. Cowper, 2 Ohio 124-1072.  
v. Manufacturers' Natural Gas  
Co., 130 Pa. St. 222-309.  
v. Reed, 86 Miss. 446-2084,  
2089.  
v. Slade, 6 Ves. Jr. 498-722.  
v. Summers, 45 Minn. 90-158,  
178.
- Willson v. Beck, 160 Iowa 276-  
1002.  
v. Burton, 52 Vt. 394-2612.  
v. Treadwell, 81 Cal. 58-143.  
v. Willson, 25 N. H. 229-1707,  
1709, 1712.
- Wilmarth v. Bancroft, 10 Allen  
(Mass.) 348-2460.  
v. Palmer, 34 Mich. 347-677.  
v. Woodcock, 58 Mich. 482-864.  
v. Woodcock, 66 Mich. 331-  
1664.
- Wilmington Water Power Co. v.  
Evans, 166 Ill. 548-1206, 1258.
- Wilmot v. Lathrop, 67 Vt. 671-  
696.  
v. Pike, 5 Hare 14-2178.  
v. Wilmot, 8 Ves. 10-579.
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426-575.
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1194, 1243.
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Div. 412-1415, 1416.
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v. Albert, 89 Mo. 537-1577.  
v. Alston, 122 Ala. 630-544.  
v. Anderson, 186 Pa. 531-423.  
v. Arentz, 70 N. C. 670-847.  
v. Atkinson, (1892) 3 Ch. 1-632.  
v. Atkinson, 77 Cal. 485-1988.  
v. Beckwith, 117 Mo. 61-1674.  
v. Bell, 5 Ir. Eq. 501-638.  
v. Bird, 28 N. J. Eq. 352-2677.  
v. Blake, 53 Vt. 305-1926.
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County, 83 N. J. Eq. 545-  
1255.  
v. Boyce, 92 U. S. 320-2374.  
v. Branch, 77 Va. 65-2339.  
v. Brown, 82 Ind. 471-2672.  
v. Buffalo Collieries Co., 79 W.  
Va. 279-885.  
v. Bull, 97 Md. 128-566.  
v. Campbell, 119 Ind. 286-2024.  
v. Campbell, 110 Mich. 580-  
2547, 2593, 2597.  
v. Carpenter, 62 Ind. 495-2174.  
v. City of New Bedford, 108  
Mass. 261-1184.  
v. Clark, 60 N. H. 352-460.  
v. Cochran, 46 Pa. St. 229-  
1685, 1686, 1700, 1702.  
v. Cochran, 31 Tex. 677-2294.  
v. Cohen, Rice Eq. (S. C.) 80-  
1362.  
v. Craig, 175 Mo. 362-794.  
v. Craig, 86 Wash. 465-1819.  
v. Duguid, 24 Ch. Div. 244-  
1099.  
v. Dmrite, 24 Mo. 301-2391.  
v. Edmonds, 24 N. H. 517-969.  
v. Eggleston, 27 Mich. 257-  
2654.  
v. Eigenbrodt, 30 Minn. 4-2553,  
2554, 2555.  
v. Finch, 2 Exch. Div. 336-137.  
v. Fisher, 148 N. C. 535-2365,  
2450.  
v. Fleming, 13 Ohio 68-650.  
v. Forbes, 2 Dev. (N. C.) 30-  
1682, 1708.  
v. Ford, 209 N. Y. 186-1228,  
1231.  
v. Galt, 18 Ill. 431-290.  
v. Giddings, 28 Ohio St. 554-  
2393.  
v. Godfrey, 145 Iowa 696-2130.  
v. Griess, 64 Neb. 792-1730.  
v. Hagey, 251 Ill. 452-1480.  
v. Hart, L. R. 1 Ch. 463-290,  
1426, 1439.  
v. Hayward, 6 Fla. 171-2554.  
v. Hefflin, 81 Ind. 35-2271.  
v. Heilman, 219 Pa. 237-542.  
v. Hicks, 10 Ohio St. 66-2176.  
v. Hill, 3 Mete. (Mass.) 66-  
2456.  
v. Hoover, 154 Ky. 1-2018.

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 v. Inloes, 6 Gill (Md.) 121-1545, 1645.  
 v. Johnson, 145 Ind. 40-1645.  
 v. Jones & Tapp, 1 Bush (Ky.) 173-321.  
 v. Kimball, 27 N. H. 300-2547.  
 v. King, 27 N. J. Eq. 374-2374.  
 v. Knight, 59 Ala. 172-2249.  
 v. Land Co., 77 N. C. 445-2174.  
 v. Leary, 120 N. C. 90-475.  
 v. Linder, 18 Idaho 438-566.  
 v. Louisville Trust Co., 102 Ky. 522-2005.  
 v. Lubke, 176 Mo. 210-2564.  
 v. Lyon, 51 Ill. 166-2759.  
 v. McEwan, 7 Ore. 85-1991.  
 v. Mackreth, 3 Burr. 1824-1389.  
 v. McWilliams, 16 S. D. 96-2394.  
 v. Magill, 105 S. C. 312-2675.  
 v. Maltby, 59 N. Y. 126-2461.  
 v. Martin, 1 Denio (N. Y.) 602-1204.  
 v. Maryland Life Ins. Co., 60 Md. 150-1065, 1078.  
 v. Mason, 158 Ill. 304-1075.  
 v. Massachusetts Inst. of Technology, 188 Mass. 565-1427.  
 v. Moore, 146 Ky. 679-1622.  
 v. Morrell, 5 Wash. 654-2176.  
 v. Nauce, 11 Humph. (Tenn.) 189-2291.  
 v. Parshall, 129 N. Y. 223-2477.  
 v. Patrick, 34 Iowa 362-2388.  
 v. Pennoek, 27 Pa. St. 238-1071.  
 v. Pennsylvania Trust Co., 114 Fed. 742-1461.  
 v. Pickering, 28 Mont. 435-2623, 2410.  
 v. Piggott, 2 Ves. Jr. 351-1062.  
 v. Reed, 270 Mo. 400-2410, 2426.  
 v. Riggs, 27 App. Cas. (D. C.) 550-1255, 1276, 1285.  
 v. Rodeman, 30 S. C. 210-238.  
 v. Rogers, 97 Ark. 369-2426.
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 v. Russell, 13 Md. 494-2407, 2569.  
 v. Sale, 41 Pa. Super. 566-1502.  
 v. Shiveley, 11 Ore. 215-2094.  
 v. Shoenberger's Ex'rs, 31 Pa. St. 295-2378.  
 v. Simpson, 80 Tex. 279-1733.  
 v. Smith, 5 Yerg. (Tenn.) 379-194, 200, 961.  
 v. Snow, 228 U. S. 217-1055.  
 v. South Park Com'rs, 70 Ill. 46-2730.  
 v. Storthz, 177 Ark. 418-2020.  
 v. Sutton (Ky.), 154 S. W. 394-2025.  
 v. Tarter, 22 Ore. 504-2652.  
 v. Tavener, (1901) 1 Ch. 578-1221.  
 v. Taylor, 89 Ala. 368-2795.  
 v. Towle, 36 N. H. 129-2715.  
 v. Traer, 20 Iowa 231-1729, 1735.  
 v. Troup, 2 Cow. (N. Y.) 195-2184, 2713.  
 v. Turner, 164 Ill. 398-573.  
 v. Vanstone, 112 Mo. 315-2472, 2474.  
 v. Watson, 144 Ky. 352-2115.  
 v. White, 84 Cal. 239-1593.  
 v. Widenham, 51 Me. 566-1680, 1719.  
 v. Willis, 131 Md. 47-821.  
 v. Wilson, 158 Ill. 567-1784, 1786, 1788.  
 v. Wilson, 261 Ill. 174-570.  
 v. Wilson, 151 Ky. 635-566, 567.  
 v. Wilson, 38 Me. 18-291.  
 v. Wilson, 43 Minn. 398-650.  
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 v. Wilson, 74 S. C. 30-671.  
 v. Wilson, 32 Utah 169-763, 1740.  
 Wilson's Appeal, 90 Pa. St. 370-2790.  
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 Wiltshear v. Cottrell, 1 El. & Bl. 674-912.  
 Wiltshire v. Sidford, 1 Man. & R. 404-1244.  
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 Wimple v. Fond, 2 Johns. (N. Y.) 288-525.  
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     v. Hare, 46 Okla. 741-2667.  
     v. Willetts (Mich.), 163 N. W. 993-1545.  
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 Winants v. Terhune, 15 N. J. Eq. 185-444.  
 Winbigler v. Sherman, 175 Cal. 270-2725.  
 Winchell v. Coney, 54 Conn. 24-2412, 2413.  
     v. Winchell, 259 Ill. 471-499, 536, 544.  
 Winchester v. Beavor, 3 Ves. Jr. 317-2706.  
     v. Charter, 12 Allen (Mass.) 606-2281, 2283.  
     v. Hees, 35 N. H. 43-1647.  
     v. Osborne, 61 N. Y. 555-1234.  
     v. Paine, 11 Ves. Jr. 194-2271, 2664, 2705.  
 Windham v. Chetwynd, 1 Burrows 414-1825.  
 Windham County Sav. Bank v. Himes, 55 Conn. 433 2684.  
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 Windon v. Stewart, 43 W. Va. 711-969, 973.  
 Windsor v. Collinson, 32 Ore. 297-1572.  
     v. Evans, 72 Iowa 692 2506.  
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 Windt v. German Reformed Church, 4 Sandf. Ch. (N. Y.) 471-1253.  
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 Winfield v. Hemming, 21 N. J. Eq. 188-2241, 2246, 2247.  
 Wing v. Chase, 35 Me. 260-1726.  
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     v. McDowell, Walk Ch. (Mich.) 175-2174.  
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     v. Miller, 54 Iowa 476-2209.  
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     v. Munday, 156 Ky. 806-2171, 2253.  
 Winn v. Abeles, 35 Kan. 85-1192, 1940.  
     v. State, 55 Ark. 360-265, 269, 308.  
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     v. Slaughterbeck, 96 Ohio 139-1038, 1548.  
 Winship v. Pitts, 3 Paige (N. Y.) 259-965, 984.  
 Winslow v. City of Vallejo, 148 Cal. 743-1330.  
     v. Clark, 47 N. Y. 261-2700.  
     v. Goodwin, 7 Mete. (Mass.) 363-527, 590.  
     v. Kimball, 25 Me. 493-1826.  
     v. King, 14 Gray (Mass.) 323-1673.  
     v. McCall, 32 Barb. (N. Y.) 541-1699.  
     v. Merchants Ins. Co., 4 Mete. (Mass.) 310-912, 918, 2370.  
     v. Newell, 19 Vt. 164-1972.  
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     v. Rutherford, 59 Ore. 124-2324.  
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 Winsor v. Mills, 157 Mass. 362-432, 597, 607, 610, 2306, 2310, 2311, 2312.  
     v. Pratt, 2 Brod. & B. 650-1842.  
 Winstanley, Re, 6 Ont. 315-2309.  
 Winstead, Ex parte, 92 N. C. 703-812.  
 Winsted Savings Bank & B. Ass'n v. Spencer, 26 Conn. 195-1728.  
 Winston v. Burnell, 44 Kan. 367-2380, 2386.  
     v. Johnson, 42 Minn. 398-1227, 1230, 1231, 1609.  
 Winston v. Jones, 6 Ala. 550-1057.  
 Winter v. Brockwell, 8 East 308-1221, 1381, 1382.  
     v. Payne, 23 Fla. 470-1664.  
     v. Ritchie, 57 Kan. 212-2303.  
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 Winthrop v. Fairbanks, 41 Me. 307-1231, 1268, 1269.  
 Winthrop Co. v. Clinton, 196 Pa. 472-2323, 2324.  
 Winthrop Harbor v. Gurdes, 257 Ill. 596-1872.  
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     v. Pfaff, 98 Md. 576-1470.  
     v. Sparks (Ala.), 73 So. 394-1505.  
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     v. Lucksinger, 84 N. Y. 31-1202, 1206, 1207, 1212, 2042, 2044.  
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 Wistar's Appeal, 125 Pa. 526-692.  
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 Witham v. Brooner, 63 Ill. 344-350, 360, 1567.  
 Witherington v. Mason, 86 Ala. 345-854.  
 Withers v. Atkinson, 1 Watts (Pa.) 236-1644.  
     v. Bank, etc., Co., 104 Miss. 681-1713.  
     v. Jenkins, 14 S. C. 597-831, 834, 841.  
     v. Larrabee, 48 Me. 570-223, 234, 1585.  
     v. Yeadon, 1 Rich. Eq. (S. C.) 324-1052, 1099.  
 Witherspoon v. Brokaw, 85 Mo. App. 169-280.  
     v. Duncan, 4 Wall. (U. S.) 210-1562.  
     v. Hurst, 88 S. C. 561-1457.  
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 Witmer's Appeal, 45 Pa. St. 455-919, 2777.  
 Witt v. Creasey, 117 Va. 872-2047, 2048.  
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 Witte v. Quinn, 38 Mo. App. 681-200.  
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     v. Parker, 102 Cal. 93-2641.  
 Witter v. Harvey, 1 McCord (S. C.) 67-1666, 2082.  
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 Wittington v. Flint, 43 Ark. 504-2471.  
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 Wittmeier v. Tidwell, 147 Ala. 354-2722, 2723.  
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 Wixom's Estate, In re, 35 Cal. 320-856.  
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     v. Johns, 7 Colo. App. 360-1780.  
     v. Melick, 11 N. J. Eq. 204-1126.  
     v. Winchester, 15 Gray (Mass.) 461-2531.  
 Wolf, In re, 88 N. Y. Misc. 433-2355.  
 Wolf v. Bollinger, 62 Ill. 368-1842.  
     v. Brass, 72 Tex. 133-1322.  
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     v. Fleischacker, 5 Cal. 244-2299.  
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     v. Rauck, 150 Iowa 87-1477.  
 Wolfe v. Buckley, 52 Tex. 641-2293.  
     v. Childs, 42 Colo. 121-689.  
     v. Doe, 13 Sm. & M. (Miss.) 103-2632.  
     v. Dowell, 13 Smedes & M. (Miss.) 103-2396.  
     v. Frost, 4 Sandf. Ch. (N. Y.) 72-1432.  
     v. Hines, 93 Ga. 329-1075.  
     v. Iowa Railway & Light Co., 173 Iowa 277-457.  
     v. McGuire, 28 Ont. 45-978.  
     v. Scarborough, 2 Ohio St. 361-995.  
     v. Town of Sullivan, 133 Ind. 331-1537, 2031.  
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 Wolfenberger v. Hubbard, 184 Ind. 25-2700.  
 Wolfer v. Hemmer, 144 Ill. 554-571.  
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 Wolffe v. Wolff, 69 Ala. 549-248, 250, 1492.  
 Wolfskill v. Los Angeles County, 86 Cal. 405-1879.  
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     v. King, L. R. 8 Eq. 165-1110.  
 Wolsey v. Chapman, 101 U. S. 755-1554.  
 Wolveridge v. Steward, 1 Crompt. & M. 659-168.  
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 Wood, In re, [1894] 2 Ch. 310-1112.  
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     v. Beach, 7 Vt. 522-1626.  
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     v. Bryant, 68 Miss. 198-824.  
     v. Carson, 257 Pa. 522-141.  
     v. Chapin, 13 N. Y. 509, 1576, 1626, 2180, 2259, 2265, 2266.  
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     v. Edes, 2 Allen (Mass.) 578-1213.  
     v. Fowler, 26 Kan. 682-1012, 1017, 1030, 1031.  
     v. French, 39 Okla. 685-1771, 1772, 2218.  
     v. Goodfellow, 43 Cal. 185-2516.  
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     v. Goodwin, 49 Me. 260-2646, 2647.  
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     v. Griffin, 46 N. H. 230-606, 614, 974.  
     v. Hammond, 16 R. I. 98-1058, 2349.  
     v. Hewett, 8 Q. B. 913-1256.  
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 2205.  
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 313-254.  
 v. Irving, 159 Iowa 658-458.  
 v. Johnson, 117 Minn. 267-  
 2495.  
 v. Kelley, 30 Me. 47-2061.  
 v. Keyes, 7 Paige (N. Y.) 478-  
 811.  
 v. Keyes, 8 Paige 365-449,  
 451.  
 v. Kingston Coal Co., 48 Ill.  
 356-1714.  
 v. Krebbs, 30 Gratt. (Va.)  
 708-2243.  
 v. Lake, 62 Ala. 489-2396.  
 v. Leadbitter, 13 Mees. & W.  
 837-1202, 1204, 1206,  
 1207, 1215, 1216, 1217,  
 1218, 1257, 1724.  
 v. Le Baron, 8 Cush. (Mass.)  
 473-720.  
 v. Lee, 5 T. B. Mon. (Ky.) 50-  
 810.  
 v. Leeka, 262 Ill. 607-328.  
 v. Logue, 167 Iowa 436-286,  
 634, 1606.  
 v. Lordier, 115 Ind. 519-2560.  
 v. McGuire, 15 Ga. 202-581.  
 v. Manley, 11 Ad. & El. 34-  
 1216.  
 v. Michigan Air Line R. Co.,  
 90 Mich. 334-1206.  
 v. Montpelier (Vt.), 82 Atl.  
 671-1792.  
 v. Morgan, 56 Ala. 397-814,  
 820.  
 v. Moulton, 146 Cal. 317-  
 1164, 1167.  
 v. National Water Works Co.,  
 33 Kan. 590-1529.  
 v. Owen, 133 Ga. 751-329.  
 v. Page, 24 R. I. 594-241.  
 v. Pehrsson, 21 N. D. 357-  
 443.  
 v. Pittman, 113 Ala. 212-1561.  
 v. Price, 79 N. J. Eq. 14-801,  
 2234, 2236, 2269.  
 v. Putnam Coal Co., 90 Ky.  
 588-2243.
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 2255.  
 v. Reamer, 118 Ky. 841-841.  
 v. Reeves, 5 Jones Eq. (58 N.  
 C.) 271-454.  
 v. Reynolds, 7 Watts & S.  
 (Pa.) 406-2778.  
 v. Robertson, 113 Ind. 323-  
 487.  
 v. Saunders, 10 Ch. App. 582-  
 1236.  
 v. Saunders, 44 Law J. Ch.  
 514-1329.  
 v. Seeley, 32 N. Y. 105-797.  
 v. Smith, 51 Iowa 156-2696.  
 v. Stehrer, 119 Md. 143-1439.  
 v. Sugg, 91 N. C. 93-713.  
 v. Turner, 27 Tenn. (8  
 Humph.) 685-187.  
 v. Veal, 5 Barn. & Ald. 454-  
 1861.  
 v. Wand, 3 Exch. 748-1142,  
 1155, 1234, 1237, 1239,  
 2038, 2079.\*  
 v. Weimar, 104 U. S. 786-  
 2414.  
 v. Weir, 5 B. Mon. (Ky.) 544-  
 2787.  
 v. Whelan, 93 Ill. 153-919.  
 v. Wood, 59 Ark. 441-795, 796.  
 v. Wood, 116 Ark. 142-404.  
 v. Wood, 61 Iowa 256-2640.  
 v. Wood, 127 Ky. 514-374.  
 v. Wood, 5 Paige (N. Y.) 596-  
 784.  
 v. Wood, 83 N. Y. 575-729.  
 v. Woodley, 160 N. C. 17-1228.  
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 1840.  
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 601, 607.  
 v. Clifton, [1905] 2 Ch. 257-  
 179, 608.  
 v. Kelly, 85 Ala. 368-2757, 2760.  
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 2689.  
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 778-826.  
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 (N. J. Eq.), 85 Atl. 1004-1452.  
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 596-372.  
 v. Planter's Bank, 1 Sneed  
 (Tenn.) 297-423.

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 v. Allegheny & K. R. Co., 72 Fed. 371-1642.  
 v. Fisher, 20 Ind. 387-1788, 1789, 2375, 2376.  
 v. Short, 17 Vt. 387-1154, 2077.  
 v. Sparrell Print, 187 Mass. 426-1494, 1495.  
 v. Swan, 58 N. H. 380-2483.  
 v. Swan, 59 N. H. 22-2453, 2454.  
 v. Warren, 67 Vt. 251-2295.
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 v. Crosby's Unknown Heirs, 92 Neb. 783-1942.  
 v. Estey, 43 Vt. 515-1605.  
 v. Woodcock, Cro. Eliz. 795-584.
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 v. Rosenthal, 61 N. Y. 382-171, 1674.
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- Woodley v. Holt, 14 Bush (Ky.) 788-2443.
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 v. Blake, 2 Vern. 222-325.  
 v. Pease, 17 N. H. 282-1675.  
 v. Pitman, 79 Me. 456-1031.  
 v. Spencer, 54 N. H. 507-1662.  
 v. Woodman, 89 Me. 128-492, 524.
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 v. Beekman, 43 N. Y. Super. Ct. 282-1205.  
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 v. Hundley, 147 Ala. 287-436.  
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 v. Neal, 28 Conn. 165-1525, 1526.  
 v. Paddock, 130 N. Y. 618-1384, 1930.  
 v. Pleasants, 81 Va. 37-499, 595.  
 v. Robb, 19 Ohio 212-2396, 2400.  
 v. Roysden, 105 Tenn. 491-1930.  
 v. Trenton Water Power Co., 10 N. J. Eq. 489-264, 310.  
 v. Woodruff, 44 N. J. Eq. 349-271.
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 v. Early, 95 Va. 307-991.  
 v. Farmere, 7 Watts (Pa.) 382-2227, 2229.  
 v. Garnett, 72 Mass. 78-2185, 2192.  
 v. Hildebrand, 46 Mo. 284-1642, 1643, 2424.  
 v. Lowrance, 49 Tex. Civ. App. 542-1433.  
 v. McGarock, 10 Yerg. (Tenn.) 133-2659.  
 v. McGraw, 127 Fed. 914-2656.  
 v. Mains, 1 G. Greene (Iowa) 275-2775.  
 v. North, 6 Humph. (Tenn.) 309-1680, 2119.  
 v. Rock Hill Fertilizer Co., 102 S. C. 442-1126.  
 v. Rozelle, 75 Miss. 782-2776.  
 v. Soucy, 166 Ill. 407-294.  
 v. Wallace, 30 N. H. 384-755.  
 v. Woods, 66 Me. 206-2532.  
 v. Woods, 44 N. C. 290-272.
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 v. Lippold, 113 Ga. 877-2609, 2612.
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 v. Dowse, 10 C. B. 722-795.  
 v. Gates, 38 Ga. 205-981.  
 v. Hennegan, 128 Cal. 293-2010.  
 v. James, 115 N. Y. 346-371.  
 v. Jewell, 140 U. S. 247-1065.  
 v. Leaver, 38 N. H. 29-1592.  
 v. McCollom, 16 N. D. 42-457, 460.  
 v. Pickett, 8 Gray (Mass.) 617-2388.  
 v. Sartwell, 129 Mass. 210-2205, 2789.  
 v. Seely, 11 Ill. 157-1203.  
 v. Walling, 31 Iowa 533-271.  
 Woodward's Appeal, 81 Conn. 152-1912.  
 Woodward's Appeal, 38 Pa. St. 322-2484.  
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 Woodworth v. Campbell, 5 Paige (N. Y.) 58-714.  
 v. Raymond, 51 Conn. 70-1303, 2033.  
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 v. Wagner, 89 Wash. 429-878.  
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 v. Wilkins, 3 How. (Miss.) 360-760, 761.  
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 v. Schrader, 116 Ill. 29-676.  
 Wooliscroft v. Norton, 15 Wis. 198-1406, 1414.  
 Woolley v. Gaines, 114 Ga. 122-2346.  
 Woolridge v. Hancock, 70 Tex. 18-2140.  
 Woolridge v. Smith, 243 Mo. 190-1252.  
 Woolsey v. Lasher, 35 N. Y. App. Div. 108-1484.  
 Woolston v. Pullen, 88 N. J. Eq. 35-952, 969.  
 Wooly v. Constant, 4 Johns. (N. Y.) 54 1642.  
 v. Inhabitants of Groton, 2 Cush. (Mass.) 305 1647.  
 Woonsocket Sav. Inst. v. American Worsted Co., 13 R. I. 255-2710, 2727.  
 Wooster v. Cooper, 59 N. J. Eq. 204 1078, 1086, 1092, 1093, 1101.  
 v. Fiske, 115 Me. 161-1380, 1865.  
 v. Fitzgerald, 61 N. J. L. 368 1078, 1081.  
 v. Page, 54 N. H. 125 2304.  
 Wooten v. Frick, 38 Md. 428-482.  
 v. Steele, 109 Ala. 563 2282.  
 Wooton v. White, 90 Md. 64-2435, 2436.  
 Wootton v. Seltzer, 83 N. J. Eq. 163-2183.  
 v. Seltzer, 87 N. J. Eq. 207-1426.  
 Woreester v. Lord, 56 Me. 265 1940.  
 Worcester Nat. Bank v. Cheeney, 87 Ill. 602-2669, 2787.  
 Word v. Box, 66 Tex. 596-1924, 1990.  
 Worden v. Worden, 96 Wash. 592-657.  
 Wordsley Brewery Co. v. Halford, 90 Law T. (N. S.) 89-156.  
 Work v. Hall, 79 Ill. 196-2771.  
 Workman v. Curran, 89 Pa. St. 226-2066, 2067.  
 v. Guthrie, 29 Pa. St. 495-672, 674, 1957, 1960, 2016.  
 v. Stephenson, 26 Colo. App. 339-1258.  
 v. Stephenson (Colo. App.), 144 Pac. 1126-1207.  
 Worley v. Carter, 30 Okla. 642-2378.  
 v. Taylor, 21 Ore. 589-2741.  
 Wormley v. Wormley, 8 Wheat. (U. S.) 449-420, 1097, 2241, 2254.

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 Worrall v. Munn, 5 N. Y. 229-1765.  
     v. Rhoads, 2 Whart. (Pa.) 427-2046, 2051.  
     v. Winn, 5 N. Y. 229-1764.  
 Worrell v. Forsyth, 141 Ill. 22-791.  
 Worsham v. Callison, 49 Mo. 206-751.  
 Worth v. Wrenn, 144 N. C. 656-2010.  
 Worthen v. Garno, 182 Mass. 243-1299.  
     v. Pearson, 33 Ga. 387-782.  
     v. Ratcliffe, 42 Ark. 330-320.  
 Worthington v. Cooke, 56 Md. 51-1473, 1483, 1486.  
     v. Gimson, 2 El. & El. 618-1281, 1283, 1291.  
     v. Hiss, 70 Md. 172-689.  
     v. Lee, 61 Md. 530-163, 264.  
     v. Middleton, 6 Dana (Ky.) 309-777.  
     v. Staunton, 16 W. Va. 208-681, 682.  
     v. Wade, 82 Tex. 26-1864.  
     v. Wilmot, 59 Miss. 608-2654.  
 Wragg v. Denham, 2 Younge & C. 117-2464.  
 Wragg's Representatives v. Comptroller-General, 2 Desaus. (S. C.) 520-2752.  
 Wragg & Son v. Mead, 120 Iowa 319-1688.  
 Wray v. Steele, 2 Ves. & B. 388-402, 403.  
     v. Wray, (1905) 2 Ch. 349-661.  
 Wreford v. Kenrick, 107 Mich. 389-1494, 1495.  
 Wren v. Parker, 57 Conn. 529-1933.  
     v. Wren, 100 Cal. 276-658.  
 Wrenford v. Gyles, Cro. Eliz. 645-208.  
 Wright v. Astoria Co., 45 Ore. 224-1780.  
     v. Bates, 13 Vt. 341-2385.  
     v. Briggs, 99 Ind. 563-2487, 2492, 2667.  
     v. Brooks, 47 Mont. 99-661.  
     v. Brown 163 Mo. App. 117-1208, 1221.  
     v. Brown, 116 N. C. 26-589.  
     v. Bundy, 11 Ind. 398-2396.  
 Wright v. Burroughes, 3 C. B. 685-156, 317, 318.  
     v. Carter, 27 N. J. L. 76-1539.  
     v. Cartwright, 1 Burrow 282-583.  
     v. City of Council Bluffs, 130 Iowa 274-1016, 1019.  
     v. Degroff, 14 Mich. 164-796.  
     v. Denn, 10 Wheat. (U. S.) 204-2736.  
     v. Du Bignon, 114 Ga. 765-908.  
     v. Dunn, 73 Tex. 293-1075.  
     v. Eaves, 10 Rich. Eq. (S. C.) 582-2536.  
     v. Everett, 87 Iowa 697-308.  
     v. Fort, 126 N. C. 615-2715.  
     v. Franklin Bank, 59 Ohio St. 80-2789.  
     v. Gaskill, 74 N. J. Eq. 742-535.  
     v. Graves, 80 Ala. 416-242.  
     v. Hardy, 76 Miss. 524-218.  
     v. Henderson, 12 Tex. 43-2362, 2395, 2396, 2466.  
     v. Howard, 1 Sim. & S. 190-1235.  
     v. Jennings, 1 Bailey Law (S. C.) 277-812.  
     v. Kayner, 150 Mich. 7-646.  
     v. Knapp, 183 Mich. 656-634, 649.  
     v. Lake, 30 Vt. 206-2460.  
     v. Lancaster, 48 Tex. 250-1593.  
     v. Larson, 51 Minn. 321-2266.  
     v. Lattin, 33 Ill. 293-205.  
     v. McDonell, 88 Tex. 140-932, 935, 936, 939.  
     v. Mattison, 18 How. (U. S.) 50-1988.  
     v. Moore, 38 Ala. 593-1345, 2069, 2071.  
     v. Nipple, 92 Ind. 310-1703, 1707.  
     v. Patterson, 45 Mich. 261-2665.  
     v. Pearson, 1 Eden 119-415, 541.  
     v. Pfrimmer, 99 Neb. 447-1446, 1448, 1451.  
     v. Roberts, 22 Wis. 161-961.  
     v. Roseberry, 121 U. S. 488-1562, 1563.  
     v. Saddler, 20 N. Y. 320-2350.  
     v. Shumway, 1 Biss. (U. S.) 23-2121, 2367.

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- Wright v. Sperry, 21 Wis. 336-694.  
     v. Stice, 173 Ill. 571-707, 723, 1988.  
     v. Strother, 76 Va. 857-723.  
     v. Tracey, 8 Ir. R. C. L. 478-230.  
     v. Tukey, 3 Cush. (Mass.) 290-1862, 1875.  
     v. Wakeford, 17 Ves. 454-1078.  
     v. Watson, 96 Ala. 536-877.  
     v. West, 2 Lea (Tenn.) 78-786.  
     v. Westheimer, 2 Idaho 962-2302.  
     v. Whitehead, 14 Vt. 268-2659.  
     v. Williams, 1 Mees. & W. 77-1235.  
     v. Willis, 23 Ky. L. Rep. 556-1339.  
     v. Wooters, 46 Tex. 380-2624.  
     v. Wright, 1 Ves. Sr. 409-565, 589.  
     v. Wright, 16 Ves. Jr. 188-450.  
     v. Wright, 21 Conn. 329-1003.  
     v. Wright, 242 Ill. 71-404.  
     v. Wright, 41 N. J. Eq. 382-1062.  
     v. Wright, 59 How. Prac. (N. Y.) 176-676.  
     v. Wright's Lessee, 2 Md. 429-727.  
 Wright's Appeal, 12 Pa. St. 256-2737.  
 Wright Lumber Co. v. McCord, 145 Wis. 93-797.  
 Wright & Taylor v. Board of Education, Bullitt County, 151 Ky. 560-272.  
 Wrightman v. Reynolds, 24 Miss. 675-2127.  
 Wrightson, In re, (1904) 2 Ch. 95-557.  
 Wrixon v. Vize, 2 Dru. & War. 192-2690.  
 Wronkow v. Oakley, 133 N. Y. 505-2330.  
 Wuester v. Folin, 60 Kan. 334-1790.  
 Wunder v. McLean, 134 Pa. 334-146.  
 Wunderle v. Ellis, 212 Pa. St. 618-2646, 2669.  
     v. Wunderle, 144 Ill. 40-2350, 2351.  
 Wunderlin v. Cadogan, 50 Cal. 613 1593.
- Wurt's Ex'rs v. Page, 19 N. J. Eq. 365-417.  
 W. W. V. Co. v. Black, 113 Va. 728-1207.  
 Wyatt v. Elan, 23 Ga. 201-2024, 2231.  
     v. Harrison, 3 Barn. & Adol. 871-1187, 1190.  
     v. Simpson, 8 W. Va. 394-727.  
     v. Smith, 25 W. Va. 813-845.  
 Wyckoff v. Gardner, 20 N. J. L. 556-645.  
     v. Wyckoff, 49 N. J. Eq. 344-2738.  
 Wylie v. Kirby, 115 Md. 282-321.  
     v. McMakin, 2 Md. Ch. 413-2689, 2708.  
 Wylly v. Screven, 98 Ga. 213-2418.  
 Wylly-Gabbett Co. v. Williams, 53 Fla. 872-2398, 2399.  
 Wyman v. Ballard, 12 Mass. 304-1684, 1718.  
     v. Brown, 50 Me. 159-547, 551, 2284.  
     v. Matthews, 53 Fed. 678-2400.  
     v. New York, 11 Wend. (N. Y.) 486-1320, 1869.  
     v. Oliver, 75 Me. 421-747.  
     v. Porter, 108 Me. 110-2532.  
     v. Symmes, 10 Allen (Mass.) 153-1825.  
 Wyndham v. Carew, 2 Q. B. 317-279.  
 Wynkoop v. Burger, 12 Johns. (N. Y.) 222-1336, 1338, 1349.  
     v. Cowing, 21 Ill. 570-2365.  
 Wynn v. Garland, 19 Ark. 23-1214.  
     v. Wynn, 112 Ga. 214-1813.  
 Wynne v. Small, 102 N. C. 132-1733.  
     v. State Nat. Bank of Ft. Worth, 82 Tex. 378-2731.  
 Wyoming C. & T. Co. v. Price, 81 Pa. St. 156-2166.  
 Wytheville Crystal Ice & Dairy Co. v. Frick Co., 96 Va. 141-2708.  
 Wyzata v. Great Northern Ry. Co., 50 Minn. 438-1977.  
 Xenos v. Wickham, L. R. 2 H. L. 312-1740, 1741, 1751, 1763.  
 Yaeger & Bethel Hardware Co. v. Pritz, 69 Fla. 8-2578.

[REFERENCES ARE TO PAGES.]

- Yakima County v. Conrad, 26 Wash. 155-2091.
- Yale v. Flanders, 4 Wis. 96-1727.
- Yancey, Ex parte, 124 N. C. 151-722.
- Yancey v. Blakemore, 95 Va. 263-2559.
- v. Radford, 86 Va. 638-651, 705.
- v. Tatlock, 93 Iowa 386-1690.
- Yankey v. Sweeney, 85 Ky. 55-831.
- Yaukton Building & Loan Association v. Dowling, 10 S. D. 540-2533.
- Yarborough v. Hughes, 139 N. C. 199-2695.
- v. West, 10 Ga. 471-385.
- Yard v. Ford, 2 Wms. Saund. 175-2029.
- Yard's Appeal, 86 Pa. 125-630.
- Yard's Appeal, 64 Pa. St. 95-435.
- Yardley v. Cuthbertson, 108 Pa. St. 395-1831.
- Yarnell v. Brown, 170 Ill. 362-2785.
- Yates, Estate of, In re, 170 Cal. 254-430.
- Yates v. Aston, 4 Q. B. 182-2406.
- v. Big Sandy Ry. Co., 28 Ky. L. Rep. 206-366.
- v. Burt, 161 Mo. App. 267-1629.
- v. Hurd, 8 Colo. 343-2222.
- v. McKibben, 66 Iowa 357-2297.
- v. Milwaukee, 10 Wall. (U. S.) 497-1022, 1026.
- v. Town of Warrenton, 84 Va. 337-1537.
- v. Van de Bogert, 56 N. Y. 526-1659.
- v. Yates, 255 Ill. 66-423.
- Yazoo & M. V. R. Co. v. Banister, 89 Miss. 808-1714.
- v. Brown, 99 Miss. 88-1153.
- v. Davis, 73 Miss. 678-1170.
- v. Lakeview Traction Co., 100 Miss. 281-303, 306, 308.
- Yeager v. Farnsworth, 163 Iowa 537-1604.
- v. Tuning, 79 Ohio St. 121-1210, 1621.
- v. Woodruff, 17 Utah 361-1210, 2048.
- Yeap Cheah Neo v. Oug Cheng Neo, L. R. 6 P. C. 381-617.
- Yearly v. Long, 40 Ohio St. 27-2738.
- Yearworth v. Pierce, Aley, 31-949.
- Yeates v. Briggs, 95 Ill. 79-857.
- Yeaton v. Roberts, 28 N. H. 459-521.
- Yellowly v. Gower, 11 Exch. 274-969.
- Yeo v. Mercereau, 18 N. J. L. 387-749.
- Yeomans v. Herrick, 178 Mo. App. 274-1454.
- Yerex v. Eineder, 86 Mich. 24-1164, 1165.
- Yerkes v. Hadley, 5 Dak. 324-2125.
- Yetzer v. Thoman, 17 Ohio St. 130-1946.
- Yglesias v. Dewey, 60 N. J. Eq. 62-711.
- Yoakum v. Davis, 162 Mo. App. 253-896.
- Yocco v. Conroy, 104 Cal. 468-1139.
- Yocum v. Zahner, 162 Pa. 468-981.
- Yoder v. Robinson, 45 Okla. 165-2611.
- Yoe v. Hanvey, 25 S. C. 94-856.
- v. Hanvey, 25 S. C. 96-2292.
- v. McCord, 74 Ill. 33-1830.
- v. Montgomery, 68 Tex. 338-2785.
- Yoesel v. Rieger, 75 Neb. 180-558.
- Yokum v. Thomas, 15 Iowa 67-1717.
- Yolo County v. City of Sacramento, 36 Cal. 193-1546.
- York v. Davidson, 39 Ore. 81-1130.
- v. Steward, 21 Mont. 515-137.
- v. Stone, 1 Salk. 158-639.
- York Bank's Appeal, 36 Pa. St. 458-2779.
- York County v. Rolls, 27 Ont. App. 72-1153.
- York Haven Water & Power Co., Appeal of, 212 Pa. 622-1015.
- Yorra v. Lynch, 226 Mass. 153-148.
- Yosemite Valley Case, 15 Wall. (U. S.) 77-1553.
- Yost v. Critcher, 112 Va. 870-2258.
- v. First Nat. Bank, 66 Kan. 605-2389.

[REFERENCES ARE TO PAGES.]

- Youde v. Jones, 13 Mees. & W. 534-551.  
 Youghiogheny River Coal Co. v. Pierce, 153 Pa. St. 74-1392.  
 Youle v. Richards, 1 N. J. Eq. 534-2364, 2464.  
 Yound v. Adams, 14 B. Mon. (Ky.) 102-672.  
 Young, Petitioner, 11 R. I. 636-1610, 1612, 1614.  
 Young v. Bake, 128 Minn. 398-2386.  
     v. Bankier Distillery Co., (1893) App. Cas. 691-1142, 1443.  
     v. Berman, 96 Ark. 78-1505.  
     v. Bigger, 73 Kan. 146-691.  
     v. Blakeman, 153 Cal. 477-996, 998.  
     v. Boardman, 97 Mo. 181-786.  
     v. Bradley, 101 U. S. 782-390, 429.  
     v. Braman, 105 Me. 494-1313, 1314.  
     v. Brand, 15 Neb. 601-2451.  
     v. Cosgrove, 83 Iowa 682-1650.  
     v. De Bruhl, 11 Rich. Law (S. C.) 638-631, 642.  
     v. Edwards, 33 S. C. 404-681.  
     v. Elgin (Miss.), 27 So. 595-1740.  
     v. Ellis, 91 Va. 297-321.  
     v. Grieb, 95 Minn. 396-1925.  
     v. Harris, 36 Ark. 162-2754.  
     v. Haviland, 215 Mass. 120-2459.  
     v. Hill, 31 N. J. Eq. 429-2608, 2617, 2641.  
     v. Holland, 117 Va. 433-378.  
     v. Hyde, 255 Mo. 496-780.  
     v. Hyland, 37 Utah 229-1001.  
     v. Kinkead's Adm'rs, 101 Ky. 252-577.  
     v. Landis, 73 N. J. L. 266-1882.  
     v. Lathrop, 67 N. C. 63-2284.  
     v. Lea, 3 Sneed (Tenn.) 249-845.  
     v. Miles, 10 B. Mon. (Ky.) 287-416.  
     v. Miller, 6 Gray (Mass.) 152-2523.  
     v. Morehead, 94 Ky. 608-755.  
     v. Morgan, 89 Ill. 199-2668.  
 Young v. Mutual Life Ins. Co., 101 Tenn. 311-1082, 1085.  
     v. Omohundro, 69 Md. 424-2439.  
     v. Overbaugh, 145 N. Y. 158-2141.  
     v. Peachy, 2 Atk. 256-393.  
     v. Peachy, 2 Atk. 254-408.  
     v. Ringo, 1 T. B. Mon. (Ky.) 30-1575.  
     v. Ruth, 55 Mo. 515-2467.  
     v. Schofield, 132 Mo. 650-2791.  
     v. Shaner, 73 Iowa 555-2628, 2629.  
     v. Sheldon, 139 Ala. 444-1066, 1082.  
     v. Smith, 28 Mo. 65-207.  
     v. Snow, 167 Mass. 287-424.  
     v. Spencer, 10 Barn. & C. 145-952, 963.  
     v. Tarbell, 37 Me. 509-815.  
     v. Templeton, 4 La. Ann. 254-2776.  
     v. Thrasher, 115 Mo. 222-660, 666, 760, 814.  
     v. Wiley (Ind. App.), 72 N. E. 54-2216, 2258.  
     v. Williams, 17 Conn. 393-2665.  
     v. Wood, 11 B. Mon. (Ky.) 123-2760.  
     v. Young, 36 Me. 133-980.  
     v. Young, 97 N. C. 132-489, 1071.  
     v. Young, 45 N. J. Eq. 27-462, 750.  
     v. Young, 89 N. Y. 22-376.  
     v. Young, 89 Va. 675-526, 527, 528, 929.  
     v. Young, 157 Wis. 424-326.  
 Young's Estate, In re, 259 Pa. 206-716.  
 Young Men's Christian Ass'n of Portland v. Croft, 34 Ore. 106-2495.  
 Youngblood v. Eubank, 68 Ga. 630-935.  
     v. Vastine, 46 Mo. 239-2211.  
     v. Youngblood, 24 Ga. 614-1812.  
 Younge v. Guibeau, 3 Wall. (U. S.) 363-1755.  
 Younger v. Duffie, 94 N. Y. 535-1821.

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 Youngman v. Railroad Co., 65 Pa. St. 278-2426, 2432.  
 Youngs v. Carter, 10 Hun (N. Y.) 194-763.  
     v. Heffner, 36 Ohio St. 232-704, 2015.  
     v. Wilson, 27 N. Y. 351-2412.  
 Youngs Mining Co. v. Courtney, 219 Fed. 868-1494.  
 Younker v. McCutcheon, 177 Iowa 634-1340, 1341.  
 Yount v. Morrison, 109 N. C. 520-2714.  
 Youse v. McCreary, 2 Blackf. (Ind.) 243-2467.  
 Youst v. Martin, 3 Serg. & R. (Pa.) 423-2253, 2255.  
 Yuan Suey v. Fleshman, 65 Ore. 606-1494.  
 Yule v. Fell, 123 Iowa 662-150.  
 Yuttermann v. Grier, 112 Ark. 366-2105.  
 Zabriskie's Succession, 119 La. 1076-1934.  
 Zabriskie v. Salter, 80 N. Y. 555-2509.  
     v. Sullivan, 80 N. J. L. 673-240.  
 Zabriskie's Ex'rs v. Wetmore, 26 N. J. Eq. 18-431.  
 Zaegel v. Kuster, 51 Wis. 31-2646.  
 Zaiser Co. v. Finnegan, 161 Iowa 631-2172.  
 Zander v. Scott, 165 Ill. 51-2301.  
 Zane v. Fink, 18 W. Va. 693-2270.  
     v. Kennedy, 73 Pa. St. 182-1065.  
     v. Sawtell, 11 W. Va. 43-440.  
 Zantlinger v. Joseph, 43 App. Cas. (D. C.) 542-208.  
 Zapf v. Carter, 70 N. Y. App. Div. 395-2017, 2018.  
 Zapp v. Miller, 109 N. Y. 51-677.  
 Zebach's Lessee v. Smith, 3 Binn. (Pa.) 69-1077.  
 Zehner v. Johnston, 22 Ind. App. 452-2547.  
 Zeibold v. Foster, 118 Mo. 349-1670.  
 Zeigler v. Brennehan, 237 Ill. 15-687, 992.  
 Zeigler v. Daniel, 128 Ark. 403-1757, 2269.  
     v. Lexington Compress & Oil Mill Co., 105 Miss. 820-938.  
 Zeiner v. Edgar Zinc Co., 79 Kan. 406-2198.  
 Zeininger v. Schnitzler, 48 Kan. 63-1246.  
 Zeiser v. Cohn, 207 N. Y. 407-2756.  
 Zell v. Universalist Society, 119 Pa. St. 390-1283, 1289, 1366.  
 Zeller v. Eckert, 4 How. (U. S.) 295-1936, 2010.  
     v. Martin, 157 Wis. 341-1960.  
 Zenske v. Zenske, 62 Ore. 46-462.  
 Zent v. Picken, 54 Iowa 535-1681.  
 Zerban v. Erdman, 258 Ill. 436-2039.  
 Zerbey v. Allan, 215 Pa. 383-2042.  
 Zerfing v. Seelig, 14 S. D. 303-1681.  
 Zeust v. Staffan, 16 App. D. C. 141-832, 838, 839, 845.  
 Ziek v. United Tramways, Ltd., (1908) 2 K. B. 126-1582.  
 Zigefoose v. Zigefoose, 69 Iowa 391-2052.  
 Zigler v. McClellan, 15 Ore. 499-966.  
 Zileh v. Young, 184 Ill. 333-215.  
 Zilka v. Graham, 26 Idaho 163-1192.  
 Zillmer v. Landguth, 94 Wis. 607-2311.  
 Zimble v. Abrahams, [1903] 1 K. B. 577-220.  
 Zimmerman v. Bosse, 60 Wash. 556-912.  
     v. Cockey, 118 Md. 491-1297.  
     v. Daffin, 149 Ala. 380-885.  
     v. Ginter, 69 Kan. 331-1949.  
     v. Kirchner, 151 Iowa 483-1609.  
     v. Makepeace, 152 Ind. 199-367.  
     v. Snowden, 88 Mo. 218-2080.  
 Zimmerman Mfg. Co. v. Wilson, 147 Ala. 275-2130.  
 Zinc Co. v. City of La Salle, 117 Ill. 411-1862, 1883.  
 Zipp v. Barker, 40 N. Y. App. Div. 1-1457.

## [REFERENCES ARE TO PAGES.]

- |  |  |
|--|--|
| Zippar v. Reppy, 15 Colo. 260-258.                 | Zugenbuhler v. Gilliam, 3 Iowa 371-1246.           |
| Zirkle v. Hendon, 180 Ala. 209-2756.               | Zulaback v. Kingfisher (Okla.), 158 Pac. 926-1116. |
| Zirngibl v. Calumet, etc., Co., 157 Ill. 430-1992. | Zule v. Zule, 24 Wend. (N. Y.) 76-1479.            |
| Znamanacek v. Jelinek, 69 Neb. 110-1275, 1292.     | Zundel v. Baldwin, 114 Ala. 328-1993.              |
| Zoeller v. Loi, — Ind. App. —, 120 N. E. 623-329.  | Zunkel v. Colson, 109 Iowa 695-2004.               |
| Zoerb v. Paetz, 137 Wis. 59-1742.                  | Zuver v. Lyons, 40 Iowa 510-488.                   |
| Zoller v. Goldberg, 183 Mich. 197-1439.            | Zweibel v. Myers, 69 Neb. 294-1962, 1963.          |
| Zollman v. Moore, 21 Gratt. (Va.) 313-2174.        | Zweimer v. Vest, 96 Neb. 399-1946.                 |
| Zotalis v. Cannellos, 138 Minn. 179-297.           | Zwick v. Johns, 89 Iowa 550-857.                   |
| Zouch v. Parsons, 3 Burrows 179-2336.              | Zwietusch v. Luehring, 156 Wis. 96-161.            |
| Zouche's Case, 1 Dyer 57-242.                      | Zwingle v. Wilkinson, 94 Tenn. 246-2756, 2761.     |
| Zuege v. Nebraska Mortgage Co., 92 Kan. 272-2452.  |  |





# INDEX

---

[REFERENCES ARE TO PAGES]

## A

### ABANDONMENT

- by tenant, effect on rent, 1492.
  - resumption of possession by landlord, 1585.
- of chattels, by relinquishment of possession of land, 936.
  - easement, 1377.
  - fixtures, by relinquishing possession of land, 935.
  - highway, 1537, 1887.
  - homestead, 857, 2304, 2305.
  - husband by wife, as bar of dower, 795.
  - leased premises, 1492, 1584.
  - license, 1220.
  - mortgaged property, receivership to prevent, 2445.
  - public use of land dedicated, effect, 1537, 1887.
  - user by public, 1537, 1887.
  - way, by establishment of highway, 1375.
  - wife by husband, adverse possession of husband's property, 2027.
  - wife by husband, effect on curtesy, 843.

### ABATEMENT

- of obstruction of easement, 1362.
  - right of action for dower, 821.

### ABEYANCE

- of fee, until vesting of remainder, 510.
  - freehold, 500, 545.
  - seisin, 500.

### ABSOLUTE LIABILITY

- for damage by water, 1184, 1186.
- for damage to neighbor, 1117, 1184.

### ABUTTING OWNERS ON HIGHWAY

- compensation for change of grade, 1533.
  - railway in street, 1532.
  - vacation of street, 1536.
  - withdrawal of support, 1192.

[REFERENCES ARE TO PAGES.]

**ABUTTING OWNERS ON HIGHWAY**—Continued.

- rights as to access, 1531.
  - air, 1531.
  - light, 1531.
  - trees, 1534.
  - view, 1534.
- rights on extinction, 1538.
- withdrawal of support, excavation in highway, 1192.

**ACCELERATION**

- of mortgage debt, on partial default, 2676, 2677.
  - remainder, 519.
    - effect of intention, 521.
- rent, 1478.

**ACCEPTANCE**

- of assignment of leasehold, to impose liability under covenant, 181.
- of assignment of mortgage, 2534.
- of conveyance, 1788, 1795.
  - as element of delivery, 1795.
  - inference from beneficial character, 1789, 1792.
  - necessity to transfer burden of covenant, 1406.
  - ratification by grantee, 1796.
- conveyance containing assumption of mortgage debt, 2486.
- conveyance in trust, 387, 1794.
- dedication, in behalf of public, 1872.
  - delay in, 1877.
  - necessity, 1872.
- deed, necessity, 1788.
- deed poll, as involving covenant, 1402.
- highway, 1872, 2088.
- lease as attornment, 102.
- mortgage, 2376.
- office of trustee, necessity, 388.
- rent from assignee, effect on assignor's liability, 1472, 1583.
- transfer of mortgage, 2534.
- transfer of mortgaged land, as involving assumption of debt, 2486.
- trust, 387, 422, 1794.

**ACCESS**

- difficulty of, as determining existence of way of necessity, 1306.
- easement of, creation by reference to nonexistent highway, 1314.
  - in favor of abutting owner on highway, 1531.
- interference with by landlord, as eviction, 202.
- to navigable waters, deprivation of right, 1022, 1029.

**ACCESSION**

- see "Accretion"; "Fixtures."

[REFERENCES ARE TO PAGES.]

**ACCIDENT**

- as ground for relief from forfeiture, 323.
- causing severance of fixture, effect, 940.
- destroying part of leased premises, covenant requiring restoration, 140.
- escape of water by, 1183, 1184.
- fire caused by, tenant's liability, 139, 977.
- fixtures severed by, 977.
- injuring leased premises, tenant's liability, 139, 977.
  - effect on liability for rent, 1497.
- trees severed by, 977, 989.

**ACCORD AND SATISFACTION**

- of mortgage debt, 2587, 2607

**ACCOUNTING**

- by cotenant, 674, 992.
  - mortgagee, for rents and profits, 2438, 2440, 2661.
  - annual rests, 2440.
  - trustee, 416.
- for waste committed, 984, 986.
- in favor of widow, refusal to assign dower, 820.
- on rescission of conveyance in consideration of support, 328.

**ACCRETION**

- acquisition of land by, nature of right, 2094.
- apportionment of new land, 2112.
- artificial production of changes, 2105.
- as rule of construction, 2094.
- by drying of lake, 2114.
- effect of intention, 2095.
- future accretion, vested right in, 2109.
- inapplicable to sudden and perceptible changes, 2102.
  - land under water, 2100.
- intention as controlling, 2095.
- nature of doctrine, 2094.
- reappearance of submerged land, 2106.
- subject to highway, 2108.
- title by, 2093.
- to island, 2110.
- whether independent of intention, 2094.

**ACCUMULATIONS**

- trusts for accumulation, validity, 619.

**ACKNOWLEDGMENT**

- as prerequisite to record, 1728.
- as raising presumption of delivery, 1752.
- as rendering instrument admissible in evidence, 1729, 1753.

[REFERENCES ARE TO PAGES.]

**ACKNOWLEDGMENT**—Continued.

- before cognator, 1730.
- bona fide purchaser protected against defects, 1734, 1735.
- by agent, 1802.
- by married woman, 851, 1735.
- certificate of, conclusiveness, 1733.
  - what must be shown, 1732, 1802.
- date of, as fixing date of delivery, 1761.
- disqualification of official by interest, 1729.
- entry under unacknowledged instrument, tenancy at will, 217.
- how taken, 1731.
- in behalf of corporation, 1803.
  - certificate, 1803.
- of conveyance, necessity, 1728.
  - as prerequisite to record, 1728.
- of mortgage, necessity, 2375.
- of receipt of consideration for conveyance, effect, 1625, 1626.
- of release of dower by wife, 780.
- of signature to will, 1821.
- official to take, 1729.
  - duties, 1731.
  - effect of pecuniary interest, 1729.
- raising presumption of delivery, 1752.
- rendering instrument admissible in evidence, 1729, 1753.
- to release of dower, 780.
- who may take, 1729.

**ACQUIESCENCE**

- as defense to proceeding to enforce restrictive agreement, 1452.
  - settling boundary, 999.
- by landowner in public user, as showing dedication, 1864.
- by lessor in assignment of leasehold, as relieving lessee from rent, 1472.
- in acts on land, implication of license, 1205.
  - adverse possession of land, 1917.
  - boundary line, by adjoining owners, 999.
  - breach of condition, 296.
    - effect as to subsequent breaches, 297, 299.
  - breach of restrictive agreement, 1452, 1453.
  - change of channel of stream, 1130, 1154.
  - change of conditions in lake, 1160.
  - erection of wall, liability of landowner, 1246.
  - expenditures by municipality, as evidencing dedication, 1867.
  - infant's conveyance, after arrival of age, 2338.
  - location of way, 1336.
  - making improvements, estoppel to deny easement, 1327.
  - obstruction of easement, 1381, 1384.
    - way, 1383.

[REFERENCES ARE TO PAGES.]

**ACQUIESCENCE**—Continued.

- in acts on land—continued.
  - oral partition, effect, 701.
  - possession, as creating tenancy at will, 221.
  - prescriptive user of land, 2028.
  - removal of obstructions in stream, effect, 1154.
  - user of land by public, 1864, 2079.
  - user of land, implication of license, 1213.
  - wrongful possession, as creating tenancy at will, 222.

**ACT OF GOD**

- causing damage to premises, tenant not liable, 977.
- contributing to overflow of land, effect, 1147.
- destroying part of leased premises, obligation as to restoration, 140.
- flood as, 1147, 1168.
- increasing flow of surface water, 1168.
- injuries caused by, tenant's liability, 139, 977.
- severing fixtures, 977.
  - timber, 977, 989.
- wind as, 977, 989.

**ACTIONS**

- by cestui que trust against third person, 363, 367.
- by cotenants, 698.
- concerning trust property, 367.
- for dower, 817.
  - partition, 709.
  - rent, 1507, 1508.
  - waste, 979.
- to condemn land, 2160.
  - foreclose mortgage, 2675.
  - redeem from mortgage, 2660.

**ACTIVE TRUSTS**

- nature, 412.
  - see "Trustees"; "Trusts."

**ACTIVE USES**

- not executed by statute of uses, 355.
- see "Uses."

**ACTUAL NOTICE**

- distinguished from constructive notice, 2245.

**ACTUAL POSSESSION**

- necessary to running of limitations, 1924.

[REFERENCES ARE TO PAGES.]

**ADDITIONAL SERVITUDE**

on highway, 1527.  
see "Highways."

**ADJACENT SUPPORT**

for lands and buildings, 1187, 1243.  
see "Lateral Support"; "Subjacent Support."

**ADJOINING OWNERS**

acquiescence in boundary line, 1001.  
agreement as to construction and use of wall, 1262-1266.  
agreement as to joint use of halls and stairways, 1209.  
boundaries, adjustment, 994-1003, 1650, 1666.  
building against neighbor's wall, 1246.  
construction and maintenance of fence, statutory provisions, 1248  
covenants, running of benefit and burden, 1400.  
damage by smoke, 1124.  
destruction of wall or buildings, effect on party wall rights, 1366-1368.  
disagreeable odors as between, 1124.  
discharge of surface water, 1163.  
easement of support of building, 1243.  
easement to withdraw support, 1242.  
eavesdrip, 1186.  
encroachments in air space, 864.  
encroachments under ground, 866.  
escape of water, 1183, 1185.  
estoppel to question boundary line, 1002.  
excavations, statutory requirement of notice, 1193.  
excessive heat as nuisance, 1125.  
flooding land, 1145, 1162.  
interference with easement, 1358.  
interference with natural right, 1116.  
interference with privacy, 1122.  
intrusion above land, 864.  
judicial determination of boundary, 996.  
lateral support, 1187, 1194.  
maintenance of hospital as nuisance, 1119.  
maintenance of partition fence, easement, 1247.  
malice in depleting water supply, 1180.  
malice in withdrawing support, 1192.  
malicious erections, 1122, 1123.  
natural rights as between, 1117.  
    as to lateral support, 1187.  
    as to percolating water, 1175.  
    as to pollution of air, 1124.  
    as to surface water, 1163, 1167.  
    as to water in lake or pond, 1157.  
    as to water in stream, 1128.  
suspension and extinguishment, 1194.

[REFERENCES ARE TO PAGES.]

**ADJOINING OWNERS**—Continued.

- negligence in excavating, 1191.
  - noise and vibration as between, 1118, 1125, 1127.
  - obligation to fence, 1003-1005.
  - obstruction of flow of surface water, 1167.
  - obstruction of light, 1121, 1133.
  - obstruction of view, 1122.
  - on stream, rights as to water, 1131.
  - oral agreement as to boundary, 996.
  - overlooking windows, 1122.
  - partition fences, 357, 1247, 1414, 2036.
  - party walls, 1244, 1261, 1310, 1416.
    - alterations, 1342.
    - increase in height, 1340.
    - insertion of beams, 1341.
    - nature, 1244.
    - running of benefit and burden of agreement, 1416.
    - statutory provisions for erection, 1311.
  - pollution of air, 1124.
    - easement allowing, 1234.
  - pollution of water, 1142, 1175.
  - projections over land, 1119.
  - proximity of hospital, 1119.
  - recognition of line as boundary, 999.
  - repairs and alterations of party wall, 1350.
  - right to freedom from noise, 1118, 1125.
    - pollution of air, 1124.
    - smoke, 1118.
    - vibration, 1118, 1125.
  - rights as to use of wall, 1246.
  - rights of user as between, 1117.
  - running of covenants as to user of land, 1402.
  - spite fence, 1123.
  - storage of explosives, 1118, 1120.
  - subsidence of land, resulting from operations on adjoining land, 1187.
  - surface water, 1160.
  - trees on border line, 896.
  - underground water, 1175.
  - unsightliness of building, not tort, 1121.
  - withdrawal of natural support, 1187, 1194.
    - damage to buildings, 1190.
    - substitution of artificial, 1188.
- see, also, "Abutting Owners on Highway"; "Air"; "Animals";  
 "Border Trees"; "Boundaries"; "Building"; "Building Re-  
 strictions"; "Drainage"; "Easements"; "Eaves"; "Fences";  
 "Lateral Support"; "Light"; "Natural Gas"; "Natural  
 Rights"; "Negligence"; "Noise"; "Nuisance"; "Oil"; "Party  
 Walls"; "Percolating Waters"; "Restrictive Agreements";

[REFERENCES ARE TO PAGES.]

**ADJOINING OWNERS**—Continued.

“Riparian Owners”; “Subjacent Support”; “Surface Water”; “Underground Water”; “Walls”; “Water”; “Watercourse”; “Ways”; “Windows.”

**ADMINISTRATOR**

cum testamento annexo, exercise of power given executor, 1071.  
see, also, “Executors and Administrators.”

**ADMISSION**

of trust, 378-387.

**ADOPTION**

of child, effect for purpose of descent, 1909.

**ADULTERY**

effect on curtesy, 843.  
effect on dower, 794.

**ADVANCEMENT**

to prospective heir, 1629, 1912.

**ADVERSE POSSESSION**

acknowledgment of true title by tenant in possession, 1966.  
acquisition by cotenant, 692.  
actual occupation necessary, 1924.  
admission of title in third person, effect, 1943.  
against cestui que trust, 1953.  
child, 2024.  
cotenant, 672, 2014.  
grantee, 2007.  
husband, does not bar widow's claim for dower, 821.  
husband and wife, effect of curtesy initiate, 846.  
infant, 1973.  
insane person, 1973.  
landlord, 1996.  
married woman, 846, 1973.  
mortgagor or mortgagee, 2021, 2657, 2689.  
municipality, 1536, 1976.  
person in prison or out of state, 1973.  
principal, 2007.  
railroad, 1977.  
remainderman, 1951, 2012, 2023.  
reversioner, 1951.  
state, 1536, 1975.  
United States, 1975.



[REFERENCES ARE TO PAGES.]

**ADVERSE POSSESSION**—Continued.

- against cestui que trust—continued.
  - widow of owner, 821.
  - wife of owner, 802.
- although public or private easement in land, 1930.
- as between cotenants, 672, 2014.
  - husband and wife, 2025.
  - mortgagor and mortgagee, 2680.
  - parent and child, 2024.
- as destroying contingent remainder, 507.
- as excluding dower in favor of disseisee's widow, 738.
- as invalidating conveyance by rightful owner, 2289.
- bona fides unnecessary, 1940.
- burden of proof, 1933, 1936.
- by agent, as against principal, 2006.
  - third person, 1927.
- by cotenant, 2014.
  - foreclosure purchaser, 2022.
  - grantee of cotenant, 2019.
  - grantor, as against grantee, 2007, 2128.
  - husband, against wife, 2025.
  - joint disseisors, 635.
  - lessee of nonowner, 1983.
  - licensee, 2006.
  - life tenant, as against remainderman, 2012, 2023.
  - mortgagee, as against mortgagor, 2021.
  - overholding tenant, 2001.
  - parent, as against child, 2024.
  - particular tenant, benefits remainderman, 1985.
  - purchaser at tax sale, 2159.
  - surviving spouse, 2024.
  - tenant, acknowledgment of true title, 1966.
  - tenant, as against landlord, 1996.
  - tenant pur autre vie, 2014.
  - trustee, as against cestui, 2001.
  - two, as creating joint tenancy, 635.
  - wife, as against husband, 2026.
- cessation of possession, 1960.
- character of estate acquired by, 1981.
- claim of fee simple, necessity, 1945.
- claim of title, necessity, 1936, 1944.
- color of title, as defining constructive possession, 1987. See "Color of Title."
- creates new title, 1980.
- disability of rightful owner, effect, 1972.
- disseisin distinguished, 1923.
- duration necessary, 1918.

[REFERENCES ARE TO PAGES.]

**ADVERSE POSSESSION**—Continued.

- effect as against bona fide purchaser, 1986.
  - as against inchoate dower right, 802.
  - as determining boundary line, 1000, 1946.
  - as excluding curtesy, 829, 843.
  - as excluding dower, 737.
  - as extinguishing easement, 1385.
  - as extinguishing highway, 1536.
  - as invalidating transfer by owner, 2288.
  - as regards restrictive agreement, 1437.
  - as transferring title, 1978.
  - as vesting title, 1978.
- effect of Torrens system, 1919.
- entry necessary, 1924.
- evidence of claim of title, 1946.
- evidence of hostile character, 1933.
- existence of fee tail estate, effect, 1952.
- extends to land acquired by accretion, 2109.
- extent of land covered, 1987.
- fee simple title acquired, 1981.
- history of doctrine, 1917.
- hostility of possession, 1923.
- in favor of cotenant's grantee, 2019.
  - government, 1953, 1984.
  - lessee, 1983.
  - remainderman, 1985.
  - remainderman, by life tenant, 1984.
  - state, 1953.
- interruption, acquisition of tax title, 1963.
  - action for possession, 1956.
  - admission by tenant, 1966.
  - cessation of hostility, 1960.
  - cessation of possession, 1959.
  - contract or conveyance from rightful owner, 1963.
  - entry, 1955.
  - offer to purchase, 1962.
  - possessor's recognition of title, communicated to third person, 1961.
  - purchase of title, 1963.
  - recognition of title in third person, 1964.
  - taking of lease, 1963.
- mistake as to boundary, 1946.
- mistaken belief that land belongs to government, 1943, 1984.
- occasional entry insufficient, 1926.
- of land acquired by accretion, 2109.
- of minerals, 1993.
- pasturing cattle insufficient, 1926.
- policy of, the statutes, 1920.

[REFERENCES ARE TO PAGES.]

**ADVERSE POSSESSION**—Continued.

- possession must be actual, 1924.
  - must be exclusive, 1928.
  - must be notorious, 1927.
  - must be visible, 1927.
- presumption of conveyance distinguished, 1923.
- purchase of claim of third person as interruption, 1965.
- purchase of rightful title as interruption, 1962, 1965.
- recognition of title in third person as interruption, 1964.
- right of action necessary, 1950.
- runs against husband's right of curtesy, 843.
- subject to restrictive agreement, 1337.
- tacking possessions, 1968.
- theory of doctrine, 1920.
- title based on, as against bona fide purchaser, 1986.
- under color of title, 1919, 1987.
- under impression that title in third person, 1943.
- under invalid lease, 1983.

**ADVERSE USER OF LAND**

- as establishing easement, 1232, 2041
- as extinguishing easement, 1384.
  - see "Prescription."

**ADVOWSONS**

- not recognized in this country, 9.

**AEROLITE**

- as part of land, 866.

**AFTER-ACQUIRED TITLE.**

- as defense to action on covenant for title, 1678, 1708.
- estoppel to assert, 2117.
- in case of dedication, 1861.

**AGE**

- of capacity to convey land, 2333.
- of capacity to devise land, 2341.

**AGENT**

- acknowledgment by agent, 1802.
- adverse possession by, 1927, 2006.
- delivery of deed by, 1600, 1745.
- execution of deed by, 1797, 2330.
  - necessity that conveyance be that of principal, 1799.
- filling blank in conveyance, 1597.
- notice to, 2219.
- powers of agency, 1043, 2711, 2719, 2726.

[REFERENCES ARE TO PAGES.]

**AGENT**—Continued.

- to fill blank in conveyance, 1598.
- see, also, "Powers of Attorney."

**AGREEMENT**

- as to boundary line, 996.
- for security, creating lien, 2743.
- to give mortgage, 2746.
  - see "Contracts"; "Covenants"; "Equitable Liens"; "Restrictive Agreements."

**AGRICULTURAL FIXTURES**

- annexed by life tenant, removability, 930.
- annexed by tenant under lease, removability, 930.
- effect of acceptance of renewal lease, 938.
- loss of right of removal, 934.
- removal after term, 934.
- restrictions on right of removal, 932.
- right terminated by forfeiture, 938.
- right terminated by surrender, 937.

**AIDS**

- under feudal system, 24.

**AIR**

- passage of, no natural right, 1127.
  - as between landlord and tenant, 1277.
  - easement as to passage, 1233.
  - in favor of abutting owner on highway, 1531.
- pollution, right of immunity from, 1124.
  - easement as to, 1234.
  - necessity of actual damage, 1127.
- rights as to air space, 864.

**AIR SPACE**

- encroachment on, from adjoining land, 864.
- rights of control by landowners, 1119.

**ALIENATION**

- by alien, 2350.
  - corporation, 2347.
  - cotenant, 678.
  - criminal, 2353.
  - government, 1552-1564.
  - infant, 2332.
  - insane person, 2342.
  - landlord at will, 226.
  - married woman, 730, 2330.
  - tenant at will, 227.

[REFERENCES ARE TO PAGES.]

**ALIENATION**—Continued.

- conditions in restraint of, 2306.
  - in case of leasehold estate, 160.
- limitations in restraint of, 2306.
- method, assignment, 1570.
  - bargain and sale, 1572.
  - covenant to stand seised, 1572.
  - devise, 51, 1806.
  - exchange, 1571.
  - feoffment, 33, 1566.
  - finer, 1567.
  - grant, 1567.
  - lease, 1568.
  - livery of seisin, 33, 1566.
  - patent, 1561.
  - quit claim, 1576.
  - recoveries, 1567.
  - release, 1568.
  - surrender, 1578.
- of bare legal title, 419.
  - benefit and burden of covenants, 174, 1401.
  - cestui que trust's interest, 418, 2319.
  - contingent remainder, 325.
  - dower interest or estate, 803, 804, 824.
  - easement, 1226.
  - equitable interest, 418.
  - estate by curtesy, 845, 847.
  - estate for years, 51.
  - executory interest, 588.
  - fee simple, 51, 1589.
  - fee tail estate, 71.
  - feud, 25.
  - growing trees, 881, 883.
  - homestead, 850, 856.
  - interesse termini, 115.
  - joint interest, 679.
  - life estate, 81.
  - minerals in place, 867.
  - mortgage, 2518.
  - mortgaged land, 2471.
  - possibility of reverter, 474.
  - pre-emption right, 1553.
  - remainder, 524.
  - reversion, 149-151, 471.
  - right of re-entry, 313.
  - rights and liabilities as to rent, 1469.
  - riparian rights, 1151.
  - tenancy at will, 227.

[REFERENCES ARE TO PAGES.]

**ALIENATION**—Continued.

- of bare legal title—continued.
  - tenancy from year to year, 237.
  - term of years, 159.
  - trustee's title, 419.
- restraints on, 2279. See "Restraints on Alienation."
- rights of, early restrictions, 25.
  - see, also, "Assignment"; "Conveyances"; "Grant"; "Judicial Sale"; "Lease"; "Mortgages"; "Personal Capacity"; "Release"; "Restraints on Alienation"; "Sale"; "Surrender."

**ALIENS**

- acquisition of land by, 2350, 2353.
- as cestuis que trust, 370.
- conveyances to, 2350.
- curtesy in favor of, 2351.
- descent to, from or through, 2350, 2351.
- dower in favor of, 2351.
- escheat by reason of alienage, 2142.
- forfeiture of land by, 2143.
- gift of proceeds of sale of land, 442.
- removal of disabilities, 2353.

**ALLEY**

- grant of right of user, 1337.
- reference to nonexistent alley, as creating easement of passage, 1314.

**ALLODIAL LAND**

- nature, 18.

**ALLUVION**

- acquisition of land by, 2094.
- see "Accretion."

**ALTERATIONS**

- to fit servient tenement for exercise of easement, 1348.
- waste in making, 954, 962.

**ALTERATIONS OF INSTRUMENTS**

- admissibility in evidence of altered instrument, 1643.
- as to name of grantee, 1603.
- divesting property rights, nugatory, 1642.
- filling blank in assignment of mortgage, 2529.
- filling blank in conveyance, 1597.
- contract, 1643, 1644.
- conveyance, effect, 1641.
- instrument creating power, 1645.
- mortgage, 1644.

[REFERENCES ARE TO PAGES.]

**ALTERATIONS OF INSTRUMENTS**—Continued.

mortgage note, no effect on mortgage, 2407.  
substitution of different grantee, 1603.

**ALTERNATIVE LIMITATIONS**

upon different contingencies, 581.

**ALTERNATIVE REMAINDERS**

nature, 510.

**ANCESTOR**

meaning of expression, 1903.

**ANCESTRAL LAND**

conveyance and reconveyance, effect, 1905.  
descent of, 1902.  
exclusion of half blood, 1898.  
land acquired in exchange for, 1905.  
what is, 471, 1902.

**ANCHORAGE**

rights of, on private land, 1547.

**ANCIENT LIGHTS**

doctrine not recognized in this country, 2039.

**ANIMALS**

fences to prevent trespass by, 1003.  
*feræ naturæ*, rights of landowner, 1035.  
live stock running at large, 1003.  
right of hunting on another's land, 1388.  
trespassing on railroad track, liability of owner, 1005.  
wrongfully killed by trespasser, belong to landowner, 1036.

**ANNEXATION**

of chattels to land, 905.  
see "Fixtures."

**ANNUAL CROPS**

pass to personal representative, 877.  
see, also, "Crops"; "Emblements."

**ANNUAL RESTS**

in accounting by mortgagee, 2440.

**ANNUITIES**

charged on land, 2735.  
what are, 13.  
3 R. P.—70

[REFERENCES ARE TO PAGES.]

**ANTENUPTIAL AGREEMENT**

as barring dower, 789.

**ANTENUPTIAL DEBTS**

enforceable against community property, 659.

**ANTICIPATORY BREACH**

in connection with covenant for rent, 1478.

**APARTMENT**

lease of, destruction of building, 1498.

**APARTMENT HOUSE**

destruction, effect on rent of apartment, 1498.

failure to supply heat, as eviction, 1504.

implied stipulations as to mode of user, 1452.

landlord's liability for defects in, 147.

right of way through halls, 1250.

**APPLICATION OF PURCHASE MONEY**

duty of purchaser from trustee as to, 420.

**APPOINTMENT**

of agent, 1043, 1797, 2184.

of trustee, 421.

powers of, 1045, 1047.

under power, 1062, 1078, 1081, 1091.

as making property assets for payment of debts, 1107.

relates back to creation of power, 1048.

when illusory, 1094.

see "Powers"; "Powers of Attorney"; "Trustees."

**APPORTIONMENT**

of accretions, 2112.

conditions, 317.

easements, 1346.

land formed by accretion, 2112.

land under lake, 1021.

profit à prendre, 1398.

reclamations, on navigable waters, 1033.

of rent, as to amount, 1482, 1496.

as to time, 1478.

by partial extinction, 1484.

in action on covenant, 1485.

on grant of portion, 1484.

on lease of land and chattels, 1467.

on partial eviction, 1502.

on severance of leasehold, 1473, 1484.



[REFERENCES ARE TO PAGES.]

**APPORTIONMENT**—Continued.

- of rent—continued.
  - on severance of reversion, 1473, 1483.
  - when chattels included in lease, 1467.
- of shore or flats, 1032.

**APPROPRIATION OF WATER**

- easement allowing, 1234.
- for purpose of sale, 1137.
- from stream, 1132.
  - for use on non riparian land, 1136.
  - prescriptive right, 2056, 2060, 2062, 2074, 2077.
  - priority of, 1155.
- of underground water, to detriment of neighbor, 1176.
- prescriptive right, 2056, 2060, 2062, 2074, 2077.
  - see “Percolating Water”; “Surface Water”; “Underground Water”; “Water”; “Watercourse.”

**APPURTENANCES**

- as including easement, 1277, 1291, 1673.
- conveyance with, as passing easement, 1291, 1673.
- crops and trees as, 878.
- easements as included in term, 1673.
- grant with, effect, 1277, 1291, 1673.
- land not appurtenant to land, 1673.
- lease with, as creating easement of light, 1277.

**APPURTENANT EASEMENT**

- cannot be separated from dominant tenement, 1228.
- change in dominant tenement, effect, 1346, 1370.
- creation by grant, 1231.
- dominant tenement subsequently to be acquired, 1233.
- exercise only in connection with dominant tenement, 1331.
- extinction, attempted separation from dominant tenement, 1363.
  - condemnation of dominant tenement, 1364.
  - destruction of dominant tenement, 1364, 1365.
  - submersion of dominant tenement, 1364.
- favorable over easement in gross, in construction of grant, 1230, 1231.
  - in construction of reservation, 1231.
- included in ejectment for dominant tenement, 1228.
- nature, 1223.
- passes on conveyance of dominant tenement, 1227, 1304.

**AQUEDUCT**

- apparent user or land for, implied grant of easement, 1279.
- easement to maintain, 1236.
  - implied grant, 1274, 1279, 1283.
  - location, 1338.

[REFERENCES ARE TO PAGES.]

**AQUEDUCT**—Continued.

- easement to maintain—continued.
  - prescriptive right, 2035, 2074, 2077.
  - within covenant against incumbrances, 1685.
- implied grant of easement, when apparent, 1279.
  - when continuous, 1283.
- prescriptive right, 2035, 2074, 2077.
- water in, as private property, 1131, 1390.
  - see “Artificial Watercourse”; “Water”; “Watercourse.”

**ARCH**

- over right of way, 1353.

**ARTIFICIAL WATERCOURSE**

- easements in, 1237.
- no natural rights in, 1237.
- presumption as to easements in, 1238.
- rights of riparian owners, 1237.
- rights of servient owner as to continuance, 1238.
- when regarded as natural, 1237, 1238.
  - see “Aqueduct”; “Watercourse.”

**ASSENT**

- by grantee to conveyance, 1788.

**ASSESSMENTS**

- for local improvements, lien on land, 2792.
  - payment by life tenant, 87.
- sale of land for nonpayment, 2155.
- within covenant against incumbrances, 1684.
  - see “Taxes.”

**ASSETS**

- appointed property as, 1107.

**ASSIGNMENT**

- condition against, license for breach, 298.
  - relief from forfeiture, 322.
- covenants against, as running with land, 177.
- distinguished from sublease, 170.
  - for purpose of distress, 189.
- of benefit and burden of covenants, 174, 1403, 1405, 1419, 1718.
  - chattel interest in land, 1570.
  - contractual benefits and burdens, 1402.
  - debt secured by mortgage, 2519.
  - dower, 808. See “Dower.”
  - easement in gross, 1226.
  - equitable interest, 418.

[REFERENCES ARE TO PAGES.]

**ASSIGNMENT**—Continued.

- of benefit and burden of covenants—continued.
  - estate for years, 159.
  - executory interest, 588.
- of leasehold, assignee not liable for prior breach, 183.
  - assignee bound by condition, 319.
  - covenants against, 160-162.
  - effect on lessee's liabilities, 165, 169, 174.
  - form, 163.
  - liability for rent, 1470, 1510.
  - necessity of acceptance, 181.
  - necessity of mentioning assigns, 182.
  - necessity of writing, 1570.
  - operation of law, 161, 164.
  - part performance, 164, 180.
  - right to make, 159.
  - running of covenants, 174-184.
  - within statute of frauds, 163.
- of license, 1221.
  - mortgage, 2518.
    - as subject to equities, 2536, 2542.
    - record and priorities, 2545, 2551.
    - subsequent payment to assignor, 2592.
  - mortgage in terms, not referring to debt secured, 2527.
  - part of mortgage debt, priorities, 2551.
  - possibility, 474.
  - possibility of reverter, 474.
  - power, 1068, 1070.
  - remainder, 524.
  - rent, 1469.
  - reversion, 149.
    - running of covenants, 174-184.
  - right of action on covenant for title, 1721.
  - right of action on covenant of lease, 176.
  - right of entry, 313.
  - right to attack conveyance, 2288.
  - tenancy from year to year, 237.
  - term of years, 159.
  - vendor's lien, 2758, 2763, 2765.
  - widow's homestead, 859.
    - see, also, "Alienation"; "Conveyances"; "Grant"; "Lease",  
"Mortgages"; "Subrogation"; "Transfer."

**ASSIGNMENT FOR BENEFIT OF CREDITORS**

- distinguished from deed of trust to secure, 2399.

**ASSIGNS**

- mention necessary, to running of covenant as to thing not in esse,  
182, 1415.

[REFERENCES ARE TO PAGES.]

**ASSUMPSIT**

- between cotenants, for money had and received, 676.
- for breach of trust, 369.
  - part of cost of party wall, 1422.
  - rent, 1511, 1512, 1514.
  - rents and profits received by cotenant, 676.
  - use and occupation, 1514.
    - against tenant holding over, 251.
  - user of wall, 1246.

**ASSUMPTION**

- of mortgage debt by transferee of land, 2485.

**ATTACHMENT**

- for rent, 1522.
- interests subject, 2788.
- levy under, effect as against subsequent distress, 1520.
- lien, priorities, 2789.
  - priority as against unaccepted conveyance, 1788.
  - within covenant against incumbrances, 1684.

**ATTESTATION CLAUSE**

- in conveyance, as raising presumption of delivery, 1752.
- in will, necessity, 1828.

**ATTESTING WITNESSES**

- to conveyance, 1727.
- to will, competency, 1823.
  - necessity, 1821.
- testamentary provision for, 1824.

**ATTORNEY**

- acknowledgment before, of interested party, 1731.
- execution of instrument by, 1797.
- fees, as element in damages for breach of covenant of title, 1714.
- fees, stipulation in mortgage, 2733.
  - see, also, "Agent."

**ATTORNEY, POWERS OF**

- nature, 1043.
  - see "Powers of Attorney."

**ATTORNMENT**

- as precluding denial of title, 191.
- by acceptance of lease, 102.
- by another's tenant, as starting adverse possession, 1998.
- distress based on, 190.
- equivalent to acceptance of lease, 102.

[REFERENCES ARE TO PAGES.]

**ATTORNMENT**—Continued.

- estoppel to deny title, 191.
- expression used in two senses, 102.
- in case of concurrent lease, 157.
- on transfer of reversion, for purpose of notice to purchaser, 2236.
- on transfer of seignior, 34.
- to mortgagee, 2447.
- to paramount title, 198.
- to stranger, 102.
- to transferee of reversion, 34, 151, 1568.
- under mistake, estoppel to deny title, 193.

**AUTHORITY**

- common-law authority, 1043, 1055.
- to execute deed, 1797.
- to fill blank in deed, 1597.

**AUTOMOBILE**

- use on way granted for carriages, 1332.

**AVOIDANCE**

- of conveyance containing release of dower, effect, 781.
- of infant's conveyance, 2335.
- of insane person's conveyance, 2344.

**AVULSION**

- by action of water, 2094.

**AWAY-GOING CROPS**

- customary right, 893.
- see, also, "Crops"; "Emblements."

**B****BAILIFF**

- employment by mortgagee, 2448.

**BANK OF STREAM**

- as boundary, 1012, 1016, 1656, 1658.
- change by artificial causes, 2095.
- change by natural causes, 2093.
- effect of accretion, 2093.
- object on, as monument, 1660.
- referred to as boundary, construction, 1656-1659.
- see "Rivers"; "Shore"; "Streams"; "Water"; "Watercourse."

**BANKRUPTCY**

- adjudication as divesting title, 2155.
- conveyances in violation of bankruptcy law, 2287.

[REFERENCES ARE TO PAGES.]

**BANKRUPTCY**—Continued.

- discharge in, effect on mortgage, 2407, 2586.
- limitation over on, 2316.
- statutory power of sale in trustee, 1044.

**BARGAIN AND SALE**

- after statute of uses, 348.
- before statute of uses, 344.
- consideration necessary, 1574, 1576.
- creation of executory interest by, 546, 548, 549.
- creation of power by, 1057.
- effect of statute of uses, 348, 360.
- in favor of uncertain persons, 550.
- nature, 344, 1572, 1574.
- of reversion, 472.
  - attornment unnecessary, 152.
- or feoffment, in accordance with intention of parties, 349, 360, 1572.
- power of revocation in, 1049.
- recital of payment of consideration, conclusiveness, 1626.
- supported as covenant to stand seised, 1589.
- to person not ascertained, 550.
- to use of another, use not executed, 360.
- transfer of reversion by, 472.
- utilization in United States, 1575.
- valuable consideration, necessity, 1574.
  - recital sufficient, 1626.

**BARRING THE ENTAIL**

- how effected, 71-72.
- meaning of expression, 70.
- statute De Donis, 70.
  - see "Fee Tail, Estate in."

**BARS**

- over right of way, 1354, 1355.

**BASE FEE**

- as resulting from limitation over, 559.
- estate to terminate on contingency, 334.
- nature, 71, 334-337.
- on conveyance by tenant in tail, 71.
  - see "Determinable Fee."

**BASTARDS**

- descent to and from, 1906.

**BATHING**

- public rights of, on shore of tide waters, 1011.

[REFERENCES ARE TO PAGES.]

**BEACH**

referred to as boundary, 1660.  
see "Shore."

**BED OF LAKE**

ownership, 1018, 1021.

**BED OF STREAM**

ownership 1012, 1016, 1132, 1656, 1658.  
see "Boundaries"; "Navigable Waters"; "Rivers"; "Streams";  
"Water"; "Watercourse."

**BENEFICIARY**

see "Cestui Que Trust."

**BENEFIT**

of covenant, as passing on transfer of land, 174, 1403.  
of party wall agreement, assignment, 1417.

**BEQUEST**

of leasehold, as within covenant against assignment, 162.  
of money to be invested in land, interest in land realty, 440.

**BETTERMENT ACTS**

compensation for improvements on another's land, 944.  
in favor of cotenant, 689.  
in favor of life tenant, 85.  
lien for compensation, 2750, 2795.

**BEYOND SEAS**

adverse possession against persons, 1973.

**BIRTH OF ISSUE**

as necessary to curtesy, 832.  
see, also, "Children"; "Issue."

**BLANK**

in assignment of mortgage, authority to fill, 2529.  
in conveyance, as to name of grantee, 1597.  
authority to fill, 1598.  
filling without authority, protection of bona fide purchaser,  
1601-1603.  
in name of grantee, subsequent insertion under oral authority, 1596,  
1746.

**BLOOD**

as consideration for covenant to stand seised, 1574.

[REFERENCES ARE TO PAGES.]

### BLOOD HEIRS

sufficiency of expression for creation of fee tail, 59.

### BOARDER

distress on goods of, 1521.

### BONA FIDE PURCHASERS

acquisition of legal title for purpose of protection, 2174.

at execution sale, 2258.

claiming under escrow, 1771, 1779.

creditors as, 2139, 2213.

estoppel to assert after-acquired title against, 2130.

for value, 2247.

from purchaser with notice, 2258.

from trustee, protected against trust, 419.

holders under quitclaim deeds as, 2173, 2204.

mortgagees as, 2248, 2559.

not protected, if no title in vendor, 2169.

of debt secured by mortgage, 2536, 2542.

of infant's land, 2333.

insane person's land, 2343.

land conveyed in fraud of creditors, 2284.

land subject to lease, 149.

mortgage, 2536, 2543, 2544, 2548, 2550.

trust property, 419.

presumption, 2260.

protected by recording act, 2181.

in equity, 2171, 2177.

protection against agreement as to boundary line, 999.

agreement restricting use of land, 1439.

charge in will, 2740.

claim of dower, 767, 797.

claim that conveyance was mortgage, 2390.

conditional character of delivery, 1771.

constructive severance of fixture, 941.

contract for removal of fixture, 2284.

creditors of donee of power, 1107.

creditors of vendor, 2284.

dower claim, 767, 797.

easement, 1217, 1385.

estoppel by representation, 2138.

estoppel to assert after-acquired title, 2130.

fraud as to creditors, 2284.

fraud in acknowledgment, 1734.

homestead claim, 853.

instrument conditionally delivered, 1780.

invalid acknowledgment, 1735.

invalid delivery, 1743.



[REFERENCES ARE TO PAGES.]

**BONA FIDE PURCHASERS**—Continued.

- protection against agreement as to boundary line—continued.
  - invalid insertion of grantee's name in conveyance, 1601, 1602.
  - judgment, 2778.
  - mechanic's lien, 2771.
  - mortgage apparently merged, 2618.
  - mortgage purporting to be satisfied, 2637, 2641.
  - prior equity, 2171.
  - prior legal title, 2171.
  - release of covenant for title, 1722.
  - showing that conveyance intended as mortgage, 2390.
  - title based on adverse possession, 1986.
  - trust for partnership, 670.
  - unaccepted conveyance, 1788.
  - unauthorized filling of blanks, 1601, 1602.
  - unauthorized release of mortgage, 2637, 2641.
  - use, 346.
  - vendor's lien, 2756-2758, 2762.
  - way of necessity, 1304, 1305.
- protection as to fixtures, 923.
- purchaser with notice from purchaser without notice, 2257, 2260.
- under power of sale in mortgage, 2729.
- under power to sell for payment of debts, 1090.

**BONA FIDES**

- not necessary to adverse possession, 1940.
- prescription, 2051.

**BOND**

- for debt secured by mortgage, 2409, 2410, 2416.
- substitution of different bond, 2622.

**BOOMS**

- right to erect in navigable river, 1024.

**BORDER TREES**

- rights of adjoining owners, 896.
- see, also, "Trees."

**BOTES**

- right of, cutting wood for repairs, 961.

**BOUNDARIES**

- agreement between adjoining owners, 996.
- as between proprietors on navigable waters, 1032.
- as between proprietors on nonnavigable stream, 1034.
- by thread of stream, 1012.

[REFERENCES ARE TO PAGES.]

**BOUNDARIES**—Continued.

- description in conveyance, 1650.
  - by adjoining land, 1651.
  - by courses and distances, 1652-1654.
  - by highway, 1660.
  - by monuments, 1651.
  - by private way, 1660, 1665.
  - by water, 1656, 2095.
- estoppel to question boundary line, 1002.
- express agreement, 996.
- implied agreement, 999.
- in bed of lake, 1020.
- judicial determination, 994, 995.
- line recognized by adjoining owners, 999.
- location, agreement or acquiescence, 996, 999, 1001.
- meander lines as, 1015, 1020, 1649.
- mistake in location, adverse possession, 1946.
- naming nonexistent street as boundary, effect as creating easement, 1313.
- on highway, 1660.
  - lake or pond, 1018.
  - navigable nontidal stream, 1012.
  - nonexistent way, as creating easement, 1313.
  - nonnavigable stream, 1016.
  - thread of stream, change in location, 1010.
  - tide waters, 1007.
  - water, change by natural causes, 2093.
  - way, as including land within way, 1666.
- oral agreement as to, 996.
- practical location, 1001, 1655.
- temporary agreement, possession not adverse, 1950.
- trees located on, 896.

**BRANCHES**

- projecting over another's land, 896.

**BREACH OF LEASE**

- undesirable expression, 99.

**BRIDGE**

- conveyance of, 1647.
- nature of franchise, 12.

**BUILDING**

- alteration as waste, 962, 963.
- as fixture, 910.
- as marking boundary of land, 1652.
- as removable fixture, 928, 933.

[REFERENCES ARE TO PAGES.]

**BUILDING**—Continued.

- conveyance of land for, implied grant of easement of support, 1296.
- conveyance with appurtenances, 1674.
- damage by subsidence of land, 1190.
- damage by withdrawal of support, 1191.
- description of building as including land, 1646.
- destruction, effect on easement to use stairway, 1367.
  - effect on easement of light, 1366.
  - effect on party-wall rights, 1366-1368.
  - effect on rent, 1497.
  - extinction of easement, 1364, 1365, 1367, 1368, 1369.
- divided ownership, 945.
  - easement of support, 1244.
  - no duty to repair lower floor, 1349.
- easement of extending over another's land, 1255.
- easement of support, 1243, 1349.
- eaves of, 864, 1652.
  - adverse possession of land under, 1929.
- encroachment on adjoining land, implied grant of easement, 1276.
- erected on another's land, compensation for, 943.
- erection of, as waste, 965.
- exception of, in conveyance, 1614.
- extending over another's land, as tort, 864.
- grant of, as including land, 1647.
- infection with disease, as waste, 966.
- injury to, as waste, 962.
- interfering with surface water, 1167.
- license to erect, 1203.
- materials for, as passing on conveyance of land, 1675.
- nonrepair as waste, 968.
- obstructing easement of light, consent to erection, 1382.
- on land of another, 943.
- on leased premises, destruction by incendiary fire, 976.
  - effect of destruction on rent, 1497.
- outbuildings regarded as appurtenances, 1674.
- over right of way, 1353.
- placing excessive weight in, as waste, 966.
- projecting over another's land, 864, 1255.
- removal and substitution of, as waste, 962, 965.
- removal by landlord of support, as eviction, 202.
- separate ownership of floors, 945, 1244, 1349.
- support by, no duty of repair, 1349.
- support from adjacent land, 1191.
  - adjoining building, 1243.
  - party wall, 1244.
- unsightliness, not ground for objection by neighbor, 1121.
- waste as to, 962, 968.
- waste in, injunction to prevent, 983.

[REFERENCES ARE TO PAGES.]

**BUILDING**—Continued.

water on roof of, 1186.

weight of, causing subsidence of land, 1190, 1194.

see "Building Restrictions"; "Party Walls"; "Structures";  
"Walls."

**BUILDING RESTRICTIONS**

enforcement against purchasers with notice, 1429.

enforcement in equity, 1425.

see, also, "Equitable Restrictions"; "Restrictive Agreements."

**BURDEN**

of covenant, as passing on transfer of land, 174, 1405.

of party-wall agreement, as running with land, 1420.

see, also, "Covenants."

**BURDEN OF PROOF**

as to adverse user of land, 2045.

adverse character of possession, 1933.

bona fide purchase, 2260.

boundary of land on water, 1656.

claim of right, for purpose of prescription, 2050.

conditional delivery, 1783.

conveyance intended as mortgage, 2386, 2390.

delivery of conveyance, 1748.

paramount title, action for breach of covenant, 1704.

prescription for highway, 2083.

purchase for value without notice, 2260, 2264.

**BURIAL RIGHTS**

nature, 1250, 1252.

**BUSHES**

part of the land, 876.

**BUSINESS**

illegality of, for which lease made, effect on rent, 1505.

undesirability, not ground for objection by neighbor, 1121.

way of necessity for, 1308.

**C****CANAL**

covenant for repairs, as running with land, 1414.

**CANCELLATION OF INSTRUMENT**

as mode of enforcing forfeiture, 309.

as revesting title, 1804.

for breach of condition, 309.

[REFERENCES ARE TO PAGES.]

**CANCELLATION OF INSTRUMENT**—Continued.

- for breach of condition—continued.
  - duress, 1639.
  - failure to furnish support as agreed, 326.
  - fraud, 1639.
  - mistake, 1636, 1638.
- of conveyance, for mistake, 1638.
  - conveyance in consideration of support, 326.
  - defeasance of mortgage, 2474.
  - infant's conveyance, 2335.
  - lease, 1579, 1580.
  - will, as revocation, 1838.

**CARRIAGE**

- automobile as, 1332.

**CASE, ACTION ON**

- for waste, 981.

**CATTLE**

- duty of landowner to fence against, 1003.
- duty of owner to prevent trespass by, 1003.
- gates, in connection with private right of way, 1356, 1357.
- pasturing of, not possession of land, 1926.
- pasturing on private right of way, 1352.
- pollution of water by, 1143.
- trespass by, effect of absence of fence, 1003.
- trespass on railroad track, liability for injuries, 1006.
- water for, appropriation by riparian owner, 1133.

**CAVEAT EMPTOR**

- applicable against lessee, 136, 141.

**CEMETERY**

- dedication for, 1855-1857, 1884.
- location, as waste, 955.
- privilege of interment, nature, 1252.
- regulations as to burial, 1254.

**CERTIFICATE**

- of acknowledgment, by agent, 1802.
  - conclusiveness, 1733.
  - in behalf of corporation, 1803.
  - what must be shown, 1732, 1802.
- of entry on public land, 1562.
  - registered title, 2274.

**CESSER, PROVISION FOR**

- nature, 331-337.

[REFERENCES ARE TO PAGES.]

**CESTUI QUE TRUST**

- action by, 365.
- adverse possession against, though no right of action, 1954.
- as defendant to suit as to trust property, 367.
- as owner of land, 362.
- as trustee, 362, 371, 425.
- bar by running of limitations against trustee, 368, 1438.
- devise by, 419.
- legal capacity, 370.
- must be definite, 372.
- nature of rights, 362.
- option to terminate trust, 430.
- right to call for legal title, 430.
- right to partition, 716.
- right to possession, 416.
- suit by, 365-367.
- transfer by, 418.
- under trust for investment in land, interest is realty, 440.
- under trust for sale, interest is personalty, 440.
- who may be, 370.

**CESTUI QUE USE**

- regarded differently in equity and at law, 341, 342.

**CESTUI QUE VIE**

- death, effect, 93.
- see "Pur Autre Vie, Estate."

**CHAIN OF TITLE**

- instruments not in, record as notice, 2186.
- instruments within, 2182, 2186.
- meaning of expression, 2182.
- recitals in, as notice, 2240.

**CHAMBER**

- in house, separate ownership, 945.

**CHANCERY**

- assumption of jurisdiction over uses, 340.
- cy pres jurisdiction, 438.
- see, also, "Equity."

**CHANDELIER**

- removable as domestic fixture, 929.

**CHANGE**

- of location of way, 1338.

[REFERENCES ARE TO PAGES.]

**CHANNEL**

of watercourse, change and restoration, 1130, 1141.  
 see, also, "Watercourse."

**CHARGE ON LAND**

as indicating quantum of estate, 50.  
 created by words of covenant, 1403.  
 liability in inverse order of alienation, 2740.  
 of annuity, 2735.  
     debts, 2736.  
     legacy, 2736.  
     sum of money, 2734.  
     support, 330.  
 personal liability, 2742.

**CHARITABLE TRUST**

cy pres doctrine, 436.  
 dedication of land for, 1857.  
 gift to non-existent corporation, application cy pres, 437.  
 indefinite beneficiaries, 435.  
 jurisdiction of equity, 434.  
 may be perpetual, 435.  
 nature and validity, 433.  
 restraints on alienation, 2312.  
 subject to rule against remoteness, 617.

**CHARITY**

dedication of land for, 1857.  
 see, also, "Charitable Trust."

**CHARTER OF FEOFFMENT**

nature, 33, 1566.

**CHATTEL MORTGAGE**

of fixture, 921.  
 on article subsequently annexed to land, 921.  
     rights of prior mortgagee of land, 924.  
     rights of subsequent purchaser of land, 922.

**CHATTELS PERSONAL**

annexed to land, as part of realty, 903.  
 crops, 877.  
 fixtures, 903.  
 heirlooms, 3.  
 inclusion in lease of land, effect on rent, 1467.  
 on land, as passing by conveyance of land, 1674.  
 removal by landlord not eviction, 202.  
 what exempt from distress, 1519.

[REFERENCES ARE TO PAGES.]

**CHATTELS REAL**

- estate for years, 98.
- estate from year to year, 228.
- executory limitations of, 584.
- life estate in, 584.
- no dower in, 748.
- of wife, husband's rights, 728.
- origin of term, 8.
- remainder in, 584.
- use in, not executed by statute of uses, 357.
- what are 7, 39.

**CHILD**

- adopted, descent by and from, 1909.
- advancement to, 1629, 1912.
- birth, as revoking will, 1844.
- descent to, 1894.
- en ventre sa mere, 503, 600, 1907.
- homestead rights, 860.
- illegitimate, descent, 1906.
- omission from will, 1849, 1915.
- posthumous, 503, 600, 1907.
- purchase in name of, 404.
- unborn, 503, 600, 1907.
- see, also, "Children."

**CHILDREN**

- adverse possession as against, 2023, 2024.
- appointment among, 1061, 1094.
- as heirs, 1894.
- as meaning heirs of the body, 60, 61.
- as word of limitation, creating fee tail, 60.
- birth of, as revoking will, 1846, 1847.
- gift to, as a class, 497, 581, 595.
  - rights of after-born children, 550.
  - to take effect in futuro, 581.
- gift to A and his children, as creating fee tail, 60, 61.
  - as creating cotenancy with children, 60.
  - as creating life estate with remainder, 60.
- homestead rights of, 860.
- illegitimate, descent to and from, 1906.
- omitted from will, statutory provisions, 1849, 1915.
- possession of parent not adverse to, 2023, 2024.
- power to appoint among, illusory appointment, 1094.
- remainder to, application of rule in Shelley's case, 535.
  - after born entitled, 498.
- sufficiency of expression for creation of fee tail, 60.
  - vested or contingent, 493.
  - vested though not all born, 498.



[REFERENCES ARE TO PAGES.]

**CHILDREN**—Continued.

- support of, implication of power of sale, 1059.
- unborn, conveyance to, 1595.
- see, also, "Child."

**CHOSE IN ACTION**

- implied warranty by assignor, 2552.
- mortgage debt as, 2519, 2537.
- see, also, "Mortgages."

**CHURCH**

- dedication of land for, 1857, 1858.
- passage through grounds of, as permissive rather than hostile, 2047.
- rights of pewholder, 1250.

**CIDER PRESS**

- removable as trade fixture, 931.

**CISTERN**

- in highway, as additional servitude, 1530.
- removable as domestic fixture, 929.

**CIVIL LAW**

- computation of relationship, 1897.
- rule as to surface water, 1167.

**CLAIM**

- enforcement of forfeiture by, 305, 307.

**CLAIM OF RIGHT**

- as element in adverse possession, 1936, 1944.
- as element in prescription, 2049.
- as element in prescriptive user by public, 2084.

**CLAIM OF TITLE**

- necessity for adverse possession, 1936, 1944.

**CLAIMS**

- mineral, in public lands, 1556.

**CLASS**

- devise to, as remainder or executory interest, 556.
  - death of member, 1834, 1835.
- executory devise to, 556, 581.
- gift to, construction, 556, 581.
  - death of member, 1833, 1835.
- remoteness, 595, 616.

[REFERENCES ARE TO PAGES.]

**CLASS**—Continued.

- power in favor of, death of member, 1099.
  - exclusive or non exclusive, 1061.
  - failure to exercise, 1052.
  - fee simple need not be given to each, 1062.
  - illusory appointment, 1094.
- remainder in favor of, 497, 555.
- remainder in favor of, opening to let in other members, 498.
  - time of ascertaining members, 503.
- transfer, 525.
- rule against perpetuities, applied to gift to, 595.

**CLAUSE OF DEFEASANCE**

- validity, 1623.

**CLAY**

- removal as waste, 955.

**CLEARING LAND**

- as waste, 957.

**CLOTHES LINES**

- easement of placing on another's land, 1255.

**COAL**

- way of necessity to mine, 1300.
  - see, also, "Minerals."

**CODICIL**

- to will, 1843, 1852, 1853.

**COLLATERAL KINDRED**

- ancestral lands, descent to blood of ancestor, 1902.
- descent to, 1896.

**COLOR OF TITLE**

- adverse possession under, 1919, 1986.
- as determining extent of adverse possession, 1987.
- as evidence of claim of right, for purpose of adverse possession, 1941.
- possession under, presumably adverse, 1932.
- what is, 1988.

**COMMITTEE**

- of lunatic, sale of land by, 2153.

**COMMON**

- dedication for, 1854, 1884.

[REFERENCES ARE TO PAGES.]

**COMMON**—Continued.

- of estovers, 1394.
  - pasture, 1394.
  - piscary, 1394.
  - turbary, 1394.
- public, nature, 1540.
- rights of, apportionment, 1398.
- right of profit, distinguished from several right, 1394.

**COMMON RECOVERY**

- as barring fee tail, 70.

**COMMON, TENANCY IN**

- see "Tenancy in Common."

**COMMONS, PUBLIC**

- in New England, 1541.

**COMMUNAL LANDS**

- nature, 1542.

**COMMUNITY PROPERTY**

- antenuptial debts, enforcement against, 659.
- civil law origin, 657.
- death of spouse, effect, 659.
- devise of, 659.
- husband's rights of control, 658.
- in what states recognized, 656.
- nature, 656.
- not subject to partition, 712.

**COMPENSATION**

- for additional servitude in highway, 1527.
- deprivation of access to navigable water, 1022.
- deprivation of right of wharfing out, 1027.
- flowage of land by construction of railroad, 1148.
- impairment of easements in highway, 1531.
- improvements by cotenant, 688.
  - by life tenant, 84, 85.
  - on another's land, 943.
  - lien, 2750.
- land taken for public use, 2160.
- restrictive agreement destroyed for public use, 1428.
- use of land for highway, 1524, 1527.
- use of party wall, 1246, 1264.
  - running of benefit of covenant, 1417
- vacation of highway, 1536.
- of trustee, 417.

[REFERENCES ARE TO PAGES.]

**COMPETENCY**

- of witnesses to will, 1823.
- see "Personal Capacity"; "Wills"; "Witnesses."

**COMPETITION**

- agreement preventing, enforcement against purchaser of land, 1413, 1431.

**CONCURRENT LEASE**

- as passing benefit of condition, 317.
- as substituting lessee as landlord, 156.
- nature and effect, 155, 156, 1490.
- running of covenant on, 181.

**CONCURRENT OWNERSHIP**

- see "Co-Ownership."

**CONDEMNATION**

- effect as creating way of necessity, 1305.
- effect on dower, 800.
- effect on rent, 1495.
- for highway, effect on existing right of way, 1374.
- for public use, 2160.
- for railroad purposes, implied grant of easement, 1296.
- of easement, 1261.
- of rights under restrictive covenant, 1428.
- see "Eminent Domain"; "Highways."

**CONDITION**

- against alienation, 2306.
- assignment of leasehold, 160.
- contest of will, 281.
- remarriage, 284.
- sale of liquor, 289.
- annexed to particular estate, effect on remainder, 482.
- apportionment of, 317.
- as to place of residence, validity, 290.
- as to use of premises, 288, 291.
- attached to particular estate, effect on remainder, 482.
- belated performance, payment of money, 304.
- breach, waiver, 295, 304.
- what constitutes, 290.
- calling for commission of crime, 280.
- capricious, not favored, 288.
- character of act involved, 262, 263.
- conducting to separation of married couple, 280.
- construction adverse to, 270.
- contemplating divorce, 280.

[REFERENCES ARE TO PAGES.]

**CONDITION**—Continued.

- creation, 268-274.
  - by statement of purpose of conveyance, 272.
- delivery of deed on condition, 1762.
- demand for performance, 292.
- distinguished from covenant, 264, 310.
  - special limitation, 263, 264.
- trust, 265.
- enforcement of forfeiture for breach, cancellation of instrument, 309.
  - claim, 305.
  - ejectment, 305, 306, 308.
  - entry, 305-307, 308.
  - persons entitled, 311.
- estate upon, nature, 260.
- estoppel to assert, 296.
- excluding dower, validity, 288.
- express or implied, 265-267.
- extinction, unity of ownership of condition and land, 295.
- forfeiture for breach, effect as against intervening transferee, 318.
  - effect as defeating dower claim, 769.
  - effect as defeating sublease, 174.
  - effect on remainder, 482.
  - election against, 302.
  - equitable relief against, 319.
- ignorance of, as defense to forfeiture, 294.
- illegality of, 278, 279.
- implied in lease, 267.
- impossibility, effect, 276, 278, 296.
- in dedication for public use, 1881.
- in law, 265-267.
- in lease, apportionment, 317.
  - right of re-entry for breach, 265.
  - transfer, 316.
  - who may enforce forfeiture, 316.
- in power, 1086.
- in restraint of alienation, 2306, 2314.
- in restraint of marriage, 281.
- invalidity, effect, 275.
- lack of certainty in expression, 279.
- language creating, 268.
- legal impossibility of, 278.
- license for breach, 295, 298.
- nonpayment of rent, demand, 293.
- not favored, 270.
- not to be orally shown as evidence of consideration, 1631.
- not to take profits of land, 288.
- of capricious character, validity, 288.
- of forfeiture for nonpayment of rent, 293.

[REFERENCES ARE TO PAGES.]

**CONDITION**—Continued.

- of forfeiture for nonpayment of taxes, 293.
- of leased premises, 136-148, 204.
- of living with relative, impossibility, 276.
- of re-entry, as making assignment sublease, 172.
- of re-entry in lease, 212.
- of support of grantor, 226.
- on conveyance of trees, as to time of removal, 884.
- oral, 270.
- oral discharge, 295, 296.
- performance, demand for, 292.
- performance, substantial sufficient, 290.
- performance, time for, 291.
- precedent and subsequent, 260, 262, 273, 548, 578.
  - as creating contingent remainder, 489.
  - construction against, 496.
  - effect of invalidity, 275.
  - equitable relief against, 325.
  - impossibility immaterial, 278.
  - in case of contingent remainder, 485.
  - in case of executory interest, 545, 557.
  - in restraint of marriage, 282, 283.
  - nature, 260.
  - on dedication for highway, 1882.
  - prevention of performance by interested party, 278.
  - to exercise of power, 1087.
  - valid though oral, 270.
  - waiver, 298.
- prohibiting sale of liquor, 289.
- promoting separation of husband and wife, 280.
- release of, 295.
- relief against forfeiture for breach, 319.
- repugnant to nature of estate, 288.
- requiring consent to marriage, 282.
- requiring lease at named rent, validity, 288.
- requiring purchase of commodity from particular person, 290.
- requiring residence on land, 290.
- restricting character of structure on land, 289.
- restricting competition, 289, 290.
- restricting mode of using land, 288.
- right of re-entry for, not inconsistent with equitable restriction, 1427.
- special limitation distinguished, 264, 273.
- strictly construed, 273.
- subsequent, 262-325.
  - distinguished from condition precedent, 262, 273, 548, 578.
  - distinguished from special limitation, 264.
  - effect of invalidity, 276.
  - enforcement by heirs, 311.

[REFERENCES ARE TO PAGES.]

**CONDITION**—Continued.

- subsequent—continued.
  - forfeiture for breach of covenant, 264.
  - in restraint of marriage, 283.
  - mode of enforcement, 305-310.
  - relief against forfeiture, 319.
  - reversion not necessary, 269.
  - validity when oral, 269.
  - who may enforce, 311.
- substantial performance sufficient, 290.
- support of grantor as, 325, 330.
- time of performance, 291.
- validity, 275.
- waiver of, 295.
- who may enforce, 311-318.

**CONDITIONAL DELIVERY OF CONVEYANCE**

- as revoking will, 1849.
- burden of proof as to, 1783.
- character of condition, 1774.
- conveyance to corporation to be formed, 1781.
- death of grantor or grantee, 1779.
- delivery conditioned on death, 1783.
  - reservation of right of withdrawal, 1785, 1787.
  - second delivery, 1787.
- distress levied by grantor pending satisfaction of condition, 1781.
- grantor as owner of land pending satisfaction of condition, 1781.
- grantor cannot retain control, 1767.
- insanity of grantor after delivery, 1780.
- manual transfer, necessity, 1763.
  - to grantee's agent, sufficiency, 1765.
  - to grantor's agent, sufficiency, 1766.
  - to third person, necessity, 1764.
- necessity of contract of sale, 1774.
- priority as against subsequent attachment or judgment creditor, 1780.
- protection of innocent purchaser, 1771, 1772.
- quitclaim conveyance by grantor pending satisfaction of condition, 1781.
- right to rents and profits pending satisfaction of condition, 1781.
- satisfaction of condition, effect by way of relation, 1778.
- second delivery, 1769.
- unauthorized handing of instrument to grantee, 1771.

**CONDITIONAL FEE**

- as resulting from limitation over, 559.
- at common law, 53.
- before statute De Donis, 53.
- dower in, 769.

[REFERENCES ARE TO PAGES.]

**CONDITIONAL FEE**—Continued.

- in Iowa, 55.
- in South Carolina, 55.
- no remainder upon, 561.
- possibility of reverter on, 473.

**CONDITIONAL LIMITATION**

- ambiguity of phrase, 331.
- meaning of phrase, 331, 554, 561.
  - see, also, "Executory Devise"; "Executory Limitations"; "Special Limitation, Estate on."

**CONDITIONAL SALE**

- distinguished from mortgage, 2389, 2476.
- of article subsequently annexed to land, 921.
  - rights of prior mortgagee of land, 924.
  - rights of subsequent purchaser of land, 922.

**CONDUIT**

- for transmission of water power, 1240.

**CONFIDENTIAL RELATIONS**

- inference of undue influence, 407, 1831.
- trusts arising from, 407.

**CONFISCATION**

- of land of enemy alien, 2143.

**CONFLICT OF LAWS**

- in reference to land, 3.

**CONSANGUINITY**

- see "Descent."

**CONSIDERATION**

- absence of, resulting use, 344.
- acknowledgment of receipt, 1626.
- as measure of damages for breach of covenant for title, 1706, 1709, 1712, 1717.
- conveyance without, resulting trust, 393.
- for agreement to create trust, necessity, 385.
  - bargain and sale, 1574, 1576.
  - contract to create trust, necessity, 385.
- conveyance, necessity, 1624.
- conveyance of mortgagor's interest to mortgagee, 2473.
- covenant to stand seised, 1574.
- declaration of trust, necessity, 383.
- mortgage, necessity, 2400.



[REFERENCES ARE TO PAGES.]

**CONSIDERATION**—Continued.

- for agreement to create trust—continued.
  - transfer by mortgagor to mortgagee, 2173.
  - transfer of mortgage, 2535.
- good and valuable, 1628, 2247.
- imported by seal, 1625.
- inadequate, as putting purchaser on inquiry, 2217, 2218, 2243, 2253.
- inadequate, paid by innocent purchaser, 2251.
- necessity, as against creditors, 2282.
  - as against subsequent purchaser, 2535.
  - to create trust, 383, 385.
  - to protect bona fide purchaser, 2247.
  - to support bargain and sale, 1574.
  - to support conveyance, 1624.
  - to support mortgage, 2400.
- nominal, what is, 2251.
  - paid by innocent purchaser, 2251.
- of blood or marriage, 1573.
- of love and affection, 1625.
- oral assumption of incumbrance, right to show, 1632.
- part payment before notice, effect, 2253.
- payment as showing grant of easement rather than license, 1208.
- payment by note, whether purchase for value, 2255.
- payment for license, does not prevent revocation, 1207.
- pre-existing debt as, 2248.
- recital of amount, conclusiveness, 1627.
- recital of character, conclusiveness, 1628.
- recital in mortgage, not controlling as to amount secured, 2415.
- recital of payment, as precluding resulting trust, 394.
  - conclusiveness, 1626.
  - necessity, 1626.
- return of, necessity for avoidance of infant's conveyance, 2336, 2340.
- return of, necessity for avoidance of insane person's conveyance, 2345.
- trust resulting from payment, 397.
- trust resulting from nonpayment, 393.
- valuable, as giving priority to purchaser, 2247.
  - as against subsequent purchaser, 2245.
  - or good, 1628, 1630, 2247.
  - necessity as against creditors, 2282.
  - pre-existing debt as, 2248.
  - what is, 1628, 2247.
- vendor's lien to secure payment, 2752.

**CONSOLIDATION**

- of mortgages, 2582.

**CONSTITUTIONAL LAW**

- curtesy, legislative alteration, 849.
- curtesy initiate, legislative modification, 845.

[REFERENCES ARE TO PAGES.]

**CONSTITUTIONAL LAW**—Continued.

- dower, vested rights as to, 810.
- estates tail, validity of legislation, 57, 72.
- inchoate dower as vested right, 799.
- mill acts, authorizing flowage of land, 1149.
- party walls, statutes authorizing location on another's land, 1311.
- registration of title, validity of legislation, 2275.
- vested right to accretions, 2109.

**CONSTRUCTION**

- adverse to condition, 270.
- earlier clause favored, 1619.
- grantee favored, 1618.
- habendum yields to premises, 1620.
- implied grant of easement, as rule of, 1271, 1324.
- in favor of vesting, 495, 497, 499, 577.
- of condition, 273.
  - conveyance, general rules, 1618.
  - covenants for title, 1675-1706.
  - devise to A and her children, 60, 61.
  - "die without issue," 65, 567, 575, 576.
  - gift to a class, 497, 555, 581, 1833.
  - grant of easement, 1330.
    - as to mode of exercise, 1328.
    - in gross or appurtenant, 1230.
  - habendum, 1620.
  - language creating condition, 273.
  - limitations to survivors, 489, 493, 529, 579.
  - words of description, 1652-1672.
- premises of deed controlling, 1620.
- reference to surrounding circumstances, grant of easement, 1273, 1287, 1302, 1318, 1324, 1329.

**CONSTRUCTIVE EVICTION**

- by landlord, 200.
- under paramount title, 198, 1702.

**CONSTRUCTIVE NOTICE**

- distinguished from actual, 2245.
- from information putting on inquiry, 2115.
- from possession, 2220.
- from record of instrument, 2180, 2508, 2515, 2516.
- from statements in chain of title, 2240.

**CONSTRUCTIVE POSSESSION**

- for purpose of statute of limitations, 1987.
- of minerals in land, 1993.
- under color of title, 1987.
- what constitutes, 31.

[REFERENCES ARE TO PAGES.]

**CONSTRUCTIVE SEVERANCE**

- of fixtures, 940.
- of vegetable growths, 881.

**CONSTRUCTIVE TRUST**

- arising from fraud, 406.
- arising from oral promise to hold in trust, 408.
- in favor of partnership, 664.
- in property acquired by trustee, 418.
- land purchased with trust funds, 410.
- not arising from fraud, 411.
- possession of trustee ordinarily adverse to cestui, 2002.
- purchase with trust funds, 410.
- under contract for sale of lands, 459.

**CONTINGENCY**

- terminating estate, 260.

**CONTINGENT REMAINDER**

- becoming estate in possession, 486.
- becoming vested remainder, 486.
- changed to executory devise, 562.
- contingency with a double aspect, 510.
- contract to convey, 526.
- creation by way of use, 554.
- definition, 484.
- descent of, 527.
- devise of, 527.
- distinguished from executory devise, 556.
  - executory interest, 556, 561, 562.
  - vested remainder, 490.
- does not entitle to partition, 716.
- does not entitle to recovery for waste, 986.
- entitles to injunction against waste, 987.
- equitable contingent remainder, 516.
- executory interest distinguished, 561, 562.
- failure, 500.
  - destruction of particular estate, 506.
  - not prevented because created by devise, 555.
  - not prevented because created by use, 555.
  - statutory provisions, 507.
- Fearne's classification, 485.
- fee regarded as in abeyance, 509, 510.
- forfeiture of particular estate, effect, 506.
- gift subject to condition precedent, 489.
- in favor of class, 556.
- in favor of issue of person unborn, 517.
- in favor of unascertained persons, alienation, 528.

[REFERENCES ARE TO PAGES.]

**CONTINGENT REMAINDER**—Continued.

- in fee simple, subsequent vested remainder, 511.
- is remainder subject to condition precedent, 485.
- limited as alternative to executory interest, 582.
- merger of particular estate, effect, 507.
- must vest during particular estate, 502.
- nature, 484.
- not an estate, 484.
- not capable of acceleration, 523.
- not contingent because possession uncertain, 491.
- not originally recognized, 484.
- on particular estate for years, upheld as executory interest, 585.
- particular estate of freehold necessary, 501, 585.
- powers operating as, 1046.
- release of, 525.
- remainder not contingent because possession uncertain, 491.
- restraint on alienation valid, 2308.
- reversion in donor until vesting, 509.
- reversion in heirs or residuary devisee until vesting, 510.
- right of remainderman to partition, 716.
- sale under execution, 529, 2147.
- surrender of particular estate, effect, 506.
- time of vesting, 502.
- to ascertained person, 489.
  - issue of person unborn, 517.
  - cy pres doctrine, 518.
  - surviving children, 493.
  - unascertained person, 486.
  - unborn child, 503.
- tortious alienation of particular estate, effect, 505.
- transfer, 525.
  - by estoppel, 526.
- trustees to preserve, 508.
- uncertainty of remainderman, 486.
- valid even at common law, 500.
- vested remainder distinguished, 490.
- within rule against perpetuities, 605.

**CONTINUAL CLAIM**

- nature, 31.

**CONTINUOUS**

- possession, giving title to land, 1917, 1955.
- user, for purpose of implied grant, 1272, 1281.
- user, for purpose of prescription, 2028, 2064.

**CONTRACT**

- anticipatory breach, in case of rent, 1478.

[REFERENCES ARE TO PAGES.]

**CONTRACT—Continued.**

- as to fencing, 1003.
  - fixtures annexed by tenant, 934.
  - removal of manure by tenant, 948.
  - party wall, construction and use, 1246, 1261, 1264, 1341, 1416.
  - use of land, binding on purchaser with notice, 1425.
  - use of land, enforcement in equity, 1425.
- assignment of benefit, 1403, 1419.
- assignment of burden, 1405.
- assumption of mortgage debt by transferee of land, 2485.
- by cotenant, 678.
- creating lien on land, 2747.
- cropping contract, distinguished from lease, 121.
- determining boundary, 1001.
- enforcement by beneficiary, assumption of mortgage, 2491.
  - in case of general plan of improvement, 1448.
- excluding curtesy, 841.
- excluding dower, 789.
- for cultivation on shares, 122, 897.
- for lease, distinguished from lease, 104, 112.
  - entry under, 217.
- for lodging, as license, 1204.
- for right to remove article annexed to land, 920.
  - effect as against prior mortgagee of land, 924.
  - effect as against subsequent purchaser of land, 922.
- for sale of growing trees, 880, 886.
  - sale of land, 456. See "Contract of Sale."
  - security, 2743.
  - support, mortgage to secure, 2404.
    - not transferable, 330.
  - support, obligation cannot be delegated, 330.
  - support of grantor in conveyance, rescission for breach, 325.
- of employment, employee as licensee, 1204.
- of lease, impropriety of expression, 99, 124.
- relinquishing curtesy, 841.
- relinquishing dower, adequacy of consideration, 793.
  - failure of consideration, 793.
- restrictive of use of land, 1425.
- to execute power, 1093.
- to furnish water power, 1241.
- to maintain partition fence, 1247.
- to release dower, 791.
- to support grantor, effect of breach, 325-330.
- unauthorized alterations, 1644.
- under seal, covenants running with land, 1402.
  - see "Contract of Sale"; "Covenants."

**CONTRACT OF LEASE**

- use of expression, 99, 124.

[REFERENCES ARE TO PAGES.]

**CONTRACT OF SALE**

- adverse possession of land, 2290.
- annexations by vendee, 919.
- vendor, 918.
- assignment, by way of security, 2368, 2745.
- assignment, within recording law, 2183.
- death of party to contract, succession to rights and liabilities, 461.
- default by vendee, 2763.
- deterioration of property, effect, 460.
- effect against dower claim of vendor's widow, 774.
- effect on rights of succession, 461.
- equitable conversion by contract, 463.
- equitable rights under contract, 456.
- fixtures annexed by vendee, 919.
- lien of vendor, 2763.
- loss by fire, by whom borne, 459.
- mechanic's lien, under contract with purchaser, 2770.
- mortgage of purchaser's interest under contract, 2368.
- of growing crops, 888.
- of trees, 886.
- record, 2183.
- risk of loss, 459.
- vendee, annexations by, 919.
- as tenant at will, 217.
- death, 461.
- entitled to homestead exemption, 2298.
- vendee's interest, curtesy in, 832.
- dower in, 750.
- mechanic's lien on, 2770.
- mortgage of, 2368, 2745.
- subject to judgment lien, 2782.
- vendor, death, 461, 1847.
- entitled to possession, 458.
- trustee for vendee, 459.
- vendor's interest, dower in, 751.
- refusal of release by vendor's wife, 775.
- subject to judgment lien, 2781.
- vendor's lien, after conveyance, 2761.
- before conveyance, 2763.
- within recording law, 2183.
- see, also, "Bona Fide Purchasers"; "Consideration"; "Purchase Money"; "Purchasers"; "Sale"; "Vendor's Lien."

**CONTRIBUTION**

- between life tenant and remainderman, 84-88.
- between transferees of parts of mortgaged land, 2506.
- by cotenant, acquisition of paramount title, 692, 698.
- improvements, 688, 2751.

[REFERENCES ARE TO PAGES.]

**CONTRIBUTION**—Continued.

by cotenant—continued.

payment of taxes, 692.

removal of incumbrance, 691.

repairs, 689.

for construction of fence, 1247.

construction of party wall, 1246.

improvements by life tenant, 84, 85.

increase in height of party wall, 1340, 1341.

municipal assessments, rights of life tenant, 87.

payment of decedent's debts, by widow claiming dower, 753.

payment of incumbrances, rights of life tenant, 85, 87.

payment of mortgage, 2505, 2506, 2665.

removal of incumbrance, by life tenant, 87.

repair and reconstruction of party wall, 1342, 1350.

**CONTRIBUTORY NEGLIGENCE**

of tenant under lease, defects in premises, 142.

**CONVENTIONAL LIFE ESTATE**

nature, 74.

**CONVERSION, BY PARAMOUNT AUTHORITY**

in case of sale of land, 454.

**CONVERSION, EQUITABLE**

applicability to partnership land, 665, 666.

application of doctrine in connection with contract of sale, 463.

by contract of sale, 463.

by judicial sale, effect on curtesy, 833.

conversion by paramount authority, 454.

effect on curtesy, 833.

effect on dower, 742.

election against, 452.

equitable doctrine, 438.

failure of purpose, 448.

for purpose of dower right, 742.

imperative direction necessary, 445.

of land into money, 440.

of money into land, 440.

of partnership land, 665.

on sale of land, 463.

only if power of sale mandatory, 1054.

partial failure of trust for conversion, effect, 449.

postponement of time of sale, effect, 447.

resulting trust, 448.

when actual conversion contingent, 448.

when time of actual conversion deferred, 447.

[REFERENCES ARE TO PAGES.]

**CONVEYANCES**

- acceptance, necessity, 1597, 1788.
- acknowledgment, 1728.
  - by agent, 1802.
- alteration, as to name of grantee, 1603.
- alterations, effect, 1597, 1641.
- annulment by agreement, 1805.
- appurtenances, what included, 1673.
- as exercise of power over land, 1083.
- bar of fee tail by, 71.
- bargain and sale, 349, 360, 1572.
- between husband and wife, 2330.
- blank, effect, 1598.
- blank grantee, authority to fill, 1597.
- by alien, 2353.
  - cestui que trust, 418.
  - corporation, 2348.
  - cotenant, 673, 678.
  - criminal, 2354.
  - disseisee, 2288.
  - donee of power, 1083, 1084.
  - husband, effect on wife's dower, 763, 766.
    - joinder of wife, 779.
  - infant, 2333.
  - insane person, 2342.
  - intoxicated person, 2342.
  - married woman, 730, 732, 2329.
  - trustee, 419.
- cancellation, effect, 1804.
- certificate of acknowledgment, 1732.
- classes, assignment, 1570.
  - bargain and sale, 360, 1572.
  - covenant to stand seised, 1573.
  - employed in United States, 1575.
  - exchange, 1570.
  - feoffment, 360, 1566.
  - grant, 34, 1567.
  - lease, 1568.
  - lease and release, 1573.
  - operating under statute of uses, 82, 1572.
  - quitclaim, 1576.
  - release, 1568.
  - surrender, 1578.
- component parts, covenants for title, 1675.
  - description, 1645.
  - designation of parties, 1591.
  - exception, 1605.
  - habendum, 1620.



[REFERENCES ARE TO PAGES.]

**CONVEYANCES**—Continued.

component parts—continued.

names of parties, 1591.

premises, 1590, 1620.

recital of consideration, 1625.

reservation, 1605.

words of conveyance, 1604.

conditional delivery, 1762.

conditioned on grantor's death, 1783, 1816.

conditions in, 261.

consideration, absence as causing resulting trust, 393.

acknowledgment, 1625.

adequacy, 2251.

necessity, 1624.

recital as to character, 1628, 1630.

recital of amount, 1627.

recital of payment, 1626.

construction, 1618.

earlier clause prevails, 1619.

general rules, 1618.

in favor of grantee, 1618.

premises and habendum, 1620.

covenant to stand seised, 349, 1573.

covenants for title, 1675.

delivery, 1736.

delivery in escrow, 1762.

delivery on condition, 1762.

description, 1645, 1666. See "Description."

disability to make, 2329.

distinguished from will, 1809.

effect, as excluding curtesy, 837, 839.

excluding dower, 761, 774.

execution of power, 1084.

passing crops, 878.

passing fee simple, 45-48.

passing fixtures, 918.

passing manure on land, 946.

passing materials on land, 911, 1674.

passing trees, 878.

entry under invalid conveyance, tenancy at will, 216.

escrow, 1762.

exception, 1605, 1610, 1614. See "Exception."

execution, 1722.

by agent, 1797, 2330.

by corporation, 1801, 1803.

by one not named as grantor, 1592.

by part of grantors, 1723.

failing to take effect as intended, otherwise supported, 1588.

[REFERENCES ARE TO PAGES.]

**CONVEYANCES**—Continued.

- feoffment or bargain and sale, 360.
- for purpose of partition, 700.
- grantee must be named, 1593, 1595.
- grantee's ignorance of, effect, 1790.
- grantee's name altered, 1603.
- grantee's name left blank, subsequent insertion, 1597.
- grantor must be named, 1592.
- husband's joinder in wife's conveyance, to release curtesy, 841.
- in absolute terms, as mortgage, 2377, 2391.
- in consideration of support, rescission for nonsupport, 325-330.
  - death of grantee, 330.
- in fraud of creditors, 2280.
  - curtesy, 837.
  - dower, 761.
  - subsequent purchasers, 2284.
- in trust, acceptance, 387, 388, 1794.
  - delivery, 386.
- in violation of bankruptcy act, 2287.
- induced by duress, 1639.
  - fraud, 1639.
- intended as mortgage, 2380, 2387.
- joinder by wife, to release dower, 779.
- lease is conveyance, 98-100.
- mistake in, 1633, 1636.
- of contingent remainder, 525.
  - executory interest, 588.
- fee simple, language necessary, 44.
  - statutory presumption, 48.
- fee tail, language necessary, 58.
- growing trees, 883.
  - as making them personalty, 881.
  - express limitation as to time of removal, 884.
  - formalities necessary, 883.
  - reasonable time for removal, 885.
- growing vegetation, effect, 880.
- homestead, 850, 2302.
- of land, as excluding inference of dedication, 1867.
  - as including appurtenant easements, 1227.
  - as including easements of passage, 1318, 1324.
  - as including fixtures, 918, 942.
  - as including manure on land, 946.
  - as including materials on land, 1675.
  - as including vegetation, 878, 879.
  - held by entireties, 652, 655.
  - in adverse possession of another, 2288.
  - on water, 1656.
- leasehold interest, form, 163.

[REFERENCES ARE TO PAGES.]

**CONVEYANCES**—Continued.

- of land—continued.
  - minerals in place, 867.
  - remainder, 524.
  - reversion, 149, 472.
- oral exception, validity, 879.
- oral transfer of land, 1589, 2140.
- partial declaration of use, effect, 353.
- parties must be named, 1591.
- presumption from long-continued possession, 1920.
- proof for record, 1727, 1736, 1753.
- recital of payment of consideration, effect, 1625, 1626.
- recitals as notice, 2240.
- record, effect as notice, 2181.
  - prerequisites, 2185.
- reseission by consent, effect, 1804.
- reservation, 1617. See "Reservation."
- reservation of life estate, 551.
- return to grantor as revesting title, 1804.
- sealing, 1724.
- signing, 1722.
- statement of purpose of, effect, 272.
- substitution of other grantee, 1603.
- successive, between same parties of same land, 1805.
- to A and his children, effect, 61, 62.
  - A and his issue, as creating fee tail, 64.
  - alien, 2350.
  - corporation, 2348.
  - corporation not yet formed, 1597.
  - deceased person, 1593.
  - heirs, 1594.
  - husband and wife, 646.
  - infant, 2341.
  - insane person, 2342, 2346.
  - joint tenants, failure as to one, 629.
  - married woman, 2330, 2331.
  - partnership, 661.
  - person deceased, 1594.
  - persons not yet ascertained, 550, 1595.
  - persons unborn, 550, 1595.
  - uncertain grantee, 550, 1595.
- tortious conveyance, 33, 82, 1567.
- unauthorized record, effect, 2185.
- undue influence, 1640.
- will distinguished, 1809.
- with right of repurchase, as mortgage, 2389.
- witnesses, 1727.
- words of conveyance necessary, 1604.

[REFERENCES ARE TO PAGES.]

**CONVEYANCES**—Continued.

see, also, "Alienation"; "Assignment"; "Conditional Delivery"; "Covenants"; "Deed"; "Delivery"; "Description"; "Exception in Conveyance"; "Grant"; "Grantor and Grantee"; "Record"; "Reservation"; "Restraints on Alienation"; "Sale"; "Surrender"; "Vendor's Lien."

**CO-OWNERSHIP**

accounting by cotenant, 674, 992.  
 acquisition of adverse title by cotenant, 692.  
     after cessation of cotenancy, 697.  
     contribution by other cotenants, 698.  
 action by cotenants, 698.  
 adverse possession between cotenants, 672, 2014.  
 adverse possession by cotenant, 671, 2014.  
     notice, 2017.  
 as regards future interests, 625.  
 common, tenancy in, 640. See "Tenancy in Common."  
 community property, 656. See "Community Property."  
 compensation for services, rendered by one in behalf of all, 678.  
 contract by one cotenant, how far binding on other, 678.  
 contribution by cotenant, 687, 689, 691.  
 conveyance by cotenant, 678.  
     as ouster, 673.  
     breach of covenant of seisin, 1681.  
     how far binding on other, 678.  
     notice from record, 2018.  
     of minerals, 685.  
     of specific part of land, 679, 682.  
     of timber, 685.  
 coparcenary, 643. See "Coparcenary."  
 cotenant cannot create easement, 684, 1260, 1290, 1303.  
 cotenant in possession, duty to account, 674, 992.  
 cotenant's interest, as entitled to homestead exemption, 2298.  
     curtesy in, 837.  
     dower in, 758.  
     in dominant tenement, union with servient tenement in ownership, 1374.  
     subject to judgment lien, 2781.  
 created by gift to A and her children, 60, 62.  
 dedication by one cotenant, not effective against other, 1861.  
 devise to joint heirs, 1894.  
 easement in favor of one cotenant, 1200.  
 ejectment as between cotenants, 671.  
 entireties, 645. See "Entireties, Tenancy by."  
 exception of minerals in conveyance by cotenant, 685.  
 gas and oil, rights as to, 992.  
 general nature, 624.

[REFERENCES ARE TO PAGES.]

**CO-OWNERSHIP**—Continued.

- gift to two and the heirs of their bodies, 631.
- gift to two and their heirs, 632.
- gift to two for life, 632.
- grant of easement by cotenant, 684, 1260, 1290, 1303.
- grant of license by one cotenant, 685.
- homestead in cotenant's interest, 860.
- implied grant of easement, by single cotenant, 1290, 1303.
- improvements by cotenant, allotment on partition, 688.
  - compensation, 687, 689.
  - contribution for, 687.
- insurance as between cotenants, 690.
- joint easement in land of one, 1200.
- joint possession as notice to purchaser, 2232.
- joint tenancy, 625. See "Joint Tenancy."
- lease by cotenant, 683, 684.
- license by cotenant, 685.
  - to cut trees, 686.
- minerals, rights as to, 686, 990.
- notice to cotenant by record of deed, 2018.
- oil and gas, rights as to, 992.
  - to take minerals, 686.
- ouster of cotenant, 671, 2014.
  - as starting adverse possession, 2016.
  - erection by one cotenant, 673.
  - not presumed from conveyance by cotenant, 673.
  - not shown by appropriation of rents and profits, 672.
  - question for jury, 674.
  - recovery of mesne profits, 677.
- paramount lien acquired by cotenant, 693.
- paramount title, acquired by cotenant, 692, 698.
  - acquired by husband or wife of cotenant, 697.
- partition, by agreement, 700.
  - by judicial decree, 709.
  - effect on existing lien on undivided interest, 707.
  - effect on title, 703, 723.
  - persons entitled, 713.
- partnership property, 660. See "Partnership Land."
- payment of incumbrance, contribution, 691.
- payment of taxes, contribution, 691, 692.
- possession, no exclusive right in one cotenant, 673.
- possession of one cotenant as in behalf of all, 1930.
- purchase by cotenant of other's interest, 696.
- purchase of paramount title, 692.
  - at execution sale, 694.
  - at judicial sale, 695.
  - at tax sale, 695.
  - by cotenant's consort, 697.

[REFERENCES ARE TO PAGES.]

**CO-OWNERSHIP—Continued.**

- purchaser from one cotenant, notice by possession of other, 2227.
- redemption from foreclosure sale by cotenant, 695.
- redemption from tax sale by cotenant, 695, 697.
- release of easement by cotenant, 1377.
- release to cotenant, 46, 1569.
- removal of incumbrance by cotenant, 691.
- rents and profits, accounting by cotenant, 674, 992.
- repairs by cotenant, contribution, 689.
- rights as to minerals, 990, 992.
  - oil and gas, 992.
  - timber, 686, 993.
- taxes paid by cotenant, 692.
- tenancy by entireties, 645. See "Entireties, Tenancy by."
- tenancy in common, 640. See "Tenancy in Common."
- timber, rights of cotenant, 686, 993.
- use and occupation, liability of cotenant in possession, 677.
- voluntary partition, 700.
  - implication of warranty, 708.
- waste by cotenant, 990, 993.
  - see, also, "Community Property"; "Coparcenary"; "Entireties, Tenancy by"; "Joint Tenancy"; "Partnership Property"; "Tenancy in Common."

**COPARCENARY**

- accounting by coparcener for rents and profits, 674.
- action by coparceners, 698.
- contract or conveyance by coparceners, 644, 678.
- devise to coheirs, effect, 1894.
- nature, 643.
- no right of survivorship, 643.
- partition, 700, 703, 709.
- termination of holding, 644.

**COPYHOLD TENURE**

- nature, 22.

**CORODIES**

- nature, 10.

**CORPORATIONS**

- acknowledgment by, 1803.
- as cestuis que trust, 370.
- as trustees, 370.
- conveyance to nonexistent corporation, 1597.
- conveyances by, 1803, 2347.
  - acknowledgment, 1803.
  - execution of conveyance by officer, 1801.
  - sealing, 1802.

[REFERENCES ARE TO PAGES.]

**CORPORATIONS**—Continued.

- conveyances to, 2347.
- devise to, effect of dissolution, 1832.
- dissolution, as terminating tenancy at will, 225.
  - effect on holding of land, 475.
  - possibility of reverter, 475.
- franchise as property, 12.
- grant to, heirs unnecessary for creation of fee simple, 46.
- incapacity to hold as joint tenant, 636.
- not yet formed, conveyances to, 1597.
- power to acquire and convey land, 2347.
- restrictions as to holding of land, 2348.
- stock not real property, 13.
- stockholder taking acknowledgment, conveyance by or to corporation, 1730.
- words of limitation, 46.

**COSTS OF LITIGATION**

- element in damages for breach of covenant, 1714.

**COTENANCY**

- see "Co-Ownership."

**COTRUSTEES**

- rights and liabilities, 417.

**COURSES AND DISTANCES**

- as elements of description, 1652-1654.
- control by line of adjoining tract named, 1653.
- control by reference to monuments, 1653.

**COURT BARON**

- of manor, 21.

**COVENANT TO STAND SEISED**

- creation of power by, 1057.
- degree of relationship necessary, 1574.
- effect of recital of valuable consideration, 1629.
- nature, 349, 1572.
- power of revocation in, 1049.
- utilization in United States, 1576.

**COVENANTS**

- acceptance of deed poll as evidencing, 1402.
- accompanied by condition, 265.
- against particular trade, as running with land, 177, 179.
- as affected by alteration of instrument, 1643.
- as grant of easement, 1258.
- as reservation of easement, 1270.

[REFERENCES ARE TO PAGES.]

**COVENANTS**—Continued.

- as to existence of street, by reference to street in description, 1316.
- as to things not in esse, run only if assigns mentioned, 182, 1414.
- as to use of land, 1402.
  - enforcement in equity, 1425.
- as to waste, 982.
- by acceptance of deed poll, 1402.
- damages for breach, 264.
- dependent and independent, 130, 1504.
- distinguished from condition, 264, 271, 310.
- express and implied, 124.
- avored as against conditions, 271.
- for rent, 1471, 1486, 1504, 1511.
- for title, see "Covenants for Title."
- implication, statutory prohibition, 126.
- implied and expressed, 124, 125, 127, 1677.
- in deed and in law, 125, 127.
- in lease, 124-130.
  - against assignment, 159, 177.
    - as applicable to bequest, 162.
  - as to condition of premises, 137.
  - breach by landlord as eviction, 204.
  - dependent and independent, 130, 1504.
  - distinguished from condition, 264.
  - effect of assignment of leasehold, 166-169, 174.
  - implied, as to condition of premises, 137.
    - power to demise, 126.
    - quiet enjoyment, 125.
    - to give possession to lessee, 131-133.
  - lessee's liability after assignment, 166, 168, 1471.
  - lessor's continuing liability, 158.
  - liability of mortgagee of leasehold, 2424.
  - provision for re-entry on breach, 265.
  - running with land, 174.
    - as to things not in esse, 182, 1414.
    - continuing liability of lessee, 166, 1471.
    - continuing liability of lessor, 158.
    - entry by assignee unnecessary, 180.
    - for title, 1718.
    - not on sublease, 173.
    - on equitable assignment, 180.
    - on mortgage of leasehold, 2424.
    - on oral transfer of possession, 180.
    - reassignment, 183, 1472.
  - to pay rent, 1471, 1474, 1486, 1504, 1511.
  - to repair, 141, 146.
  - transfer of leasehold, effect, 166-169, 174.



[REFERENCES ARE TO PAGES.]

**COVENANTS**—Continued.

in lease—continued.

transfer of reversion, effect, 158.

transfer of right of action, 176.

injunction against breach, 264.

rule against perpetuities, applicability, 607.

running with land, 105, 174, 185, 1401, 1405, 1416, 1471, 1718.

against particular trade, 177, 1413.

as to erection and use of party wall, 1261-1266, 1416, 1417.

effect as relieving transferor, 158, 166, 1407, 1471.

effect of intention, 1415, 1418.

liability of mortgagee, 2424.

not in connection with conveyance, 1408.

to pay incumbrance, 1413.

to pay rent, 1471, 1474, 1486, 1504, 1511.

specific performance, 264.

to exercise power, effect, 1093.

to pay rent, action on, 1511.

apportionment, 1473, 1485.

passing of burden and benefit, 1471, 1474, 1486, 1504, 1511.

to stand seised, 349, 1573.

what constitutes covenant, 1402.

which touch and concern the land, 177, 1471.

words of, as grant of easement, 1258.

as reservation of easement, 1270.

words sufficient to create, 1403.

**COVENANTS FOR TITLE**

absence as charging subsequent purchaser with notice of defects, 2244.

action by person who has parted with land, 1721.

action by remote grantee, measure of damages, 1717.

after-acquired title as defense to action, 1678, 1708.

against incumbrances, 1683, 1711, 1720.

as affecting liabilities of parts of mortgaged land, 2511, 2512.

as determining equities as regards parts of mortgaged land, 2511.

as estopping to assert after-acquired title, 2117, 2122, 2126.

as precluding claim of dower, 797.

as precluding implication of way of necessity, 1299.

breach by existence of right to remove fixtures, 1681.

damages for breach, 1706.

costs of litigation as element, 1714.

effect of subsequent acquisition of title, 1678, 1708.

defect known to covenantor, 1690, 1693.

deficiency in quantity not breach, 1677.

expenses of litigation as element of damages, 1714.

express and implied, 124, 125, 127.

further assurance, 1706, 1721. See "Further Assurance."

general and limited, 1696.

[REFERENCES ARE TO PAGES.]

**COVENANTS FOR TITLE**—Continued.

- general and special, 1677.
- implied, 126, 1677.
- in lease, tenant not estopped to deny landlord's title, 191.
- interest as element of damages, 1714.
- not broken by deficiency in quantity, 1677.
- not broken by title in covenantee, 1678.
- oral exception, 1632.
- power to demise, 126.
- quiet enjoyment, 125, 1692, 1709, 1718. See "Quiet Enjoyment, Covenant of."
- release, 1722.
- right to convey, 1683.
- running with land, 178, 1718.
- seisin, 1679, 1706. See "Seisin, Covenant for."
- subsequent conveyance as breach, 1697.
- title in covenantee no breach, 1678.
- warranty, 1692, 1709, 1718. See "Warranty, Covenant of."
- warranty implied on partition, 708, 723.

**COVERTURE**

- effect on capacity to hold and transfer land, 2329.
- equitable rights of wife, 728.
- husband's estate during, 726.
- statutory rights of wife, 207.
  - see "Entireties, Tenancy by"; "Husband and Wife"; "Marriage"; "Married Women."

**CREDITORS**

- as bona fide purchasers, 2783, 2789, 2791.
- as within protection of recording statute, 2212, 2215, 2783, 2785.
  - effect of notice, 2215.
- conveyances in fraud of, 2280.
- exemption from, by terms of creation of estate, 2315.
- of donee of power, appointed property as assets, 1107.
- of husband, rights as against dower, 773, 788, 806.
  - effect of legislation increasing dower right, 810.
- of wife, rights as against curtesy, 843.
- rights as against appointed property, 1107.
- rights to crops, 881.

**CREDITORS' SUIT**

- effect as creating lien, 2780.
- to compel sale of land, 2150, 2151.
- to enforce decedent's debts, 2151.
- to subject right of dower consummate, 806.

**CRIMINALS**

- conveyance by or to criminal, 2353.
- mortgage to secure immunity from prosecution, 2419, 2420.
- murderer's right to benefit by murder, 2353.

[REFERENCES ARE TO PAGES.]

**CROPPER**

distinguished from tenant, 121.

**CROPS**

agreements for division of, 897.

ownership pending division, 899.

title prior to division, 898.

as passing by conveyance of land, 880.

as passing on foreclosure sale of land, 2436.

chattels for most purposes, 877.

constructive severance from land, 881.

as against prior mortgage on land, 2435.

contract for sharing, 897.

contract to sell, 886.

cropping contract, 121, 897.

departing tenant's right to, 888.

disseisor's rights, 895.

doctrine of emblements, 888.

dower in, 742.

excepted from conveyance, 878.

execution sale, effect as against mortgagee of land, 2436.

included in mortgage of land, 2434.

liens on, 2793.

for rent, 1522.

manure made from crops, legal character, 946.

mortgage of, 2368, 2370.

not interest in land within statute of frauds, 888.

on land held by entireties, 652, 654.

on mortgaged land, who entitled, 2434.

pass on conveyance of land, 878, 880.

pass to executors, 877.

personal or real property, 877.

ready for cutting, as not passing by conveyance of land, 880.

reservation as rent, 1462.

right to, on termination of tenancy, 888.

severance from land, 881.

sowing of pernicious crop by tenant, injunction against, 983.

subject to levy under execution, 881.

tenancy in common, in case of contract for cultivation on shares, 899.

tenant at sufferance, rights, 894.

to be planted, as subject of mortgage, 2370.

transfer of, as chattels, 883.

see "Emblements"; "Trees."

**CROSS LIMITATIONS**

nature, 582, 632.

[REFERENCES ARE TO PAGES.]

**CROSS REMAINDERS**

- after particular estates in fee tail, 514.
- express limitations necessary in deed, 514.
- implication in will, 514.
- nature, 513.
- vested or contingent, 515.

**CULTIVATION**

- of land on shares, 122.

**CURTESY**

- adultery, effect, 843.
- as mere possibility until wife's death, 827, 849.
- assignment unnecessary, 827.
- bar by adultery, 843.
  - adverse possession by third person, 843.
  - contract, 841.
  - divorce, 842.
  - terms of creation of estate, 839.
  - wife's conveyance, 837.
  - wife's devise, 838.
- birth of issue as prerequisite, 832.
  - illegitimacy of issue, 832.
  - subsequent death immaterial, 832.
- consummate, nature, 847.
  - sale under execution against husband, 847.
  - transfer, 847.
- contract of sale, right of purchaser's husband, 832.
- conveyance in fraud of, 837.
- devise by wife, effect, 838.
- divorce, effect, 842.
- effect of equitable conversion, 833.
- effect of married women's property acts, 848.
- exclusion by express provision, 840.
- in bare legal estates, 835.
  - equitable estates, 834.
  - estates in fee tail, 833.
  - incorporeal things, 833.
  - joint tenancy, 837.
  - mortgaged property, 835.
  - mortgagee's interest, 835.
  - mortgagor's interest, 835.
  - proceeds of condemnation of land, 833.
  - proceeds of judicial sale, 833.
  - proceeds of sale of land, 833.
  - remainders, 835.
  - rents, 833.
  - reversions, 835.

[REFERENCES ARE TO PAGES.]

**CURTESY**—Continued.

- in bare legal estates—continued.
  - sole and separate property, exclusion in creation of trust, 840.
  - tenancy in common, 837.
  - undivided share, 837.
  - wild lands, 830.
- in favor of alien, 2351.
- initiate, as freehold estate, 845.
  - as possibility of estate, 827.
  - effect on seisin, 846.
  - mode of valuation, 844.
  - not recognized in all states, 827.
  - not subject to legislative modification, 845.
  - sale under execution, 845.
  - statutory change into mere possibility, 849.
  - transfer, 845.
- marriage as prerequisite, 828.
- modification or abolition by statute, 848.
- nature, 826.
- not based on descent, 827.
- not recognized in community system, 660.
- priority to wife's debts, 843.
- release of, 841.
- seisin in wife, necessity, 828, 830.
- statutory alteration and abolition, 848.
- validity of legislation altering, 849.

**CUSTODY OF LAW**

- goods in, not subject to distress, 1520.

**CUSTOM**

- harvesting of crop, by outgoing tenant, 893.
- public rights by, 1542.
- removal of fixtures by tenant, 934.
- removal of manure by tenant, 948.
- time for payment of rent, 1476.
- withdrawal of subjacent support by mining, 1194.

**CY PRES DOCTRINE**

- in case of remainder to issue of person unborn, 518.
- in connection with charitable trusts, 436.

**D****DAM**

- bursting of, liability, 1184.
- change in, as affecting prescriptive right of flowage, 2071.
- covenant to repair, as running with land, 1414.
- easement of use of, grant of water power, 1242.

[REFERENCES ARE TO PAGES.]

**DAM**—Continued.

- easement to maintain, 1199.
- erection in stream, resulting liability, 1144.
  - statutory authority, 1149.
  - to injury of pre-existing mill, 1155.
- obstructing flow of stream, 1145.
- on floatable stream, 1546, 1547.
  - see "Flowage"; "Surface Water"; "Watercourse."

**DAMAGE**

- as requisite to action for appropriation of water, 1136.
  - discharging surface water on neighbor's land, 1165.
  - disturbance of easement, 1358.
  - increase of flow in stream, 1150.
  - obstructing flow of stream, 1169.
  - obstructing flow of surface water, 1169.
  - overflowing land, 1146.
  - pollution of air, 1127.
  - pollution of water of stream, 1144.
  - unreasonable noise, 1127.
- to building, as element in recovery for withdrawal of support, 1191.
- to land, see "Waste."

**DAMAGES**

- for breach of agreement assuming mortgage, 2500.
- covenant against incumbrances, 1711.
- covenant for quiet enjoyment, 129, 1709.
- covenant for seisin, 1706.
- covenant for title, 129, 1706.
  - action by remote grantee, 1717.
  - effect of subsequent acquisition of title, 1678.
  - expenses of litigation, 1714.
  - interest, 1713.
  - value at time of eviction, 1710.
- covenant of warranty, 1709.
- stipulation for support, 328.
- for detention of dower, 819.
- for failure to give lessee possession, 132.
- for waste, 981.

**DANGER**

- from use of neighboring land, right to immunity from, 1118.

**DANGEROUS CONDITIONS**

- on leased premises, liability, 137-148.

**DATE**

- of delivery of conveyance, presumptions, 1761.

[REFERENCES ARE TO PAGES.]

**DE DONIS CONDITIONALIBUS**

as giving rise to estate in fee tail, 54, 55, 70.  
in some states not in force, 55.

**DEAD WOOD**

tenant entitled, 958.

**DEATH**

as condition of delivery of conveyance, 1783-1787.  
as terminating tenancy at will, 225.  
delivery conditioned on, 1783.  
devise over in case of death, regarded as substitutionary, 78.  
effect on *interesse termini*, 115.  
estate to commence on grantor's, 551.  
gift over on, 78, 565, 574.  
of dedicator before acceptance, 1872, 1873.  
    devisee or legatee, effect, 1831, 1832, 1835.  
    donee of power, effect, 1069, 1070, 1071, 1076.  
    donor of power, 1044, 1101.  
    grantor or grantee, after conditional delivery, 1779.  
    joint donee of power, 1076.  
    joint licensee, 1220.  
    landlord, effect, 153, 185.  
    lessee, liability of estate, 169.  
    licensee, 1220.  
    licensor, effect, 1218, 1219.  
    member of class, objects of power, 1099.  
    mortgagee, 2520.  
        effect on power of sale, 1270, 2714.  
    mortgagor, 2471.  
        effect on power of sale, 2718.  
    party to contract for sale of land, 461.  
    party to periodic tenancy, 237.  
    party to tenancy at will, 225.  
    person entitled to rent, 1474, 1477, 1479.  
    person to consent to exercise of power, 1102.  
    purchaser, rights of succession, 461.  
    tenant under lease, 164, 185.  
    trustee, 420.  
        effect on power, 1070.  
    vendee, 462.  
    vendor, 461.  
    wife, effect on community property, 659.  
without issue, limitation over on, 65, 567, 575, 611.

**DEATH WITHOUT ISSUE**

as enlarging life estate to fee tail, 67.  
devise over on, 65, 567, 575, 611.

[REFERENCES ARE TO PAGES.]

**DEBT**

- for rent, 166, 1508-1511.
  - against assignee of leasehold, 170.
  - against lessee after assignment, 166.
  - by transferee of reversion, 158.
  - lack of title in lessor no defense, 188.

**DEBTS**

- charged on land by decedent, 2736.
- enforcement against interest of cestui que trust, 2317, 2319.
  - community property, 659.
  - contingent remainder, 525.
  - cotenant's interest, 639.
  - crops and trees, 881.
  - dower consummate, 806.
  - executory interest, 588.
  - fee tail estate, 72.
  - homestead, 849, 854, 2291, **2299**.
  - land held by entireties, 654.
  - life estate, 83.
  - partnership property, 660.
  - property appointed under power, 1106.
- execution for, 2146.
- express restriction on liability of property, 2315.
- of decedent, charge on land, 2736.
  - lien on land, 2793.
- pre-existing debt as consideration, 2248.
- priority of curtesy, 843.
- priority of dower right, 773, 788, 806.
- secured by mortgage, 2403, 2419.
- subjection of appointed property, 1107.
- subjection of land in equity, 2150.
  - see, also, "Creditors"; "Creditors' Suit"; "Decedent's Land"; "Execution, Writ of"; "Judgment"; "Lien"; "Mortgages."

**DECEDENT**

- conveyance to, 1594.

**DECEDENT'S LAND**

- curtesy, 826.
- directed to be sold, interest in proceeds personalty, 441.
  - not personalty, 439, 444.
- dower, 733.
- exoneration by personalty, 753.
- homestead rights, 854.
- lien of debts, 2793.
- sale for debts, 2150.
- sale free from curtesy, 843.
- sale free from dower, 806.



[REFERENCES ARE TO PAGES.]

**DECLARATION OF TRUST**

- apart from conveyance, 378.
- as part of conveyance, 378.
- consideration unnecessary, 383.
- delivery, 386.
- form, 374.
- language necessary, 375.
- necessity of writings, 377.
- signature, 374.
- unaccompanied by conveyance, 384.

**DECLARATIONS**

- as evidence of claim of right, for purpose of adverse possession, 1941.
- as showing adverse character of possession, 1933.

**DECREE**

- for assignment of dower, 822.
- partition, 720.
- sale under mortgage, 2687.
- effect of reversal, 2689.
- strict foreclosure, 2682.

**DEDICATION**

- acceptance, delay in, 1877.
- how indicated, 1874.
- necessity, 1872.
- in part, 1878, 1879.
- what constitutes, 1874, 1875.
- as creating determinable fee, 337.
- by husband, as bar of dower, 766.
- covenant, 1861.
- municipal corporation, 1861, 1862, 1878.
- state, 1862, 1878.
- United States, 1862.
- conditional, 1881.
- death of dedicator, 1873.
- delay in acceptance, effect, 1877.
- distinguished from estoppel, 1880.
- distinguished from grant, 1859, 1860.
- effect as regards title, 1884.
- evidence as to intention, 1862, 1863.
- for purpose of navigation, 1013, 1856.
- for what purposes, 1854.
- in favor of municipality, 1859.
- inference from lapse of time, 2079.
- inference from public user, 1864, 1867, 1876.
- injunction to restrain unauthorized use of land dedicated, 1886.
- intention to dedicate necessary, 1862.

[REFERENCES ARE TO PAGES.]

**DEDICATION**—Continued.

invalidity, effect as to adverse public use, 2084.  
 limited, 1881.  
 nature, 1854.  
 necessity of acceptance, 1872.  
 no particular beneficiary, 1858.  
 of mortgaged land, 2422.  
 of servient tenement, effect on pre-existing easement, 1375.  
 of street, by sale of land with reference to plat, 1321.  
 ordinarily gives right of user only, 1884.  
 presumption from lapse of time, 2079.  
 public user as evidence of intention, 1863.  
 qualified and conditional, 1881.  
 record of plat, 1871, 1873, 1879, 1883, 1885.  
 reference to nonexistent highway, 1871.  
 reservation in favor of dedicator, 1330, 1882.  
 retention of control by dedicator, 1883.  
 revocation, 1872.  
 sales with reference to plat, 1868, 1873.  
 sales with reference to street, 1871, 1873.  
 subject to existing incumbrance, 1861.  
 subject to reservations, 1881.  
 under statute, 1879, 1883.  
 who may effect, 1860.

**DEED**

acceptance, necessity, 1788.  
 estoppel by, reference to nonexistent way, 1317.  
 indenture and deed poll, 1590.  
 of grant, 1568.  
 of quitclaim, 1568.  
 of release, 1570.  
 properly means a sealed instrument, 1725.  
     see, also, "Conveyances"; "Deed of Trust"; "Delivery"; "Lease";  
     "Mortgages"; "Release."

**DEED OF TRUST**

acceptance as necessary, 387, 1794.  
 acknowledgment before trustee or beneficiary, 1730.  
 nature, 374.  
 to secure debt, 2394.  
     assignment, 2520.  
     exercise of power of sale, 2711, 2713, 2715.  
     foreclosure, 2698, 2699.  
     levy on grantor's interest, 2465.  
     nature, 2394.  
     release by trustee, 2635.

[REFERENCES ARE TO PAGES.]

**DEED OF TRUST**—Continued.

to secure debt—continued.

right to foreclose, 2698.

see, also, "Mortgages"; "Powers of Sale in Mortgage"; "Trustees"; "Trusts."

**DEED POLL**

acceptance, as creating covenant, 1402.

nature, 1590.

**DEFEASANCE**

by executory limitation over, 1623.

effect on dower, 770.

mortgage with separate defeasance, 2377.

effect of cancellation, 3474.

**DEFEASIBLE FEE**

as resulting from limitation over, 561.

nature, 548, 561.

**DEGREES**

of kinship, computation according to civil or canon law rule, 1897.

**DELEGATION**

of power, 1068.

**DELIVERY OF INSTRUMENT**

after alteration, necessity, 1641.

by agent, 1601, 1745.

by person filling blank, 1599.

conditional, 1762. See "Conditional Delivery of Conveyance."

conditioned on death, 1783.

reservation of right of withdrawal, 1785, 1787.

second delivery, 1787.

date, 1761.

evidence, 1748, 1759.

grantor's retention of control as criterion, 1747.

history of conception, 1738.

in escrow, 1762.

insufficient, protection of bona fide purchaser, 1743.

manual transfer not conclusive of delivery, 1742.

nature of requirement, 1736.

necessity as against bona fide purchaser, 2176.

not after grantor's death, 1747.

not necessarily manual, 1739, 1747.

of conveyance in trust, 386.

declaration of trust, 386.

mortgage, 2375.

transfer of mortgage, 2534.

[REFERENCES ARE TO PAGES.]

**DELIVERY OF INSTRUMENT**—Continued.

- on condition, 1746, 1762.
- part of execution, 1745.
- presumption, acknowledgment, 1752.
  - attestation clause, 1751.
  - grantee's possession of instrument, 1750.
  - grantor's possession of instrument, 1749.
  - record of instrument, 1754-1758.
  - signing and sealing, 1751.
  - voluntary settlement, 1750.
- presumption as to date, 1761.
- properly question of intention, 1738.
- ratification of undelivered conveyance, 1744.
- retention of instrument by grantor, not conclusive against delivery, 1740.
- to third person, 1740, 1741.
- with blank name of grantee, 1579.
  - see "Conditional Delivery of Conveyance."

**DEMAND**

- for assignment of dower, as prerequisite to suit, 818.
  - payment of rent, 293.
  - performance of condition, 292.
- of rent, forfeiture for nonpayment, 293.

**DEMESNE LAND**

- of manor, 21.

**DEMISE**

- use of word, implication of covenant for quiet enjoyment, 125.
  - see "Lease": "Years, Estate for."

**DEPOSIT**

- of conveyance in escrow, 1762.
- of title deeds, as mortgage, 2749.

**DESCENT**

- advancement to heir, 1912.
- ancestral lands, 1902.
  - effect of partition, 703, 705.
- at common law, 24, 1889.
  - from first purchaser, 1890.
- cannot be altered by terms of creation of estate, 51, 78.
- curtesy not acquired by, 827.
- degrees of relationship, 1897.
- disinheritance, 1915.
- doctrine of representation, 1899.
- dower estate not acquired by, 734.

[REFERENCES ARE TO PAGES.]

**DESCENT**—Continued.

- from adopted child, 1911.
  - alien, 2351.
  - illegitimate child, 1906.
  - interference with right, by terms of creation of estate, 2309, 2310.
  - person murdered to murderer, 2353.
  - purchaser under contract of sale, 461.
  - trustee, 421.
  - unmarried minor, 1905.
- males not preferred to females, 1891.
- of community property, 659.
  - contingent remainder, 527.
  - crops, 877.
  - easement in gross, 1226.
  - equitable interest, 419.
  - estate in reversion, by devise of remainder to testator's heir, 1893.
  - estate pur autre vie, 93, 94.
  - estate tail, 73.
  - executory interest, 589.
  - fee simple estate, 51.
  - fixtures, as part of land, 917.
  - fructus naturales, 877.
  - interest subject to power, 1099.
  - interest under trust, 419, 420.
  - interest under trust for conversion, 441.
  - land devised to heir, 1893.
  - land of unmarried minor, 1905.
  - land subject to contract of sale, 461.
  - manure on land, 949.
  - mortgaged land, 2422, 2702.
  - partnership land, 668, 669, 671.
  - possibility of reverter, 474.
  - remainder, 524, 1892.
  - rent, 1475.
  - reversion, 154, 1892.
  - rights in cemetery, 1253.
  - the feud, 24.
  - trees, 877.
  - trustee's legal estate, 420.
  - vested remainder, 524.
- on failure of trust for conversion, 448-452.
- or purchase, limitation in favor of heirs, 471, 529.
- partition, effect, 703, 705, 723.
- per stirpes and per capita, 1894, 1901, 1902.
- preferred to devise, 1893.
- realty or personalty for purpose of descent, trust for conversion, 441.
- representation of deceased heir, 1899.

[REFERENCES ARE TO PAGES.]

**DESCENT**—Continued.

- rules of, absolute in character, 51.
- through alien, 2352.
- to adopted child, 1909.
  - alien, 2352.
  - blood of original owner, 1902.
  - brothers and sisters, 1896.
  - child en ventre sa mere, 1907.
  - child omitted from will, 1849, 1915.
  - coheirs, as creating tenancy in common or coparcenary, 642, 643.
  - collateral kindred, 1896, 1902.
  - decedent's wife, 825.
  - husband and wife, tenancy by entireties, 647.
  - illegitimate children, 1906.
  - issue, 1894.
  - kindred of half blood, 1898.
  - murderer from person murdered, 2354.
  - parent, 1896.
  - surviving consort, 825, 1895.
  - two or more as coparceners, 643.
  - widow, 825.

**DESCRIPTION**

- of debt secured by mortgage, 2411, 2414.
- of land conveyed, as that not previously conveyed, 1672.
  - by boundaries, 1650.
  - by courses and distances, 1650.
  - by government survey, 1648.
  - by metes and bounds, 1650, 1670.
  - by recognized designation, 1645.
  - by reference to highway, 1660.
  - by reference to plat, 1650.
  - by reference to private way, 1313, 1656.
  - by reference to water, 1656.
  - by statement of quantity, 1654.
  - general and particular, 1670.
  - in terms of building, 1646.
  - ownership by grantor as aid in description, 1668.
  - practical location, 1001.
  - sufficiency, 1646, 1666.
  - to be subsequently selected, 1672.
- of party to deed, 1591.
  - see "Conveyances."

**DESERTION**

- of husband by wife, effect on dower, 795.
- of leased premises by tenant, 1492, 1585.
- of wife by husband, effect on curtesy, 843.

[REFERENCES ARE TO PAGES.]

**DESTRUCTION**

- of building, as extinguishing easement, 1364-1369.
  - effect on rent, 214.
- of chattels leased with land, effect on rent, 1463.
  - instrument of conveyance, effect, 1804.
  - leased premises, 1497.
  - party wall, 1366.
  - will, as revocation, 1838.

**DETERMINABLE FEE**

- as acquired by condemnation, 1887, 2167.
- as acquired by dedication, 337, 1887.
- as created by gift during widowhood, 80.
- as resulting from limitation over, 558.
- dower in, 770.
- in easement, 1228.
- in land acquired for public use, 1538, 1887, 2167.
- in public, as to highway, 1539.
- nature, 334.
- no remainder on, 481.
- option in grantee to terminate, 220.
- passes to grantee subject to possibility of termination, 336.
- possibility of reverter on, 472.
- preceding executory limitation, 560.
- question of existence, 336, 588.
- resulting from invalid limitation over, 588.

**DEVIATION**

- from highway, rights of public, 1535.
- from way, rights of, 1334.

**DEVICES**

- to bar dower, 750, 762, 771.

**DEVISE**

- after payment of debts, vested estate, 578.
- as bar of curtesy, 838.
- as execution of power, 1078, 1083, 1085.
- as including crops, 877.
- as passing easement, 1305.
- as passing fixtures, 918.
- by infant, 2341.
- by married woman, 2332.
- by tenant in fee tail, 72.
- by way of remainder, 555.
- by wife to husband, election as to curtesy, 842.
- death of devisee, effect, 1831-1835.
  - statutory provisions, 1832-1835.

[REFERENCES ARE TO PAGES.]

**DEVISE**—Continued.

- devisee and devisor, tacking of possessions, 1969.
- devisee liable for decedent's debts, 2150.
- during widowhood, 75.
- easement created by, 1261, 1288, 1305.
- executory devise, 552.
  - or remainder, 561, 563.
- for charity, 433.
- implied grant of easement on, 1288.
- in general terms, as exercise of power, 1085.
- in lieu of curtesy, 842.
- in lieu of dower, 782.
  - acceptance, 787.
  - effect of acceptance, 788.
  - election, 785.
- in lieu of homestead, 858.
- in remainder, 476.
- in trust, quantum of estate, 50.
  - partial failure, 394.
  - requisites, 389.
- lapse of, 1831.
- of community property, 660.
  - contingent remainder, 527.
  - easement, 1261, 1288.
  - equitable interest, 419.
  - "estate," carries fee simple, 48.
  - estate in futuro, 552.
  - executory interest, 590.
  - fee simple estate, 48-50.
    - statutory presumption, 51.
  - fee tail estate, 59-69, 72.
  - land, fixtures passing on, 917.
  - land, vegetation passing on, 877.
  - land for sale, interest in proceeds personalty, 440.
  - land previously sold, 462, 463.
  - life estate, 76-81.
  - mortgaged land, 2422, 2703.
  - partnership land, 668.
  - possibility of reverter, 474.
  - "property," carries fee simple, 49.
  - remainder, 524, 555.
  - right of re-entry, 315.
  - trustee's estate, 421.
- on condition, 272, 275.
- over, effect of failure, 587.
- over, effect of failure of preceding limitation, 587.
- over on death, 78, 565.



[REFERENCES ARE TO PAGES.]

**DEVISE**—Continued.

- over on death without issue, 63, 65, 79, 567, 575, 611.
  - sometimes presumed substitutional, 68.
- over on failure of issue, 65-67.
- power to, reservation in favor of creator, 1050.
- presumption in favor of vested interest, 495, 577.
- quantum of estate, presumption at common law, 48.
  - statutory presumption, 50.
- residuary, as applied to subject of lapsed or void devise, 1836, 1837.
- residuary, as passing after-acquired property, 1808.
- revocation, 1837, 1840.
- substitutionary devise, 1832.
- to A and her children, after-born children as cotenants with A, 62.
  - A and B and the survivor, 632, 634.
  - alien, 2350.
  - class, 556, 581, 1833, 1835.
  - corporation, attack on validity, 2349.
  - corporation, effect of dissolution, 1832.
  - executors, with power of sale, 1042, 1047.
  - husband and wife, 646.
  - husband or wife of witness to will, 1826.
  - joint heirs, taking by descent, 644.
  - joint tenants, death of cotenant, 1833.
    - failure as to one, 629.
  - murderer of testator, validity, 2353.
  - survivors, 580.
  - tenants in common, death of cotenant, 1833.
  - testator's heirs, 470, 1893, 1894.
  - persons not in being or not ascertained, 554.
  - two persons, death of one, 629, 630, 1833.
  - two persons for their lives, 74.
  - witness of will, validity, 1824.
- until marriage, as creating life estate, 80.
- way of necessity arising on, 1305.
  - see "Executory Devise"; "Revocation"; "Wills."

**DIE WITHOUT ISSUE**

- as condition of gift over, 65, 567, 575, 611.
  - see "Failure of Issue."

**DIGNITIES**

- not recognized in United States, 10.

**DISABILITY**

- alien, 2353.
- corporation, 2348.
- criminal, 2354.
- disseisee, 2288.

[REFERENCES ARE TO PAGES.]

**DISABILITY**—Continued.

- infant, 2333, 2341.
- insane person, 2342, 2346.
- intoxicated person, 2342.
- married woman, 730, 732, 2329, 2336.

**DISAFFIRMANCE**

- of infant's conveyance, 2334.
- of insane person's conveyance, 2344.

**DISCHARGE**

- of debt secured by mortgage, 2582, 2584.
- of mortgage, 2582.
- see "Mortgages."

**DISCLAIMER**

- by grantee in deed, 1789.
- by tenant, as ground of forfeiture, 266, 1999.
- by trustee, 422.
- making possession adverse, 1936, 1998, 2002, 2007, 2016, 2021.
- of conveyance by grantee, 1789.
  - landlord's title, 266, 1998.
  - terminating tenancy at will, 225.
- particular estate, effect on remainder, 521.
- title, as basis for estoppel, 2134.
- trusteeship, 422.

**DISCOVERY**

- as origin of titles, 1549.

**DISEASE**

- infection of leased premises, 137, 966.
- as terminating tenancy at will, 225.
- waste by infection, 966.

**DISINHERITANCE**

- how effected, 1915.
- only by devise of property, 1915.

**DISPOSSESSION**

- of tenant, as eviction, 196, 199.

**DISSEISEE**

- action of trespass by, entry necessary, 243.
- and disseisor, tacking of possessions, 1972.
- conveyance by, 2288.
- has mere right of entry, 31.
- right to crops, 895.
- transfer by, 32, 2288.
- see "Disseisin"; "Disseisor."

[REFERENCES ARE TO PAGES.]

**DISSEISIN**

- claim of title as element in, 1938.
- distinguished from adverse possession, 1923.
- effect on curtesy, 829.
  - dower right, 737.
  - trust, 363.
- elements, 31, 1938, 1981, 1985.
- limitation period for suit, 1917.
- nature, 31.
- of particular tenant, effect on contingent remainder, 507.
- pending curtesy initiate, 845.
  - see "Adverse Possession"; "Disseisee"; "Disseisor"; "Seisin."

**DISSEISOR**

- and disseisee, tacking of possessions, 1972.
- compensation for improvements by, 914.
- crops severed by, 895.
- distinguished from tenant at sufferance, 242, 243.
- ejectment by, 32.
- regarded as owner, 32.
- widow entitled to dower, 738.
  - see "Disseisee"; "Disseisin."

**DISTRESS**

- abolition of, effect on nature of rent, 1466.
- after lease in reversion, 156.
- as originally incident to tenure, 18.
- as waiver of right of forfeiture, 303.
- by executor or administrator, 1519.
- by grantor in conveyance conditionally delivered, 1781.
- chattels subject, 1519.
- effect of inclusion of chattels in lease, 1467.
- estoppel to deny title, 189, 195.
- lack of title in person distraining, 189.
- nature and method, 1516.
- not in favor of assignor against assignee, 189.
- off of leased premises, 1521.
- on goods of stranger, 1519.
- reversion necessary for, 1518.
- who may distrain, 1518, 1781.

**DISTURBANCE OF EASEMENT**

- by owner of other easement, 1357.
- remedy, 1358.
- what constitutes, 1351.

**DIVERSION OF WATER**

- by nonriparian owner, 1138.
- by riparian owner, 1132, 1140.
- prescriptive right, 2076, 2074, 2077.

[REFERENCES ARE TO PAGES.]

**DIVESTING CLAUSE**

- beneficiary entitled to enjoin waste, 952.
- effect of failure, 587.
  - of failure of preceding limitation, 586.
  - of power of disposition in first taker, 569.
  - on curtesy, 834.
  - on dower, 771.
- mode of operation, 558.

**DIVISION**

- of land acquired by accretion, 2113.
- see, also, "Partition."

**DIVISION WALLS**

- see "Party Walls."

**DIVORCE**

- condition of re-entry contemplating, 280.
- effect on curtesy, 842.
  - dower, 795.
  - husband's interest in wife's land, 727.
- tenancy by entireties, 656.

**DOCK**

- easement of utilizing, 1255.
- extinction by impossibility of user, 1364.

**DOMESTIC FIXTURES**

- annexed by tenant for life, right of removal, 930.
- annexed by tenant under lease, right of removal, 929.
- loss of right of removal, 934, 937, 938.
- removal after term, 934.

**DOMICILE**

- law of, controls in case of movables, 3.
- does not control in case of land, 4.

**DOMINANT TENEMENT**

- and servient in same hands, 1371-1374, 1399.
- change in mode of user, effect on easement, 1370.
- condemnation for public use, extinction of easement, 1364.
- conveyance passes appurtenant easement, 1227, 1304, 1393.
- express mention in creation of easement, necessity, 1232.
- in connection with easement, 1223.
  - profit à prendre, 1392.
- need not adjoin servient tenement, 1224.
- recovery in ejectment, includes appurtenant easement, 1228.

**DONOR AND DONEE**

- of power, 1047.

[REFERENCES ARE TO PAGES.]

**DOOR**

on leased premises, implied reservation of right of control, 1305.

**DOS DE DOTE**

nature of rule, 755.

**DOWER**

abandonment by wife, effect on dower, 795.  
 abatement of right of action for, death of widow, 821.  
 abolition or alteration by statute, 825.  
 acquisition not by descent, 734.  
 action for, 817.  
 adultery, effect, 794.  
 adverse possession against husband, effect, 821.  
 alienage, effect, 2351.  
 antenuptial agreement, as barring dower, 789.  
 appointment under prior power, effect, 1049.  
 as breach of covenant against incumbrances, 1687.  
     covenant for quiet enjoyment, 1698.  
     covenant for seisin, 1682.  
     covenant of warranty, 1698.  
 assignment, by agreement, 815.  
     by metes and bounds, 808.  
     computation of value, 812.  
     consideration of value of improvements, 813, 814.  
     demand previous to suit, 818.  
     effect as creating estate, 823.  
     husband's alienees protected, 811.  
     in annual interest of fund, 811.  
     in money, 811, 812.  
     in separate tracts, 810.  
     in single tract, 811.  
     necessity, 803, 808.  
     of statutory substitute, 826.  
     proceeding to compel, 817, 818.  
     protection of transferee of land, 809.  
     right of alternate occupation, 809.  
     sale for purpose of, 812.  
     share of rents and profits, 809.  
     under judicial decree, 822.  
     upon divorce for husband's fault, 796.  
     valuation for purpose of, 813.  
     who to make, 815.  
 bar by adultery, 794.  
     antenuptial contract, 789.  
     appointment under power, 770, 1049.  
     condemnation proceeding, 769, 800.  
     divorce, 795.

[REFERENCES ARE TO PAGES.]

**DOWER**—Continued.

bar—continued.

equitable jointure, 790.

foreclosure of mortgage, 772.

husband's contract of sale, 774.

husband's conveyance, 761, 763, 766.

husband's lease, 768.

husband's mortgage, 767.

husband's will, 782.

jointure, 789.

bona fide purchaser not protected, 767.

change in value of land, effect on dower, 813.

change of law, effect, 810.

claim as against bona fide purchaser, 767.

computation of value, 812.

condemnation of land, effect, 769, 800.

condition excluding, validity, 288.

consummate, after husband's death, 803.

as basis of claim for partition, 816.

injunction to restrain waste, 804.

not affected by sale in settlement of estate, 806.

not an estate, 803.

release, 805.

subjection to widow's debts, 806.

transfer, 804.

contract for relinquishment, 790.

adequacy of consideration, 793.

failure of consideration, 793.

contract of sale by husband, effect, 774.

conveyance by husband, effect, 761, 763, 766.

wife's joinder to release dower, 1592.

conveyance in fraud of, 761.

creditors of husband, rights as against dower, 773, 788, 806.

damages for detention, 819, 822.

death of widow, effect on claim for withholding dower, 822.

defeat by paramount title, 768.

devices to bar, 750, 762, 769, 771.

devise in lieu of, as question of intention, 782, 783.

effect of acceptance, 788.

liability for testator's debts, 788.

statutory presumption, 783.

divorce as bar of, 795.

assignment of dower on, 796.

election as regards devise in lieu of dower, 785.

as to jointure, 791.

between dower and homestead, 858.

enforcement of condition, 769.

lien, 741, 772.

[REFERENCES ARE TO PAGES.]

**DOWER**—Continued.

- equitable conversion, 742.
- equitable jointure, bar by, 790.
- equitable proceeding to compel assignment, 817.
- estate after assignment, 823.
- estoppel of husband's grantee to deny title in order to defeat, 760.
- estoppel to claim, 796, 798.
  - as against bona fide purchaser, 768, 796.
  - by covenants for title, 797.
- exception of dower interest on conveyance, 1617.
- exclusion by having title placed in another, 750.
- execution sale, effect on, 773.
- executory limitation, effect on, 770.
- exercise of power, effect on, 770, 772, 1049.
- exoneration from decedent's personality, 753.
- extends to land acquired by accretion, 2109.
- failure of husband's heirs, effect on, 769.
- foreclosure of mortgage, effect on, 772.
- husband's estate must be descendible to issue of marriage, 748.
- in ancestor's widow, effect on claim of heir's widow, 757.
- in bare legal estate, 751, 752.
  - cotenant's interest, 722, 758, 809.
  - crops and trees, 742.
  - determinable fee, after termination, 770.
  - easement, 746.
  - equitable estate or interest, 748.
  - equity of redemption, 753.
  - estate divested by executory limitation, 770.
  - estate for years, 748.
  - estate less than freehold, 747.
  - estate on condition, 769.
  - estate subject to special limitation, 770.
  - exchanged lands, 745.
  - fee conditional, 769.
  - fee simple, after failure of heirs, 769.
  - fee tail, effect of termination of estate, 769.
  - incorporeal things, 746.
  - joint tenant's interest, 758.
  - land added by accretion, 2109.
  - land conveyed in fraud of creditors, 781.
  - land jointly owned, 758.
  - land sold under execution or at judicial sale, 773.
  - land subject to mortgage, 845.
  - land subject to previous dower estate, 755.
  - license, 747.
  - life estate, 747.
  - mines and minerals, 743, 809.
  - money to be invested in land, 742.

[REFERENCES ARE TO PAGES.]

**DOWER**—Continued.

- in bare legal estate—continued.
  - mortgaged land, 753, 772.
    - effect of payment of mortgage, 753
  - mortgagee's interest, 752.
  - partnership land, 667, 759.
  - proceeds of judicial sale, 742, 801.
  - proceeds of land to be sold, 442.
  - profit à prendre, 746.
  - purchaser's interest under contract of sale, 750.
  - quarry, 743.
  - remainder, 755.
  - rent, 746, 747.
  - resulting trust, 749.
  - reversion, 755.
  - surplus proceeds of foreclosure sale, 773, 801, 815.
  - trees, 742.
  - vendee's interest under contract, 750.
  - vendor's interest, 750, 774.
  - wild and unimproved lands, 745.
- inchoate, 798.
  - as entitling to injunction against waste, 802, 988.
  - as entitling to share proceeds of foreclosure sale, 801.
  - as entitling to share proceeds of partition sale, 801.
  - as vested right, 799.
  - computation of value, 801.
  - injunction against waste, 802, 988.
  - not assertable against disseisor, 802.
  - not transferable, 803.
  - release by wife, 774, 802.
  - relinquishment as valuable consideration, 802.
  - right to redeem from mortgage, 2647.
- joinder in conveyance to release, necessity of wife's mention as party, 1592.
- joinder in mortgage to release, 754.
- jointure as bar, 790.
  - forfeiture of provision by misconduct, 794.
  - inadequacy of provision, 792.
  - ineffectiveness of provision, 792.
- judicial sale, effect on, 773.
- lease by husband, effect on, 768.
- limitations and laches, 820.
- life estate after assignment, 823.
  - conveyance, 823.
  - mortgage, 2367.
  - partition as against tenant, 824.
  - payment of incumbrances, 823.



## [REFERENCES ARE TO PAGES.]

**DOWER**—Continued.

- life estate after assignment—continued.
  - payment of taxes, 823.
  - right to crops, 824.
- modification by statute, 809, 825.
- mortgage prior to, 772.
- nature of, 733.
- not recognized in community system, 660.
- out of dower, meaning of expression, 756.
- partition, effect, 706, 722, 758, 816.
- partition sale, effect, 759, 801, 816.
- priorities, bona fide purchaser, 767.
  - creditors of husband, 773, 788, 806.
  - mortgage given lender of purchase money, 741.
  - purchase money mortgage, 2564.
  - vendor's lien, 740, 2757.
- proceeding to compel assignment, 817, 818.
- quantum of husband's estate, 747.
- release of, 774.
  - acknowledgment necessary, 780.
  - avoidance of conveyance containing, 781.
  - by contract, 791.
  - by infant married woman, 775.
  - by joinder in conveyance, 779, 1592.
    - does not estop to assert after-acquired title, 2122.
    - effect of subsequent avoidance of conveyance, 781.
  - by joinder in mortgage, effect of nullity of mortgage, 781.
  - directly to husband, 777.
  - husband's joinder necessary, 775.
  - procurement by fraud, 801, 802.
  - statute of frauds, 776.
  - to whom available, 776.
  - to whom made, 776, 777.
- seisin in husband, necessity, 735, 737.
  - duration, 739.
- separation agreement, effect on, 778.
- statutory change, 809, 825.
- summary proceedings to compel assignment, 818.
- termination of husband's estate, 769, 770.
- transitory, 739.
- valuation of land for purpose of, 813.
- vendor's lien, priority, 740, 2757.
- waste by tenant in, 824.
- widow's quarantine, 807.

**DRAINAGE**

- into stream, riparian right, 1145, 1148, 1162.
- of marsh on neighbor's land, 1165.

[REFERENCES ARE TO PAGES.]

**DRAINAGE**—Continued.

- of riparian land, interference by obstruction of flow of stream, 1145.
- of surface water, 1162, 1175.
- statutory authority, 1310.
- to detriment of owner of hunting privilege, 1390.

**DRAINS AND DRAINAGE**

- apparent user of land for, implied grant of easement, 1278.
- as within covenant against incumbrances, 1685, 1687.
- creation of easement by statute, 1310.
- easement of, 1238, 1274, 1279, 2036.
  - by prescription, 2036.
  - effect of change in dominant tenement, 1346.
  - implied grants, 1274, 1279.
- for disposal of surface water, 1162.
- implied grant corresponding to prior use, 1274, 1279.
- in or on adjoining land, 1162, 1167, 2038.
- license to maintain, 1203.
- prescriptive right to maintain, 2061.
  - see, also, "Drainage."

**DUMPOR'S CASE, RULE IN**

- nature of, 298, 300.

**DURESS**

- conveyance under, 1639.

**DUST**

- injury to adjoining owner, 1124.

**E****EARTH**

- as subject of ownership, 866.
- removal as waste, 955.

**EASEMENTS**

- abandonment, 1377.
- abandonment by mortgagor, mortgage not affected, 2422.
- acquisition for public use, under power of eminent domain, 2162.
- adaptation of servient tenement, 1348.
- adverse possession of land, does not extinguish, 1980.
- affirmative and negative, 1199.
- agreement for, part performance, 1211.
- alterations and repairs in connection with exercise, 1348.
- annexation of article to land for exercise of easement, right of removal, 922.
- appropriation of water of stream, 1234.

[REFERENCES ARE TO PAGES.]

**EASEMENTS**—Continued.

- appurtenant and in gross, 1223, 1229, 1232.
- appurtenant, cannot be separated from dominant tenement, 1228.
  - construction of grant in favor of, 1229, 1230.
  - must contribute to enjoyment of dominant tenement, 1223.
  - passes on transfer of dominant tenement, 1227.
  - to incorporeal hereditament, 1225.
  - to land not yet acquired, 1233.
- appurtenant or in gross, construction of grant, 1231.
- effect of prescription, 1232.
- as against subsequent purchaser of servient tenement, 1217.
- as breach of covenant against incumbrances, 1684.
  - covenant for quiet enjoyment, 1700.
  - covenant for seisin, 1681.
  - covenant of warranty, 1700.
- as not involving active duties, 1198.
- assertion of, as adverse possession, 1945.
- bona fide purchaser of land, 1385.
- cessation of purpose, 1363.
- change in dominant tenement, effect, 1345, 1370.
- change in mode of exercise, 1330.
- change in place of exercise, 1339.
- change on servient tenement, effect, 1369.
- condemnation, 1261, 1310.
- condemnation of servient tenement, 1376.
- conveyance of servient tenement, 1385.
- corresponding to pre-existing quasi easement, 1272.
- created in conveyance of other land, notice from record, 2188.
- creation, condemnation proceeding, 1261, 2161.
  - conveyance with appurtenances, 1291.
  - covenant operating as grant, 1258.
  - decree in partition, 1233.
  - devise, 1611.
  - estoppel, 1313, 1327.
  - exception, 1266, 1606, 1607, 1612.
  - grant, 1328.
  - grant by one cotenant, 684, 1260.
  - implied grant, 1302.
  - oral grant followed by improvements, 1258.
  - payment of damages for nuisance, 1261.
  - prescription, 1232, 1309, 1344, 1347, 2028, 2071.
  - reference to supposed ways, 1313, 1314.
  - reservation, 1266, 1328, 1606, 1610.
  - statute, 1310.
- dedication of land does not affect, 1861.
- devise, 1261, 1288, 1305.
- distinguished from licenses, 1201, 1202.

[REFERENCES ARE TO PAGES.]

**EASEMENTS**—Continued.

- distinguished—continued.
  - natural rights, 1201.
  - profits à prendre, 1201.
- disturbance, 1351, 1358.
  - action on the case, 1358.
  - injunction against, 1360.
  - notice as prerequisite to action, 1358.
- dominant tenement, nature, 1223.
  - need not adjoin servient tenement, 1224.
  - transfer passes easement, 1227.
- dower in, 746, 747.
- duration, fee simple or fee determinable, 1228.
- enforceable against adverse possessor of land, 1980.
- equitable easement, 1425, 1434.
- estoppel to assert, 1376, 1379, 1381.
- estoppel to deny, 1313, 1327.
- exception, 1266, 1607, 1612.
- express reservation, 1266.
- extent and mode of user, 1328, 1344.
- extinction, 1376.
  - adverse user of land for limitation period, 1384.
  - cessation of purpose, 1363.
  - change in dominant tenement, 1345.
  - change in user of dominant tenement, 1370.
  - dedication of servient tenement, 1375.
  - destruction of building, 1364, 1365, 1368, 1369.
  - estoppel to assert, 1376, 1379, 1381.
  - excessive exercise, 1370.
  - executed license, 1381.
  - expiration of time, 1228.
  - express release, 1376.
  - implied release, 1378.
  - impossibility of exercise. 1364, 1365, 1368, **1378**.
  - in favor of bona fide purchaser, 1385.
  - nonuser, 1379.
  - obstruction for limitation period, 1384.
  - party wall, 1366-1368.
  - release, 1376, 1378.
  - separation from dominant tenement, 1363.
  - terms of creation, 1228.
  - unity of possession or title, 1200, 1371-1374.
  - wrongful exercise, 1370.
- failure of title to, as breach of covenant, 1700.
- failure to exercise, 1379.
- for life, 1226, 1229.
- grant of, 1328.
  - by cotenant, 684, 1260, 1290, 1303.

[REFERENCES ARE TO PAGES.]

**EASEMENTS**—Continued.

## grant of—continued.

- by mortgagor, mortgage not affected, 2422.
- construction, 1328, 1331, 1344.
- construction in favor of grantee, 1329.
- incidental covenant as running with land, 1410-1412.
- necessity of seal, 1257.
- or of ownership, 1260.
- with appurtenances, 1291.

## implied grant, 1270.

- as properly express grant, 1271, 1302.
- based on necessity, 1295.
- by cotenant, 1290, 1303.
- contemporaneous conveyances, 1288, 1305.
- corresponding to pre-existing quasi easement, 1272.
- from necessity, 1295.
- in land not belonging to grantor, 1290, 1303.
- necessity of user, 1284.
- not if contrary intention, 1274.
- of easement of necessity, 1295.
- on conveyance of land for factory, 1295.
- on conveyance of land for railroad purposes, 1296.
- on devise, 1288.
- on judicial sale, 1289.
- on lease, 1288.
- on mortgage, 1289.
- on partition, 1289.
- on release, 1289.
- on severance of ownership, 1272.
- permanent user, 1284.
- properly rule of construction, 1302.
- reference to plat depicting way, 1319.
- reference to supposed way, 1313, 1324.

## implied reservation, 1270, 1272.

- corresponding to existing user, 1292.
- effect of covenant against incumbrances, 1685.

## impossibility of exercise, 1364, 1368.

## in derogation of natural rights, 1195.

## in favor of cotenant of servient tenement, 1200.

## in favor of different persons in same land, 1200.

## in gross and appurtenant, 1223, 1229, 1232.

- descent, 1226.
- duration, 1269.
- how far recognized, 1224.
- or appurtenant, construction of grant, 1231, 1232.
- transfer, 1226.

## in highway in favor of abutting owners, 1531.

## in one's own land, 1200.

[REFERENCES ARE TO PAGES.]

**EASEMENTS**—Continued.

- interference by owner of other easement, 1357.
- involve no active duties, 1198.
- license privilege distinguished, 1211.
- merger in ownership, 1200, 1371-1374.
- misuse of, 1331, 1370.
- mode of exercise, 1328, 1345.
- nature, 1198.
- negative and affirmative, 1199.
- negligent conditions on servient tenement, liability, 1350.
- new species of easements, judicial recognition, 1256.
- no duty of active performance, 1247.
- no exclusive occupancy, 1255, 1260.
- nonuser, effect, 1379.
- notice of, 2226.
- obstruction of exercise, 1351, 1353, 1357, 1384.
  - abatement, 1362.
  - action for, 1358.
  - injunction, 1360.
  - for limitation period, 1384.
  - gates over way, 1354.
  - under license, 1381.
- of necessity, 1295, 1296.
  - for support for building, 1294.
  - on conveyance of minerals in place, 1296.
  - to remove chattels sold, 1216.
  - to remove fixtures sold, 1216.
  - to remove trees sold, 1216.
  - ways, 1297. See "Way of Necessity."
- oral gift, improvements by donee, 1211, 1327.
  - prescriptive user under, 2043.
- partial release, 1377.
- partition of servient tenement, 711.
- partition proceeding, creation in, 1261.
- place of exercise, 1338.
- practical construction of grant, 1329.
- prescription, creation by, 1232, 1309, 1344, 1347, 2028, 2071.
  - protection of innocent purchaser, 1387.
- reciprocal, 1294.
  - by prescription, 2075.
- reference to plat as creating, 1319, 1320.
- release, 1376, 1378.
- repairs on servient tenement, 1199, 1348.
  - apportionment of cost, 1249.
- reservation, 1266, 1328, 1607, 1610.
  - construction in favor of grantee, 1329.
  - necessity of words of inheritance, 1617.

[REFERENCES ARE TO PAGES.]

**EASEMENTS**—Continued.

## reservation—continued.

- servient tenement, alterations and repairs, 1348.
  - effect of increase in burden, 1346.
- nature, 1223.
- need not adjoin dominant tenement, 1224.
- partition, 711.
- rights of user by owner, 1351, 1352.

## specific easements.

- access to highway, 1313, 1531.
- air, 1233, 1234. See "Air."
- appropriation of water, 1234, 1235, 1237, 1364, 1390. See "Water"; "Watercourse."
- aqueduct, 1236.
  - implied grant, 1274, 1279, 1283.
  - rights of servient owner, 1238.
- artificial watercourse, 1236, 1237, 1274, 1279, 1283.
- burial of dead, 1253.
- church pew, 1250.
- conducting water across land, 1236.
- drainage, 1236.
- encroachment by building, 1255, 1276.
- entry to take water, 1235, 1364, 1390.
- flowage of land, 1234, 1275.
- light passing to windows, 1233.
  - from highway, 1313.
  - implied grant, 1276, 1313.
- maintenance of dam, 1199.
- maintenance of fence, 1199.
- mixing manure on another's land, 1256.
- monument on another's land, 1255.
- obstructing flow of stream, 1234.
- partition fence, 1247.
- party wall, 1244, 1261, 1340, 1416.
- passage of air, 1233.
- percolating water, 1235.
- pews, 1250.
- placing articles on another's land, 1255.
- placing clothes lines on another's land, 1255.
- pollution of air, 1234.
- pollution of stream, 1234.
- preservation of level of pond, 1276.
- reservoir on another's land, 1255.
- right of way, 1249.
  - implied grant, 1279, 1283, 1297.
- signboard on another's land, 1255.
- stairway on another's land, 1255.
- supply of water, 1235.

[REFERENCES ARE TO PAGES.]

**EASEMENTS**—Continued.

specific easements—continued.

support by lower of upper part of building, 945, 1244.

support of building from adjacent property, 1243.

support of land and buildings, 1242, 1243, 1275, 1294, 1296.

easement of necessity, 1294, 1297.

implied grant, 1275.

support of trees belonging to another, 882.

surface water, 1235.

swinging shutters over another's land, 1255.

taking of water, 1235, 1237, 1364, 1390.

tying horses on another's land, 1256.

use of wall as party wall, 1245, 1261, 1340, 1414, 1416.

utilizing another's dock, 1255.

wall on another's land, 1262.

water in stream, 1234.

water power, 1240.

way, 1249, 1279, 1283.

implied grant, 1279, 1283.

wharfing out into navigable water, 1027.

withdrawal of support from surface of land, 1242.

spurious, 1199.

statutory proceeding for, 1310.

subdivision of dominant tenement, 1346.

suspension, 1367, 1371.

tenancy in common in, 1200.

transfer, 1226.

unity of ownership, effect, 1200, 1371.

wrongful exercise as trespass, 1331.

see, also, "Adjoining Owners"; "Air"; "Aqueduct"; "Artificial Watercourse"; "Building"; "Drainage"; "Drains"; "Equitable Restrictions"; "Fences"; "Flowage"; "Highway"; "Licenses"; "Light"; "Party Wall"; "Percolating Water"; "Prescription"; "Profits à Prendre"; "Restrictive Agreements"; "Streams"; "Support"; "Surface Water"; "Water"; "Watercourse"; "Way, Easement of."

**EAVES**

adverse possession of land under, 1929.

as part of house named as boundary, 1652.

projecting over another's land, 864.

**EAVES DRIP**

liability of owner of building, 1186.

**ECCLESIASTICAL COURTS**

jurisdiction of decedent's movables, 2.



[REFERENCES ARE TO PAGES.]

**EDGE**

- of highway, referred to as boundary, 1662.
- of stream, referred to as boundary, 1658.

**EJECTMENT**

- against licensee, not revocation of license, 1218.
  - tenant at will, 215.
  - tenant holding over, 252.
- as between cotenants, 671.
  - election to forfeit lease, 302.
  - lis pendens, 2268.
- avoidance of infant's conveyance by, 2335.
- by adverse possessor, 1979.
  - cestui que trust, 366.
  - cotenants, joinder, 699.
  - disseisor, 32.
  - dowress, 817.
  - equitable owner, 366.
  - grantee of government, 1562.
  - holder of title based on adverse possession, 1979.
  - joint tenants and coparceners, 699.
  - landlord against tenant, 186.
  - lessee before entry, 117.
  - mortgagee, 2423, 2426.
  - mortgagor, 2424.
  - municipality, in case of land dedicated, 1884.
  - owner of land subject to highway, 1525.
  - proprietor of cemetery lot, 1254.
  - tenant at will, 215.
  - tenant for years, 119.
  - tenant under lease, 119.
  - tenants in common, 699.
- estoppel to deny title in, 195.
- for breach of condition, 305.
  - dominant tenement, appurtenant easement included in recovery, 1228.
  - interference with easement, 1358.
  - interference with pew right, 1359.
  - intrusion in air space, 865.
  - land dedicated, 1884.
  - land subject to highway, 1525.
- to enforce forfeiture, 306, 308.
  - obtain assignment of dower, 817.
- transfer of right of action, 2291.

**ELECTION**

- against conversion in equity, 452.
  - devise of particular estate, effect on remainder, 521, 522.
- as between conflicting descriptions, 1772.

[REFERENCES ARE TO PAGES.]

**ELECTION**—Continued.

- as to forfeiture for breach of condition, 297, 300.
  - jointure to bar dower, 791.
  - location of land excepted, 1615.
- between curtesy and devise by wife, 842.
  - dower and homestead, 825, 858.
  - dower and statutory provision, 825.
  - dower and testamentary provision, 785.
- by widow, as to dower, 785, 825, 858.
  - as to homestead, 858.
  - release of dower to husband, 778.
- in favor of dower, sequestration of estate refused, 522.
- to declare whole mortgage debt due, 2677.

**ELECTRIC WIRES**

- as additional servitude on highway, 1528, 1529.

**ELECTRICITY**

- failure to furnish on leased premises as eviction, 204.

**ELEGIT, WRIT OF**

- nature, 2146.
- see, also, "Execution."

**ELEVATED RAILWAY**

- in street, compensation to abutting owner, 1532.
- prescriptive right to maintain, 2071.
  - change of structure, 2061.

**ELEVATORS**

- defects in, liability of owner of building, 147, 1351.
- failure to furnish proper service as eviction, 204.
- landlord's liability for defects, 147.

**EMBLEMENTS**

- as meaning annual crops, 876, 889, 890.
  - fruit, 890.
  - grass, 890.
  - hops, 890.
  - straw, 890.
  - trees, 889.
  - turpentine (scrape), 890.
- ploughing and manuring land insufficient, 888.
- rights of disseisor, 895.
  - executor of tenant for life, 891.
  - lessee of life tenant, 891.
  - outgoing tenant, 84, 888.
  - tenant at sufferance, 894.
  - tenant at will, 891.
  - tenant for years, 892.

[REFERENCES ARE TO PAGES.]

**EMBLEMENTS**—Continued.

- rights of disseisor—continued.
  - tenant from year to year, 894.
  - tenant pur auter vie, 891.
- second crop from same sowing, 891.
  - see, also, "Crops"; "Trees"; "Vegetation."

**EMINENT DOMAIN**

- acquisition of easement under power of, 1261, 1310.
- acquisition of land under implied grant, 1296, 1305.
- additional servitude in highway, 1527.
- appropriation of equitable easement, 1428, 2162.
- appropriation under, 2160.
- cessation of public use, effect on title, 2166.
- compensation for additional servitude in highway, 1528.
  - deprivation of access to navigable waters, 1022.
  - deprivation of benefit of restrictive covenant, 1428, 2162.
  - deprivation of right of wharfing out, 1027.
  - deprivation of use of water, 1132.
  - destroying access to water, 1022.
  - establishment of highway, 1524.
  - establishment of turnpike, 1539.
  - flowage of land, 1148, 1169.
  - interference with easements in highway, 1531.
  - location of park or square, 1540.
  - taking of easement, 2161, 2162.
  - taking of "fee," 2161.
  - vacation of highway, 1535.
- condemnation of husband's estate, effect on dower, 769, 800.
- condemnation of leased premises, effect on rent, 1496.
- damages, when regarded as land, 456.
- establishment of highway, nature of proceeding, 1524.
- interests subject to appropriation, 2161.
- mode of exercise, 2163.
- nature of interest acquired, 1310, 2161, 2166.
- obstruction of stream by dam, statutory authority, 1149.
- power of, 2160.
  - does not preclude claim of way of necessity, 1309.
- purchase money for land taken, is personalty, 456.
- rights based on restrictive covenants, compensation for taking, 1428, 2162.
- stipulation restricting recovery of damages, as within covenant against incumbrances, 1687, 1688.
- subway not taking of property, 1533.
- taking under, not breach of covenant of warranty or for quiet enjoyment, 1695.
- time of passing of title, 2164.
  - payment of compensation, 2164, 2165.
- utilization of highway, additional servitude, 1527.

[REFERENCES ARE TO PAGES.]

**EN VENTRE SA MERE**

child, legal rights of, 503, 600, 1907.

**ENCROACHMENT**

on another's land, prescriptive right, 2037.

on space above land, as tort, 864.

**ENEMY**

destruction by public enemy, tenant's liability, 140, 977.

**ENFORCEMENT**

of forfeiture, 305-319.

**ENGINES**

as trade fixtures, 928.

**ENJOYMENT**

rights of, incident to ownership, 862, 1118.

**ENLARGEMENT**

of estate, provision for, 565.

**ENROLLMENTS, STATUTE OF**

avoidance by lease and release, 351.

purpose and effect, 349, 1572.

**ENTAIL**

see "Fee Tail Estate."

**ENTIRETIES, TENANCY BY**

abolition by married women's property acts, 650.

conveyance by husband, 652, 653.

wife, 653.

creation, 645.

by descent to husband and wife, 647.

conveyance or devise to husband and wife necessary, 646.

expression of contrary intention, 646.

presumption of intention, 647.

crops grown on land, 652, 654.

liability for husband's debts, 654.

debts of husband, enforcement, 654.

divorce, effect as terminating, 656.

for life, 646.

husband's rights of control, 652, 653.

in timber, 649.

individual debts, enforceability against land, 654.

joint debts enforceable against, 655.

lease by husband, 652.

[REFERENCES ARE TO PAGES.]

**ENTIRETIES, TENANCY BY** Continued.

- liability for husband's debts, 654.
- not recognized in all states, 651.
- partition not permissible, 655, 712.
- remainder to heirs, 632.
- rents and profits, husband's rights, 652.
- right of survivorship, 653.
- statutory modifications, 650.
- statutory presumption in favor of tenancy in common, applicability, 650.
- survivorship, 645.
- termination by divorce, 656.
- timber cut on land, 650.

**ENTRY**

- as mode of enforcing forfeiture, 305, 308.
- as requisite to running of covenant, 180.
- by agent, 1956.
  - assignee of leasehold, 164.
    - necessity for running of covenant, 180.
  - disseisee, necessity for action of trespass, 243.
  - landlord, for temporary purpose, not eviction, 202.
    - legality, 117, 119.
    - on tenant's abandonment, 1585.
    - permissible for limited purposes only, 119.
  - lessee, necessity, 114-117.
- for breach of condition, 305.
- foreclosure of mortgage by, 2684.
- interrupting adverse possession, 1956.
- necessity for enforcement of forfeiture, 306.
- on public lands, 1552, 1553, 1556.
  - state land, 1559.
- right of, not transferable, 313, 315.
- to avoid infant's conveyance, 2335.
- under invalid lease, 216, 217.
  - lease, not necessary to create estate, 116.
  - lease in reversion, 156.
  - permission, as creating tenancy at will, 217.
  - public land law, 1552, 1553, 1557, 1559.
  - see "Adverse Possession"; "Condition"; "Trespass."

**ENTRY, RIGHT OF**

- not transferable, 313.
- not within rule against perpetuities, 603.

**ENTRY, WRIT OF**

- foreclosure of mortgage by, 2685.

[REFERENCES ARE TO PAGES.]

**EQUITABLE ASSIGNMENT**

sufficiency for running of covenant, 180.  
see "Subrogation."

**EQUITABLE CHARGE**

by express provision, 1422, 1423, 2734-2742.  
favored as against condition, 272.  
see "Equitable Liens."

**EQUITABLE CONVERSION**

see "Conversion, Equitable."

**EQUITABLE EASEMENT**

binding on purchaser with notice, 1425.  
created by party wall agreement, 1423.  
nature, 1425, 1435.  
see "Equitable Restrictions."

**EQUITABLE ESTATES**

creation, 374, 391.  
curtesy in, 834.  
dower in, 148.  
execution levy on, 2148.  
limitation of fee simple in, 47.  
mortgage of, 2368.  
nature, 362-369.  
restriction as to alienation, 2317, 2319.  
seisin for purpose of curtesy, 831.  
subject to judgment lien, 2180.  
    rule against perpetuities, 606.  
    rule in Shelley's case, 541.

**EQUITABLE JOINTURE**

as barring dower, 790.

**EQUITABLE LIENS**

agreement for security, 2743.  
agreement to give mortgage, 2746.  
bona fide purchaser protected, 2740.  
charge of annuity, 2735.  
    debts, 2736.  
    legacy, 2736.  
    personal support, 2735.  
created by party-wall agreement, 1423.  
defective mortgage, 2372, 2373, 2746.  
deposit of title deeds, 2749.  
does not entitle lienor to possession, 2426, 2427.  
enforcement against subsequent purchaser, 2739.

[REFERENCES ARE TO PAGES.]

**EQUITABLE LIENS**—Continued.

- equitable mortgage, 2743.
- express charge on land, 2734.
- for improvements, 2750.
  - owelyty of partition, 2751.
  - part of cost of party wall, 1423.
  - price of land, 2752.
  - support to be furnished, 329, 2735.
- imperfect mortgage, 2746.
- mode of enforcement, 2741.
- nature, 2734.
- personal obligation, 2742.
- vendee's lien, 2765.
- vendor's lien, express reservation, 2761.
  - persons affected, 2756.
  - priority over dower claim, 2757.
  - transfer, 2758.
  - waiver, 2759.
  - when arises, 2752.
- vendor's lien before conveyance, 2763.

**EQUITABLE MORTGAGE**

- nature, 2372, 2373, 2743.
- see "Equitable Liens."

**EQUITABLE OWNERSHIP**

- classes of, 337-464.
- see "Conversion, Equitable"; "Equitable Estates"; "Trustees"; "Trusts."

**EQUITABLE POWERS**

- nature, 1046.

**EQUITABLE REMAINDERS**

- contingent, 516.
- failure of particular estate, effect, 522.
- nature, 515.
- question as to existence, 516.
- time of vesting, 505.

**EQUITABLE RESTRICTIONS**

- as to use of land, 1425.
- as within covenant against incumbrances, 1686.
- change in neighborhood, effect, 1455.
- effect of alteration of neighborhood, 1455-1458.
- effective as against disseisor, 1337.
- enforced against purchaser with notice, 1425.
- general plan of improvement, 1446.

[REFERENCES ARE TO PAGES.]

**EQUITABLE RESTRICTIONS**—Continued.

- injunction to enforce, 1427.
- notice by incorporation in prior deed, 1439.
  - record, 2183, 2190.
- record, 2183.
- violation for public purpose, compensation, 1428, 2162.
- who may enforce, 1442, 1446.
- who subject to enforcement, 1439.

**EQUITABLE SEPARATE ESTATE**

- of wife, 729.

**EQUITABLE WASTE**

- nature, 953, 967, 978, 979.
  - see "Waste."

**EQUITIES**

- conveyances of, capable of record, 2183.
- necessity of word "heirs," 47.
- on assignment of mortgage, 2536.
- on transfer of mortgage as subject to, 2542.
- on transfers of parts of mortgaged land, 2505.
- prior to judgment lien, 2784.
- purchasers with notice not protected, 2171.
  - within protection of recording law, 2211.

**EQUITY**

- acts in personam, 2154.
- appointed property as assets for payment of debts, 1107.
- compensation for improvements, 943.
- conversion in, 438.
- creditors' suit, 2150.
- cy pres doctrine in case of charity, 436-438.
- decree as transferring title, 2154.
- determination of boundary, 994.
- enforcement of forfeiture, 309.
  - restrictions as to use of land, 1425, 1428.
- equitable interests, liability to execution, 2148.
  - restriction on alienation, 2317, 2319.
- equitable jointure, 790.
- execution of mandatory power, 1051.
- foreclosure of mortgage, 2686.
- injunction against obstruction of easement, 1361.
  - breach of restrictive agreement, 1425.
- location of way, 1336.
- merger of estates in equity, 92.
- mortgage regarded as lien, 2360.
- nonexecution of power not aided, 1069.



[REFERENCES ARE TO PAGES.]

**EQUITY—Continued.**

- notice and priorities, 2168.
- omission of seal, 1258.
- partition proceedings, 710.
- powers, aider of defective execution, 1091.
- priorities in, 2170, 2175.
- proceeding to compel assignment of dower, 817.
- protection of bona fide purchaser, 2171, 2177.
- recovery of rent, 1513.
- relief against forfeiture, 304, 319, 2359.
- restrictions on use of land, 1429.
- sale of decedent's land, 2150.
  - trust property when necessary, 1059.
- separate estate of wife, 728.
- to a settlement, wife's right, 728.
- transferee entitled to protection of recording statute, 2212.
- trusts, 360.
- unsealed conveyance regarded as contract to convey, 1725.
- uses, 339.
  - see "Conversion, Equitable"; "Equitable Assignment"; "Equitable Charge"; "Equitable Easement"; "Equitable Estates"; "Equitable Liens"; "Equitable Powers"; "Equitable Remainders"; "Equitable Restrictions"; "Equities"; "Equity of Redemption"; "Exoneration"; "Marshalling"; "Mortgages"; "Subrogation"; "Trustees"; "Trusts"; "Uses."

**EQUITY OF REDEMPTION**

- curtesy in, 835.
- dower in, 752.
- homestead in, 860.
- inappropriateness of expression, 2421.
- levy on under execution, 2464, 2467.
- nature, 2359.
- transfer, 2471.
  - to mortgagee, 2473, 2474.
  - see "Mortgages."

**EQUITY TO A SETTLEMENT**

- of wife, nature, 728.

**EROSION**

- of land by water, effect on title, 2094, 2101.
- see, also, "Accretion."

**ESCAPE**

- of water artificially accumulated, 1183, 1185, 1186.
- on roof, 1186.

[REFERENCES ARE TO PAGES.]

**ESCHEAT**

- effect on dower right, 769.
- nature of doctrine, 24, 475, 1762.
- of land held by alien, 2143.
- of land of alien decedent, 2351.
- on failure of heirs, 2143.
- under feudal system, 24.

**ESCROW, DELIVERY IN**

- conditioned on death of grantor, 1783.
- contract, necessity, 1774.
- meaning of expression "escrow," 1762.
- physical transfer, necessity, 1763.
  - to grantee, 1764.
  - to grantee's agent, 1765.
  - to grantor's agent, 1766.
- revocability, 1769.
- rights of bona fide purchaser, 1771.
- satisfaction of condition, relation back, 1778.
- second delivery, 1769.

**ESTATE**

- as meaning aggregate of one's possessions, 7.
- by wrong, in disseisor, 31.
- classification, 38.
- contingent remainder not an estate, 484.
- doctrine of estates, 35.
- freehold, 43, 52, 74.
- future, 467.
- homestead as, 2292.
- in easements, 1228.
  - equitable interest, 342, 362.
  - expectancy, 467.
  - incorporeal thing, 37, 1228.
  - land, origin of conception, 37.
  - possession, 467.
  - profit à prendre, 1389.
  - remainder, 476.
  - reversion, 467.
  - sense of property, 729.
  - trees, 881.
- less than freehold, 39, 96, 214, 228.
- limitation of, 37.
- merger of, 89.
  - prevented by intervening estate, 91, 92.
- of curtesy, 826.
  - dower, 733, 823.
  - freehold and less than freehold, 7, 38, 43, 52, 74.

[REFERENCES ARE TO PAGES.]

**ESTATE—Continued.**

of curtesy—continued.

husband in wife's property, 726.

trustee, quantum, 390.

on condition, 260.

origin of expression, 35.

power distinguished, 1041.

to commence on grantor's death, 551.

vested interest, 478.

see, also, "Conditional Fee"; "Conditions"; "Determinable Fee";  
"Equitable Estate"; "Fee Simple, Estate in"; "Fee Tail,  
Estate in"; "Future Estates"; "Life Estate"; "Particular  
Estate"; "Periodic Tenancy"; "Possibility of Estate"; "Pur  
Auter Vie, Estate"; "Qualified Fee"; "Remainders"; "Re-  
version"; "Special Limitation"; "Will, Tenancy at"; "Year  
to Year, Tenancy from"; "Years, Estate for."

**ESTATE FOR LIFE**

see "Life Estate."

**ESTATE FOR YEARS**

see "Years, Estate for."

**ESTATE FROM YEAR TO YEAR**

see "Year to Year, Tenancy from."

**ESTATE IN FEE SIMPLE**

see "Fee Simple Estate."

**ESTATE IN FEE TAIL**

see "Fee Tail, Estate in."

**ESTATE IN REMAINDER**

see "Contingent Remainder"; "Remainders."

**ESTATE IN REVERSION**

see "Reversion."

**ESTATE ON CONDITION**

see "Condition."

**ESTATE PUR AUTER VIE**

see "Pur Auter Vie, Estate."

**ESTATE TAIL**

see "Fee Tail, Estate in."

[REFERENCES ARE TO PAGES.]

**ESTOPPEL**

- as against judgment lien, 2133.
  - subsequent grantee, 2139.
- assertion of after-acquired title, 194, 526, 706, 2117-2127.
- by covenant in partition deed, 706, 707.
  - deed or in pais, reference to nonexistent way, 1317.
  - improvements under oral transfer, 2141.
  - partition deed, 706.
  - reference to plat, 1320.
  - reference to supposed way, 1313.
  - representation, 2134.
    - existence of easement, 1326.
    - existence of way, 1318.
- distinguished from dedication, 1880.
- easement created by, 1290, 1313, 1326, 1379, 1381.
- of cotenant to deny validity of conveyance, 681.
  - landlord, to deny tenant's right to crop, 893.
  - municipality, by acquiescence in encroachment on street, 1976, 1977, 2139.
- particular tenant, in case of adverse possession, 1985.
- tenant to deny landlord's title, 1185, 2000.
  - action for rent, 193.
  - action on covenant for title, 191.
  - ejectment, 193.
  - suit to enforce trust, 191.
  - suit to redeem from tax sale, 191.
  - suit to rescind lease, 191.
  - tenancy by attornment of person in possession, 192.
- to deny validity of grant of easement, 685.
- widow to claim dower, 768.
  - by conveyance and covenants, 798.
- to assert after-acquired title, 194, 526, 706, 2117, 2126.
  - necessity of covenants, 2126.
  - notice from record, 2190.
- to assert breach of condition, 303.
  - condition, 296.
  - conditional character of delivery, 1772.
  - conveyance, after return or cancellation, 1804.
  - defense to mortgage claim, 2537.
  - easement, 1290, 1313, 1326, 1379, 1381.
  - forfeiture, 325.
  - invalidity of lease, after improvements by lessee, 111.
  - mortgage, 2562.
  - municipal ownership, 1976, 1977, 2139.
  - non transfer of contingent remainder, 526.
  - title, by reason of conduct, 2135.
- to change conditions as to watercourse, 1153, 1327, 2075.
- to claim as against creditors, 2139.

[REFERENCES ARE TO PAGES.]

**ESTOPPEL**—Continued.

- to claim as against subsequent purchaser, 2438.
- to claim dower, as against bona fide purchaser, 796.
- to deny authority to fill blank in deed, 1601, 1602.
  - delivery of conveyance, negligent custody, 1743, 1744.
  - existence of easement, 1211, 1258, 1290, 1313, 1326.
  - improvements on supposition of easement, 1327.
  - existence of way, boundary on way, 1313, 1317.
  - misrepresentations by vendor, 1326.
  - grant of profit à prendre, 1397, 1398.
  - husband's title, for purpose of dower, 760.
  - implied grant of easement in land subsequently acquired, 1290.
- to deny landlord's title, 185-196.
  - action for rent, 188, 194.
  - as precluding tenant from showing expiration of landlord's title, 195.
  - effect of eviction under paramount title, 194.
  - effect of tenant's relinquishment of possession, 194.
  - ejectment by landlord, 186.
  - for purpose of distress, 189.
  - partition proceeding, 191.
  - suit by tenant for specific performance by landlord, 191.
  - suit by tenant to set aside conveyance, 191.
  - suit to enjoin waste, 190.
  - trespass to try title by landlord, 187.
  - trover for wood taken by tenant, 190.
- to deny public rights in land, 1881.
  - deny release of easement, 1382.
  - question boundary line, 1002.
  - question validity of oral agreement as to use of land, 1433.
  - redeem from mortgage, 2659.
  - repudiate conveyance, grantee's name inserted after delivery, 1601, 1602.
  - infancy of grantor, 2334.
  - repudiate oral grant of easement, 1241.
  - restore stream to original channel, 1451, 1327, 2075.
  - revoke license, improvements by licensee, 1211, 1382.
- to discontinue prescriptive user of land, 2078.
- transfer of after-acquired title by, 706, 2117, 2133, 2139, 2190.
  - contingent remainder by, 526.
  - executory interest by, 589.

**ESTOVERS**

- common of, 1394.
- rights in another's land, 1303, 1394.
- tenant's right of, 961.
  - clay and gravel for repair of house, 955.
  - wood for domestic use, 961.
  - wood for repairs, 961.

[REFERENCES ARE TO PAGES.]

**ESTREPEMENT, WRIT OF**

to prevent waste, 982.

**EVICITION**

as breach of covenant for title, 128, 129, 205, 1697, 1700.  
 of cotenants, effect as ending cotenancy, 697.  
 under paramount title, 1697-1705.  
 see, also, "Eviction of Tenant."

**EVICITION OF TENANT**

acts of omission as, 204.  
 actual or constructive, 200.  
 as terminating tenancy, 206.  
     breach of covenant for quiet enjoyment, 128, 205.  
     ground for action of tort, 205.  
     terminating estoppel of tenant, 194.  
 breach of landlord's covenant as, 204.  
 by tort-feasor, 196.  
 constructive, 199, 200, 1702.  
 covenant, breach as eviction, 204.  
 distinguished from trespass, 202.  
 during rent period, rent not apportioned, 1479.  
 effect on rent, 205, 1479, 1485, 1486, 1500, 1501.  
 effect on tenant's covenants, 206.  
 failure to supply heat, 1504.  
 in pursuance of condemnation proceeding, 1496.  
 intention necessary, 201.  
 interference with enjoyment, 199.  
     light, 203.  
 misuse of neighboring premises, 203.  
 nature, 196, 199, 205.  
 on rent day, effect on rent, 1477.  
 partial, 1485, 1486.  
 removal of articles from premises, 202.  
 removal of support to building, 202.  
 retention of possession by tenant, 200, 201.  
 retention of use of chattels, 1467.  
 termination of tenancy by eviction, 206.  
 under paramount title, 196.  
     adjudication of title, 1701, 1703, 1704.  
     as terminating estoppel to deny title, 194.  
     constructive, 1702.  
     effect on rent, 1501.  
     extinguishment of paramount lien, 1703.  
     force unnecessary, 198.  
     legal process unnecessary, 1701.  
     purchase of title, 1702.  
     title must ordinarily be asserted, 1701.

[REFERENCES ARE TO PAGES.]

**EVICTIION OF TENANT**—Continued.

- under paramount title—continued.
  - what is title paramount, 197.
  - yielding to claim, 198, 199.
- untenantable condition of premises, 1503.

**EVIDENCE**

- as to consideration for conveyance, 1625, 1631.
  - mortgage character of conveyance, 2380.
  - whether instrument intended as will, 1817, 1818.
- of payment of consideration, to raise resulting trust, 398.
- of trust in land, necessity of writing, 379.
  - see, also, "Parol Evidence."

**EXCAVATIONS**

- causing subsidence of land, injunction against, 1188.
- duty to notify adjoining owner, 1191.
- in highway, withdrawal of support to abutting land, 1192.
- interfering with lateral support, 1187.
- malice in making, to detriment of adjoining owner, 1192.
- statutory requirements as to notice, 1193.
  - see "Adjoining Owners"; "Lateral Support"; "Subjacent Support."

**EXCEPTION IN CONVEYANCE**

- distinguished from reservation, 1609.
- effect of invalidity, 1615.
- in favor of third person, 1612, 1616.
- in habendum, effectiveness, 1622.
- nature, 1605.
- of crops, 879.
  - easement, 1266, 1606, 1607.
  - fixtures, 918, 941, 1614.
  - house, 1614.
  - manure, 949.
  - minerals, 867, 1614.
    - part of what may be extracted, 1462.
  - timber, 879, 881, 1614.
  - vegetation, 878.
- oral exception, validity, 879, 942, 1631.
- requisites, 1614.
- to be subsequently located, 1615.
- words of inheritance unnecessary, 46, 1616.

**EXCHANGE**

- at common law, 1571.
- effect on dower, 745.
- powers of, 1064.

[REFERENCES ARE TO PAGES.]

**EXCLUSIVENESS**

of adverse user of land, for purpose of prescription, 2053.

**EXECUTION**

of conveyance, 1722.  
     by agent, 1797.  
     by part of grantors, 1724.  
     delivery as part of, 1745.  
     proof, 1736, 1753.  
     witnesses, 1727.  
 of power, 1067, 1098.  
 of use, by statute of uses, 346.  
 of will, 1818.

**EXECUTION, WRIT OF**

exemption by express provision, validity, 2315.  
     of homestead, 849, 854, 2291.  
 extent under, way of necessity, 1306.  
 for mortgage debt, levy on mortgaged land, 2467.  
 interests subject to, 2147.  
     contingent remainder, 529, 2148.  
     crops, 881.  
     curtesy, 847.  
     dower consummate, 806.  
     equitable interest, 2148.  
     executory interest, 2148.  
     fee tail estate, 72.  
     growing crops, 881.  
     interest of grantor in trust deed, 2295, 2465.  
     joint tenant's interest, 639.  
     land held by entireties, 655.  
     leasehold interest, 161, 165.  
     life estate, 83.  
     manure on farm, 949.  
     mortgagor's interest, 2464, 2466.  
     reversion, 154.  
     tenancy at will, 2147.  
     tenancy by entireties, for husband's debts, 654.  
     vested remainder, 525.  
     widow's right of quarantine, 808.  
 levy by extent, 2147.  
 lien of, nature, 2790.  
     priorities, 2258, 2790.  
     priority as against curtesy, 844.  
     priority as against dower, 773.  
     priority as against subsequent distress, 1520.  
 provision against, in creation of estate, 2315.



[REFERENCES ARE TO PAGES.]

**EXECUTION, WRIT OF**—Continued.

- sale under, easement passes with, 1289, 1395.
- effect of irregularities, 2149.
- implied grant of easement, 1289.
- mortgaged land, priorities, 2481, 2514.
- not judicial, 2150.
- possession as notice to purchaser of adverse interest, 2228.
- purchaser affected by lis pendens, 2270.
- to bona fide purchaser for value, 2258.
- way of necessity, 1305.
- transfer to purchaser, 2149.
- see, also, "Attachment"; "Judgment"; "Restraints on Alienation"; "Spendthrift Trusts."

**EXECUTORS AND ADMINISTRATORS**

- as bound by covenant against assignment of leasehold, 162.
- as witness to will, 1825.
- crops passing to, 877.
- death of joint executor, 1076.
- distress by, 1519.
- duty to pay mortgage from personalty, 2590.
- estate for years passes to, 98.
- foreclosure of mortgage by, 2697.
- joint power, 1075.
- jurisdiction over land, 2.
- of mortgagee, exercise of power of sale, 2714.
  - right to foreclose, 2423, 2697.
- power of sale in, 1042.
  - after retirement from office, 1101.
  - control by court, 1053.
  - exercise by administrator c. t. a., 1071, 1101.
  - exercise prior to time named, 1087.
  - implication, 1057.
  - joinder in execution, 1075.
  - renunciation by coexecutor, 1075.
  - when coupled with interest, 1054.
- rent passing to, 1475.
  - distress for rent, 1519.
- right to crops, 877.
  - fixtures, 917.
  - leasehold, 165.
  - rent, 1475.
  - rent, lease of chattels with land, 1467.
- rights on death of purchaser under contract of sale, 461.
  - vendor under contract of sale, 461.
- sale of decedent's land, by decree of court, 2151, 2152.
  - under testamentary power, 1042, 1053, 1057, 1072, 1101.

[REFERENCES ARE TO PAGES.]

**EXECUTORS AND ADMINISTRATORS**—Continued.

- succession to personal property, 1889.
- real property in some states, 1890.
- within prohibition of assignment of leasehold, 162.
- see "Decedent's Land"; "Exoneration"; "Powers."

**EXECUTORY DEVISE**

- as divesting previous estate, 553.
- changed into remainder, 563.
- construction against, 577.
- contingent remainder not supportable as, 555.
- divesting estate, 558.
- does not entitle to recovery for waste, 986.
- entitles to injunction against waste, 987.
- in favor of persons not ascertained, 554.
- in form of contingent remainder, 585.
- or contingent remainder, 561.
  - in favor of class, 556.
- power of alienation in first taker, 568.
- power operating by way of, 1044.
- remainder or executory devise according to event, 562.
- remoteness of vesting, 591-623.
  - see, also, "Defeasance Clause"; "Executory Interest"; "Executory Limitation"; "Future Estates."

**EXECUTORY INTEREST**

- after life estate, in term of years, 585.
- as possibility of estate, 557.
- as subject to execution, 2147.
- classes, 564.
- contingency of condition precedent immaterial, 557.
- construction against, 577.
- conveyance of, 588.
- descent of, 589.
- destruction by tenant in tail, 569.
- devise of, 590.
- distinguished from contingent remainder, 556, 561, 562.
- executory devise, 552.
- general nature, 557.
- possibility of estate, 545.
- power in first taker to destroy, effect, 568.
- release, 589.
- remoteness of vesting, 591-623.
- repugnancy to prior estate, 568, 577.
- restraint on alienation valid, 2308.
- springing and shifting uses, 545-549.
- statutory extension of, 590, 596.

[REFERENCES ARE TO PAGES.]

**EXECUTORY INTEREST**—Continued.

transfer, 588.

see, also, "Defeasance Clause"; "Executory Devise"; "Executory Limitation"; "Future Estates."

**EXECUTORY LIMITATION**

alternative limitations, 581.

and contingent remainder combined, 582.

beneficiary entitled to restrain waste, 952.

cross limitations, 582, 633.

divesting estate, in fee simple, 558.

effect on curtesy, 834.

effect on dower, 770.

divesting remainder, remainder vested, 492.

effect of partition, 706.

power of disposition, 569.

failure, effect, 587, 614.

failure of preceding limitation, 586.

for life, effect, 588.

in conveyance, validity, 1623.

in favor of unascertained persons, 1597.

in restraint of alienation, 2306, 2314, 2317.

in the alternative, 581.

nature, 545.

not to be orally shown as evidence of consideration, 1631.

of chattel interest, 583.

power taking effect as, 1044.

to take effect on marriage, 283.

see, also, "Defeasance Clause"; "Executory Devise"; "Executory Interest."

**EXECUTORY TRUSTS**

nature, 413.

not within rule in Shelley's case, 542.

**EXEMPTIONS**

from distress, 1519.

of homestead, from sale for debts, 2291.

loss by conveyance, 2303.

under federal homestead law, 2306.

see "Execution"; "Restraints on Alienation"; "Spendthrift Trusts."

**EXONERATION**

mortgage on land, payment from personalty, 2590.

of land by personalty for purpose of dower, 753.

of part of mortgaged land, 2506.

of personalty, by charging debts and legacies on land, 2736.

see "Contribution"; "Mortgages."

[REFERENCES ARE TO PAGES.]

**EXPECTANCY, ESTATES IN**

see "Future Estates."

**EXPENDITURES**

by licensee, as preventing revocation, 1208.

by municipality, as showing dedication of land, 1867.

**EXPIRATION**

of estate for years, computation of time, 207.

of landlord's estate, right of tenant to show, 195.

**EXPLOSIVES**

right to immunity from proximity of, 1116.

storage as nuisance, 1119.

**EXPRESS CHARGE ON LAND**

as creating lien, 2734.

see "Equitable Liens."

**EXPRESS TRUSTS**

language necessary for creation, 374.

see "Trusts."

**EXPULSION**

of tenant holding over, 253.

**EXTENT**

execution by, 2147.

**EXTINGUISHMENT**

of easement, 1363.

highway, 1535.

mortgage, 2582.

power, 531.

rent, 1487.

right of profit, 1398.

**F****FACTORY**

conveyance in terms of, extends to land, 1647.

conveyance of land for, implied grant of easement, 1296.

**FAILURE**

of contingent remainder, 500.

**FAILURE OF ISSUE**

definite and indefinite, 65, 66, 612.

, devise over on, as creating fee tail, 65.

[REFERENCES ARE TO PAGES.]

**FAILURE OF INTEREST**—Continued.

- indefinite, gift over on, 65, 567, 575, 611.
- presumption as to intention, 66.
- see, also, "Die Without Issue."

**FALSA DEMONSTRATIO NON NOCET**

- applied to description in conveyance, 1669.
- applied to description of mortgage debt, 2414.

**FAMILY**

- of owner of easement of way, right of user, 1333.

**FEALTY**

- incident of tenure, 23.

**FEE**

- acquisition by condemnation proceeding, 2161.
- in public, in case of highway, 1523, 1524.
- meaning of expression, 43, 44.
- see, also, "Conditional Fee"; "Determinable Fee."

**FEE SIMPLE, ESTATE IN**

- acquired by adverse possession, 1981.
- creation of, or of life estate, 76-81.
  - construction of premises and habendum, 1621.
- defeasance, effect on curtesy, 834.
- effect on dower, 769, 770.
- descent of, 51, 78.
- devise as creating fee simple or life estate, 76-78.
  - effect of power of disposition, 80.
- divested by limitation over, 559, 568, 577.
- in minerals, 871.
- in trees, 882.
- limitation in conveyance, 44.
  - devise, 48.
- limitation over on death, 1621.
- nature, 43.
- necessity of word "heirs," 44, 48.
- no merger of, 90.
- no remainder on, 481.
- not cut down by subsequent language, 77.
- restraints on alienation, validity, 2306.
- rights of tenant, 52, 952.
- subject to limitation over, 558.
- tenant not usually liable for waste, 952.
- what is, 44.

**FEE TAIL, ESTATE IN**

- adverse possession against reversioner or remainderman, 1952.
- after possibility of issue extinct, 95.

[REFERENCES ARE TO PAGES.]

**FEE TAIL, ESTATE IN**—Continued.

- bar by conveyance, 70-72.
  - validity of legislation authorizing, 72.
- bar by fine or recovery, 70.
- bar by sheriff's deed under execution, 72.
- change in law of descent, effect, 73.
- classification, 57, 58.
- clause of cesser, 333.
- definition, 54.
- devise not permitted, 72.
- effect as regards rule against perpetuities, 610.
- general or special, 57.
- heir of the body takes as substituted purchaser, 73.
- in joint tenancy, 631.
- in rent, 70.
- in term of years not permissible, 70.
- in what things may exist, 70.
- legislation as to, constitutionality, 57.
- liability for debts of tenant in tail, 72.
- limitation, 44.
  - by use of word children, 60.
  - by use of word issue, 63.
  - devise over on failure of issue, 65-69, 567.
  - gift to heirs of the body of A, 58.
- male and female, 57.
- merger of, 73.
- mode of creation, 58-69.
- modification by statute, 55, 57.
- necessity of word "heirs," 58-61.
- not recognized in all states, 55.
- origin and history, 52.
- remainder on, 482.
  - not necessarily contingent, 491, 492.
- remainders in, created by strict settlement, 517.
- restraints on alienation, 2313.
- special and general, 57.
- statutory changes, 55.
- statutory modification and abolition, 55.
- tenancy in tail after possibility of issue extinct, 95.
- tenant not bound to pay incumbrances, 73.
- termination does not exclude dower, 769.
- waste by tenant, 953.

**FELONS**

- right to hold and transfer land, 2353.

**FEME COVERT**

- see "Coverture"; "Husband and Wife"; "Married Women."

[REFERENCES ARE TO PAGES.]

**FENCES**

- across right of way, 1334, 1554.
  - prescriptive right, 1355, 1356.
- along railroad, 1005.
- along right of way, duty of erection, 1349.
- between adjoining owners, as indicating boundary line, 999, 1000.
  - easement as to maintenance, 1247, 2036.
  - statutory provisions, 1005, 1247.
- covenant to fence, as running with the land, 1408, 1414.
- duty of landowner, 1003.
- easement as to maintenance, 1199, 1247.
  - as within covenant against incumbrances, 1686.
  - by prescription, 2036.
- erection not waste, 965.
- fence viewers, 357.
- on edge of ditch, duty of erection, 1349.
- materials for, as passing by conveyance of land, 1675.
- necessity as against trespassing animals, 1003.
- obligation of landowner to erect, 1003, 1005.
- spite fence, legality, 1123.
- statutory requirement, 1005.
- tenant's duty to repair, 973.

**FEOFFEE TO USES**

- meaning of term, 341.

**FEOFFMENT**

- nature, 33, 1566.
- or bargain and sale, in accordance with intention of parties, 360.
- to uses, 343.
- when tortious, 33.

**FERRY**

- franchise to maintain, 11, 12.

**FEUD**

- alienation of, 24.
- descent of, 24.
- meaning of term, 18.
- nature, 44.

**FEUDAL SYSTEM**

- abolition of military tenures, 27.
- nature, 16.

**FIDAE COMMISSA**

- connection with uses, 340.

[REFERENCES ARE TO PAGES.]

## FILING

for record, 2193, 2194.

## FILM THEATRE

illegality of business on leased premises, effect on rent, 1507.

## FINES

as method of transfer, 1567.

bar of fee tail by, 70.

## FIRE

damage by, tenant's liability, 140, 977, 978.

destroying party wall, duty of reconstruction, 1350.

destruction of part of leased premises, duty of lessee to restore, 140.

effect on rent, 1497.

injuries to premises sold, risk of loss on vendor or purchaser, 460.

set by stranger, tenant's liability for damage to premises, 976.

## FIRM

assets, partner's share is merely right of action, 666.

conveyance to partnership firm, 661.

see, also, "Partnership Land."

## FISH AND FISHING

appliances for catching, easement to place on another's land, 1256.

as subject of qualified ownership, 1037.

controlled by state, 1039.

exclusive grant by state, 1544.

interference with passage of fish, 1039.

profit à prendre as to, 1388.

public rights of fishing, 1036, 1544.

as incident to right of navigation, 1548.

on private land, 1010, 1544.

on shore of tide waters, 1011.

right of landowner, 1036.

subordinate to right of navigation, 1039.

right to catch, ordinarily confined to owner of land, 1038.

right to fish on another's land, 1388, 1394.

## FIXTURES

abandonment, 955.

accessories to fixtures, 910.

accidental severance, 940.

adaptability to use elsewhere, 915.

adaptability to use to which realty devoted, 914.

adaptation to use to which realty devoted, 913.

agreement as to character of article annexed, 909, 920, 941.



[REFERENCES ARE TO PAGES.]

**FIXTURES**—Continued.

- agreement for removal, validity in case of article closely incorporated with land, 920, 921, 926.
- agricultural, right to remove, 930.
- annexation by one holding under contract of sale, 919.
  - permission, 921.
  - stranger to title to land, 908, 910.
  - tort-feasor, 904.
  - trespasser, effect of mistake, 916.
- annexation under license from landowner, right of removal, 921.
  - as against prior mortgagee of lands, 924.
  - as against subsequent purchaser of land, 922.
- annexation without consent of owner of chattel, effect, 904.
- application of article to use to which realty devoted, 913.
- appropriation of article to use to which realty devoted, 913.
- articles to be annexed, as passing on conveyance of land, 1675.
- as realty or personalty, 931.
- as subject to distress, 1519.
- character of article annexed, 912.
- chattel mortgage on article subsequently annexed, 921.
  - effect as against prior mortgagee of land, 922.
  - effect as against subsequent purchaser of land, 924.
- conditional sale of article subsequently annexed, 921.
  - effect as against prior mortgagee of land, 924.
  - effect as against subsequent purchaser of land, 922.
- constructive annexation, 910, 911.
- constructive severance, 940.
- conveyance of, as of interest in land, 942.
- conveyance of land, right of removal in third person, 922.
- descend as part of land, 917.
- domestic, right to remove, 929.
- exception from conveyance, 918, 942, 1614.
- for purpose of trade, removability, 926.
- forfeiture of leasehold, effect, 938.
- general theory, 903.
- intention of annexer as controlling, 905-908.
- keys as, 911.
- license to remove, as coupled with interest, 1217.
- machinery, parts temporarily removed, 911.
- mode of annexation, 912.
- mortgage of land, after annexation, 918.
- mortgage of land, before annexation, 919, 2370.
- not subject to distress, 1519.
- oral exception on conveyance of land, 942.
- oral sale, effect, 1217.
- ornamental, right to remove, 929.
- pass on conveyance of land, 918.
- pass on sale of land, 918, 919.

[REFERENCES ARE TO PAGES.]

**FIXTURES**—Continued.

- pass under mortgage of land, 919.
- physical attachment, necessity, 910, 911.
- recovery by mortgagee of land, 2463.
- right of removal in tenant, 926.
  - as breach of covenant for seisin, 1681.
  - before relinquishment of possession, 935.
  - effect of agreement, 934.
  - effect of relinquishing possession, 937.
  - effect of renewal lease, 938.
  - effect of termination of tenancy, 937.
  - how lost, 934.
  - injury by removal, 933.
  - loss of identity on removal, 933.
  - removable fixtures as realty or personalty, 931.
  - restrictions on, 932.
  - time for removal, 934.
  - transfer, 932.
- sale of, as involving license to remove, 1216, 1217.
- severance, 940.
  - actual and constructive, 940.
  - by accident, 940.
  - by conveyance of fixture, 941.
  - by exception of fixture, 941.
  - by mortgage of fixture, 941.
  - by mortgagor, 2460.
  - constructive, 940.
  - temporary, 911.
- substitution of fixture by tenant, right of removal, 933.
- succession on owner's death, 917.
- temporary severance, 940.
- trade fixtures removable by tenant, 927.
- upon another's land, 916.
- waste as regards, 962.
- what are, 903.
  - adaptation to use of land, 913.
  - as determined by agreement, 909, 916, 920.
  - as determined by intention, 905.
  - character of article, 912.
  - mode of attachment, 910, 912.
  - necessity of articles, 914.
  - necessity of attachment, 910.
  - question of mixed law and fact, 904.
  - relationship of parties, 916.

**FLATS**

- mode of division among owners, 1032.
- referred to as boundary, 1660.
- see, also, "Shore."

[REFERENCES ARE TO PAGES.]

**FLOOD**

- as act of God, 1147, 1168.
- contributing to overflow of land, 1147.
- destroying building, effect on rent, 1498.
- increasing flow of surface water, 1168.
- water of stream, as surface water, 1137, 1173.
- rights of appropriation, 1137.

**FLOODING**

- of land, as tort, 1145.
- see, also, "Flowage."

**FLOORS**

- in separate ownership, easement of support, 1244.
- lower floor as support of upper, duty to repair, 1349.

**FLORIDA PURCHASE**

- by United States, 1551.

**FLOW**

- of stream, acquiescence in change, 1154.
- increase, 1150.
- obstruction and control, 1131, 1144, 1234.
- of surface water, 1167.
- of underground water, 1175.
- of watercourse, easement to obstruct, 1234.

**FLOWAGE OF ANOTHER'S LAND**

- by construction of railroad, 1148.
- by diversion of watercourse, 1141.
- by obstruction of stream, 1145.
- freshet as contributing cause, 1147.
- damage as requisite of action, 1145.
- easement of, 1234.
- as within covenant against incumbrances, 1685.
- change of location of dam, 2062.
- consent to obstruction, 1382.
- implied grant, 1255.
- prescriptive right, 2060, 2071, 2077.
- rights as to ice formed, 1031, 1351.
- erection of dam under mill acts, 1149.
- freshet as contributing cause, 1147.
- ice, rights of owner of servient tenement, 1031, 1351.
- license for, 1203.
- no natural right, 1145, 1162, 1169.
- prescriptive right, 2071.
- commencement of limitation period, 2056.
- discontinuance, 2077.
- exercise need not have been constant, 2060.
- statutory right, 1149.
- see "Dams"; "Watercourses."

[REFERENCES ARE TO PAGES.]

**FLUES**

- in party wall, 1344.
- express or implied grant of right, 1344.

**FLUME**

- for conduct of water, rights of abutting owners, 1236.
- for transmission of water power, 1240.
- see "Artificial Watercourse."

**FOLLOWING DISTRESS**

- nature, 1521.

**FORCE**

- in expulsion of tenant by landlord, 253.

**FORCIBLE ENTRY**

- as interrupting adverse possession, 1956.
- by landlord on tenant holding over, 253.
  - criminal liability of landlord, 253.
- interrupting adverse possession, 1956.
- proceeding by landlord against tenant, 253.
- proceeding by tenant against landlord, 254.

**FORD**

- interference with, by change in flow of stream, 1146, 1150.

**FORECLOSURE OF EQUITABLE LIEN**

- method, 2734, 2740, 2763.

**FORECLOSURE OF MECHANIC'S LIEN**

- method, 2774.

**FORECLOSURE OF MORTGAGE**

- acceleration of debt, 2676.
- as *lis pendens*, 2268, 2272.
- by entry, 2684.
  - equitable proceeding for sale, 1686.
  - sale under power, see "Power of Sale in Mortgage."
  - scire facias*, 2686.
  - strict foreclosure in equity, 2682.
  - writ of entry, 2685.
- conveyance to purchaser, 2695.
- decree, 2687.
- dower in surplus proceeds of sale, 801.
- effect of sale, 2692.
- effect on dower, 742, 772.
- effect on lease, 154, 2703.

[REFERENCES ARE TO PAGES.]

**FORECLOSURE OF MORTGAGE**—Continued.

- for default in interest, 2676.
- failure to insure, 2678.
- nonpayment of instalment, 2676.
- nonpayment of taxes, 2678.
- indemnity mortgage, 2679.
- limitations and laches, 2620, 2679.
- nature and purpose, 2675.
- not affected by personal judgment, 2679.
- parties, 2695.
- purchase by life tenant, 88.
- purchaser's right to crops, 2436, 2437.
- redemption from sale, 2694.
- rights of wife of mortgagor, 801, 2703.
- sale in parcels, 2690.
- subrogation in case of invalid sale, 2695.
- surplus proceeds of sale, 2693.
- who may institute, 2695.
- personal representative, 2697.

**FORFEITURE**

- by alien, 2143, 2350.
- corporation, 2144, 2349.
- enemy, 2143.
- life tenant, 82, 259, 2144.
- tenant for years, 259, 267.
- equitable jurisdiction, 309.
- for alienage, 2143, 2350.
- breach of express condition, 263-265.
  - demand for possession as prerequisite, 307.
  - effect as against transferee, 318.
  - election against, 300.
  - enforcement, 305.
  - relief in equity, 319.
  - in case of mortgage, 2359.
  - waiver, 300-304.
  - who may enforce, 311.
- breach of implied condition, 266.
- crime, 2554.
- nonpayment of taxes, 2159.
- violation of revenue law, 2144.
- waste, 988.
- not enforceable in equity, 309.
- of leasehold, 212, 259, 1516.
  - effect on rent, 1485, 1493, 1495, 1516.
  - effect on right to crops, 895.
  - effect on right to remove fixtures, 938.
  - for disclaimer of landlord's title, 1999, 2145.

[REFERENCES ARE TO PAGES.]

**FORFEITURE**—Continued.

- of leasehold—continued.
  - for illegal use of premises, 267.
  - for nonpayment of rent, 267, 1516.
  - right to growing crop, 895.
  - stipulation for continued rental liability, 1494.
- of mining lease, 868, 871.
- of oil or gas lease, 875.
- of particular estate, effect on contingent remainder, 506.
- of public grant, 307.
- relief against in equity, 319.
- to individual, 2144.
- to state, 2143, 2159.

**FRANCHISES**

- of corporation as realty, 12.
- of maintaining ferry, 12.
- of wharfing out into navigable waters, 1027.
- what are, 10.

**FRANKALMOIGN**

- tenure in, 19.

**FRAUD**

- as giving rise to trust, 406.
- as ground for cancellation, 1639.
- as to boundary line, relief in equity, 995.
- constructive trust based on, 407.
- conveyance in fraud of creditors, 2280.
  - curtesy, 837.
  - dower, 761, 802, 837.
  - subsequent purchasers, 2284.
- conveyance procured by, as revocation of will, 1849.
- dower as affected by fraudulent conveyance, 781.
- in acknowledgment of conveyance, 1734.
  - exercise of power of sale in mortgage, 2724.
  - procuring assumption of mortgage, 2497.
  - procuring conveyance, 1639.
  - procuring release of mortgage, 2640.
- mortgage in fraud of creditors, 2419, 2538.
- on creditors, conveyance to husband and wife by entireties, 655.
- on curtesy, 837.
- on dower, by husband's conveyance, 761, 802, 837.
  - placing title in third person, 750.
- on power, 1095.
- taking conveyance with notice of prior rights as, 2214.

[REFERENCES ARE TO PAGES.]

**FRAUDS, STATUTE OF**

- abolished general occupancy, 94.
- application to agreement for security, 2748.
  - agreement as to boundary line, 996.
  - agreement as to use of land, 1431.
- assignment of leasehold, 163, 1571.
- assumption of mortgage debt, 2487, 2488.
- boundary agreement, 996.
- change of location of way, 1339.
- contract for security, 2748, 2750.
- contract relinquishing dower, 796.
- conveyance in fee simple, 1566, 1589, 1722.
- creation of easement, 1211, 1258, 1271.
- declaration of trust, 377, 392, 405, 408.
- dower, release, 776.
- exception of fixture on conveyance of land, 942.
- exchange, 1571.
- implied grant of easement, 1271.
- lease for years, 103, 216, 233.
- mortgage of land, 2372.
- partition, 700.
- partnership property, 663.
- party-wall agreement, 1264.
- permission to commit waste, 968.
- release, 776, 1571.
- restrictive agreement, 1431.
- resulting trust, 398.
- revocation of will, 1838.
- sale of crops, 887.
- sale of fixtures, 932, 942.
- sale of trees, 880, 886, 887.
- sealed instrument, 1722.
- security agreement, 2748.
- surrender, 1580.
- transfer by mortgagor to mortgagee, 2474.
- trust, 377, 392, 405, 408.
- invalidity of lease under, effect, 111, 216, 233.
- part performance, oral gift of land, 2140.
  - oral grant of easement, 1211.
  - oral lease, 111, 112.
- writing necessary to evidence trust, 377.

**FRAUDULENT CONVEYANCE**

- in fraud of creditors, 2280.
  - effective to bar dower, 765.
- release of dower in, effect of avoidance of deed, 781.
- see, also, "Fraud."

[REFERENCES ARE TO PAGES.]

**FREEHOLD**

- abeyance of, 500, 545.
- as signifying life estate, 38.
- created by lease not naming duration, 218.
- estates of, 7, 38, 43, 52, 74.
  - see, also, "Conditional Fee"; "Determinable Fee"; "Fee Simple Estate"; "Fee Tail Estate"; "Life Estate."

**FRESHET**

- as act of God, 1147, 1168.
- causing overflow of stream, 1147.
- contributing to overflow of land, 1147.
- flood water of stream as surface water, 1174.

**FRUCTUS INDUSTRIALES**

- distinguished from fructus naturales, 876.
- pass to executors, 877.
  - see, also, "Crops."

**FRUCTUS NATURALES**

- what are, 876.
  - see "Trees."

**FRUIT**

- as fructus naturales, 876, 886.
- as part of land, 876.
- cutting of fruit trees as waste, 960, 983.
- on branches extending over another's land, 897.
- on trees and bushes, legal character, 876.
- outgoing tenant not entitled, 890.
- ownership, 876.
- to be picked, sale as chattels, 880.

**FURNISHED HOUSE**

- lease of, implied covenant as to condition, 137.

**FURTHER ASSURANCE**

- covenant for, nature, 1706.
  - runs with land, 1721.

**FUTURE ACQUISITIONS**

- mortgage of, 2368.

**FUTURE ADVANCES**

- mortgage to secure, 2404, 2567.
  - priorities, 2568.



[REFERENCES ARE TO PAGES.]

**FUTURE ESTATES AND INTERESTS**

- acceleration, 519.
- at common law, 500, 545.
- contingent remainders, 484.
- co-ownership of, 625.
- creation by bargain and sale, 549.
  - devise, 552.
- curtesy in, 835.
- dower in, 755.
- executory interests, 545.
- future terms of years, 583.
- in chattels real, 583.
- inaccuracy of expression, 467.
- invalidity at common law, 500, 545.
- less than freehold, 583.
- limitations supported as operating under statute of uses, 1589.
- mortgage of, 2367.
- on dissolution of corporation, 475.
- possibility of reverter, 472.
- remainder, contingent, 484.
  - vested, 476.
- remoteness of vesting, 591.
- reversion, 467.
- right of reverter, 472.
- statutory provisions, 596.
- to commence on grantor's death, 551.
- under statute of uses, 545, 547, 549.
- vested remainder, 476.
  - see, also, "Contingent Remainders"; "Entry, Right of"; "Executory Devise"; "Executory Interest"; "Executory Limitation"; "Perpetuities, Rule Against"; "Possibility of Estate"; "Reversion"; "Reverter, Possibility of"; "Shelley's Case, Rule in."

**FUTURE POSSESSION, RIGHTS OF**

See "Future Estates."

**FUTURE USES**

- executed by statute, 545, 547.

**G****GAME**

- on another's land, right to take, 1388.
- right to hunt, as incident to right of navigation, 1036, 1547.
- rights of landowner, capture and killing, 1035.

**GAMING**

- mortgage to secure debt, 2419.

[REFERENCES ARE TO PAGES.]

**GARAGE**

lease for, illegality as defense to rent, 1506.

**GAS**

natural gas, rights of landowner, 1414.  
right to take from another's land, 1397.  
rights of cotenant, 992.  
noxious, as nuisance, 1126.  
pipes in street, no compensation to landowner, 1529.  
way of necessity for pipe, 1304.  
see "Natural Gas."

**GATES**

effect in connection with prescriptive user for passage, 2034, 2047.  
existence of, as rebutting inference of dedication, 1867.  
as showing public user of land to be permissive, 2087.  
on right of way, 1354.  
as adverse user of land, 1385.  
failure to shut, 1357.  
prescriptive right to maintain, 1355, 1356, 2037.

**GAVELKIND**

species of tenure, 20.

**GENERAL FIELDS**

in New England, 1541.

**GENERAL OCCUPANCY**

nature of doctrine, 93, 94.

**GENERAL PLAN**

of restrictions as to use of land, 1446, 1553.  
acquiescence in breach, 1453.  
evidence, 1450.  
notice of, 1451.  
see "Equitable Restriction"; "Restrictive Agreement."

**GIFT**

by way of advancement, 1912.  
conveyance by way of, 1628.  
donee not purchaser for value, 2252.  
in default of appointment under power, 1048, 1098.  
in joint tenancy, failure as to one tenant, 629.  
in trust, validity, 383.  
invalid gift not trust, 376.  
mistake in, as ground for relief, 1637.  
mortgage as, validity, 2403.  
not authorized under power of sale, 1066.

[REFERENCES ARE TO PAGES.]

**GIFT**—Continued.

- of claim secured by mortgage, 2535.
  - land to be purchased, gift of realty, 441.
  - mortgaged land, duty to pay mortgage, 2479.
  - proceeds of land to be sold, gift of personalty, 441.
  - realty, validity, 1624.
- oral gift, effect of expenditures by donee, 1211, 2141.
- reformation for mistake, 1636.
- to A and B and the survivor, 632, 634.
- to class, to take effect in futuro, 581.
- to municipality, not dedication, 1860.

**GIFT OVER**

- in case of death without issue, 63, 65-69, 79.
- on death, 78.
- on marriage, 283, 285.
  - see "Defeasance Clause"; "Executory Limitations."

**GOVERNMENT**

- adverse possession in favor of, 1953.
- land belonging to, 1549.
- grants by, 1552-1564.
  - see "State"; "United States."

**GOVERNMENT SURVEY**

- description of land by, 1648.

**GRADE**

- of highway, change detrimental to abutting owner, 1533.

**GRAIN**

- as fructus industriales, 876.

**GRANDCHILDREN**

- remainder in favor of, 498.
- remoteness of gift, 595.

**GRANT**

- at common law, 34, 1567.
- by state, 1557.
  - United States, 1552.
- distinguished from dedication, 1860.
- easement created by, 1229, 1257, 1328.
- of easement, construction as to mode of exercise, 1328.
  - construction in favor of appurtenancy, 1229, 1230.
  - construction in favor of grantee, 1329.
  - covenant as, 1258.
  - express, 1257.

[REFERENCES ARE TO PAGES.]

**GRANT**—Continued.

- of easement—continued.
  - implication, 1270.
  - necessity of seal, 1257.
  - necessity of words of inheritance, 1259.
  - party-wall easement, 1262, 1264.
  - profit à prendre, 1397.
  - right of way, 1331.
  - water power, 1239.
- presumption of, from long possession, 1920.
- seal necessary, 1257.
- Spanish and Mexican grants, 1560.
- things lying in, 34.
  - see, also, "Conveyances"; "Easements"; "Grantor and Grantee."

**GRANTOR AND GRANTEE**

- acknowledgment by grantor, grantee cannot take, 1729.
- adverse possession between, 2007, 2009.
- designation in conveyance, 1591.
- name of grantee omitted from conveyance, subsequent insertion, 1597.
- necessity of naming in conveyance, 1593.
- possession of grantor, notice of adverse claim, 2238.
- purchaser from grantee, notice by grantor's possession, 2238.
- substitution of different grantee in conveyance, 1604.
- tacking of adverse possessions, 1968.

**GRASS**

- as fructus naturales or industriales, 876, 890.
- mortgage of, as realty, 883.
- part of the land, 876.
- rights of departing tenant, 888, 890.
- to be cut, sale as chattels, 880, 886.

**GRAVEL**

- profit à prendre, 1389.
- removal as waste, 955.

**GREAT LAKES**

- land under, ownership, 1018.

**GREAT PONDS**

- land under, ownership, 1020.
- taking of water for municipal use, 1158.

**GROSS**

- easements in, 1223.

**GROWING CROPS**

- see "Crops"; "Vegetation."

[REFERENCES ARE TO PAGES.]

**GUARDIAN**

sale of land by, 2153.

**GUESTS**

at inn, distress on chattels of, 1521.  
of tenant, liability for injuries to, 143.  
right to utilize right of way, 1333.

**H****HABENDUM**

construction in connection with premises, 1620.  
nature, 1590.

**HALF BLOOD**

rights of inheritance, 1898.

**HALLWAY**

right of way in, 1250.

**HARBOR**

referred to as boundary, 1656.  
right to build wharves, 1024.  
see "Navigable Waters"; "Tide Waters."

**HEAT**

excessive, interference with use of neighboring premises, 1125.  
failure to furnish on leased premises, 137, 204, 1504, 1505.  
heating of water in stream, 1143.  
repair of apparatus, duty of landlord, 147.

**HEIRLOOMS**

nature, 3.

**HEIRS**

advancements to, 1912.  
adverse possession between surviving spouse and heirs, 2022.  
and ancestor, tacking of possessions, 1968.  
and widow, tacking of possessions, 1970.  
as word of limitation, 44-52.  
bound by decedent's debts, 2150.  
bound by estoppel of ancestor, 2130.  
bound by use or trust, 344.  
conveyance by, 1591.  
conveyance to, validity, 1594.  
conveyance to grantor's heirs, 471.  
death without, escheat, 2142.  
devise to, 470, 497, 1893.  
entitled to assert forfeiture, 311.

[REFERENCES ARE TO PAGES.]

**HEIRS**—Continued.

- exclusion by will, 1915.
- failure of, escheat, 2142.
- gift to A and his heirs, as indicating substitutionary gift to heirs, 1832.
- gift to grantor's heirs, 470.
- gift to testator's heirs, 470, 497.
- mortgage by, 2367.
- necessity of word, conveyance in fee simple, 44-52.
  - conveyance in fee tail, 58, 59.
  - creation of power to dispose of fee simple, 1064.
  - devise of fee simple, 48.
  - exception, 46, 1269, 1614, 1616.
  - grant of easement, 1230, 1259.
  - mortgage, 2374.
  - reservation, 1268, 1607, 1617.
  - statutory provisions, 48.
  - sufficiency of insertion in habendum, 45.
  - sufficiency of insertion in warranty, 45.
- of grantor, estoppel to assert after acquired-title, 2130.
- of infant, avoidance of conveyance, 2336.
- of insane person, avoidance of conveyance, 2344.
- of living person, effect of gift to, 488.
- omission of word by mistake, rectification, 1632.
- remainder in favor of, contingent, 488.
  - rule in Shelley's case, 530, 538.
- take subject to decedent's debts, 2793.
- use of word in habendum, 1620.
- who are, under laws of descent, 1889.

**HEIRS OF THE BODY**

- for purpose of estate tail, 57, 59, 73.
- limitation to, fee tail estate, 58.
- of joint tenants, 631.
- remainder in favor of, rule in Shelley's case, 530.

**HERBAGE**

- in highway, rights to, 1525.
- lease of, reservation of rent, 1466.
- on right of way, servient owner entitled, 1352.
- profit à prendre as to, 1388.
- right of pasturage, 1394.

**HEREDITAMENTS**

- franchises as, 11.
- incorporeal, 9.
- meaning of term, 15.

[REFERENCES ARE TO PAGES.]

**HIGH-WATER MARK**

as boundary, 1014, 1658.  
 what is, 1009, 1014, 1015.

**HIGHWAY**

abandonment, 1537.  
 abutting on water, ownership of bed, 1665.  
 abutting owner, rights as to easements in, 1531.  
     compensation for highway use, 1531-1534.  
     right of view, 1534.  
     rights as to use of highway, 1531-1534.  
 action of trespass by landowner, 1526.  
 additional servitude in, 1527.  
 adverse possession against public, 1536.  
 as affecting ownership of land, 1523, 1524.  
 as boundary, determination of location, 1660, 1664.  
     effect of previous vacation, 1665.  
     effect of change of location, 1664.  
     when highway nonexistent, 1313, 1664.  
 as breach of covenant against incumbrances, 1686, 1689.  
     for seisin, 1681.  
     of warranty or for quiet enjoyment, 1695.  
 boundary on nonexistent highway, as creating easement of passage,  
     1313.  
 change of grade, to detriment of abutting owner, 1533.  
 change of line by continued user, 2080.  
 compensation for highway use, 1524, 1527, 1531.  
 creation, 1524.  
     reservation in favor of public, 1610, 1612.  
 dedication of land for, 1854, 1884.  
     acceptance, 1872, 1875.  
     reservations by dedicator, 1882.  
 defects in proceeding to establish, prescriptive user by public, 2084.  
 depicted on plat, dedication, 1868, 1871, 1873.  
 description of land at named distance from highway, mode of meas-  
     urement, 1665.  
 discontinuance, subsequent private way, 1317.  
 easements in favor of abutting owners, 1531.  
 ejection by landowner, 1525.  
 establishment, effect on pre-existing private way, 1374.  
 establishment on right of way, effect, 1375.  
 estoppel to deny existence, appearance on plat referred to, 1319.  
 extending to water, accretion, 2108.  
 extending to water, change in location of water, 2108.  
 extinction, 1535.  
     by abandonment, 1537.  
     by adverse possession against public, 1536.  
     by vacation, 1535.

[REFERENCES ARE TO PAGES.]

**HIGHWAY**—Continued.

- extinction—continued.
  - compensation to abutting owners, 1536.
  - effect, 1538.
  - reverter to original owner, 1538.
  - rights of landowner, 1538.
- for limited purposes, 1882.
- grass on, 1525.
- land in, as subject of conveyance, 1660.
- manure on, 949.
- minerals under, 1525.
- nature, 1523.
- no prescriptive user by individual, 2059.
- nonuser, 1537.
- obstruction in, no prescriptive right to maintain, 2031.
- opening as waste, 955.
- prescription for, 2079.
  - interruption of public user, 2086, 2087.
  - recognition by municipality, 2088.
  - width, 2090.
- reference to point on margin, for purpose of description, 1663.
- referred to as boundary, 1660.
- right of passage over, no incidental right of hunting, 1036.
- right of user or fee in public, 1523, 1524.
- right of way leading to, 1332.
- rights of deviation, 1535.
- rights of owner of fee, 1525.
- statutory proceedings to establish, 1524.
- subject to rights in dedicator, 1881.
- to be used only at certain seasons, 1881.
- trees in, 1525, 1534.
- turnpike, 1539.
- use for railroad, 1528, 1532.
- usually right of public user merely, 1884.
- vacation, 1535.
- width, when based on prescription, 2090.

**HOLDING OVER**

- by tenant for years, by reason of sickness, 250.
  - ejectment against, 253.
  - forcible expulsion, 253.
  - liability for mesne profits, 244, 245, 252.
  - liability in use and occupation, 245, 251.
  - not adverse to landlord, 2001.
  - option of landlord as to new tenancy, 248.
  - pecuniary liability, 251, 252.
  - right to remove fixtures, 935, 939.
  - summary proceeding against, 252.
  - under agreement, 256.



[REFERENCES ARE TO PAGES.]

**HOLDING OVER**—Continued.

- by tenant pur auter vie, adverse to remainderman, 2014.
- tenancy at sufferance, 241.

**HOLOGRAPHIC WILL**

- nature and essentials, 1829.

**HOMAGE**

- under feudal system, 23.

**HOMESTEAD**

- allowance to widow, 860.
- bona fide purchaser of, 853.
- children's rights, 860.
- conveyance, 850, 2302.
- devise, 2304.
- election between devise and, 858.
- election between dower and, 858.
- entry on public land, 1553.
- estate of widow, 855.
- exemption from execution, 849, 2291.
  - as an estate, 2292.
  - as to what debts, 2299.
  - claim and selection, 2302.
  - effect of conveyance by debtor, 2303.
  - in what property, 860, 2295, 2297.
  - loss by abandonment, 2305.
  - persons entitled, 2293, 2297.
  - under federal law, 2306.
  - waiver, 2305.
- loss by failure to occupy, 857, 2305.
- marriage as prerequisite, 850.
- mortgage by husband, joinder of wife, 853.
- of husband, no estate in wife during coverture, 854.
- priority of purchase money mortgage, 2564.
- probate homestead, allotment to widow, 855, 859.
  - out of what interests in husband, 860.
- release of right, 858.
- right of transfer, 2302.
- surviving husband's rights, 854.
- transfer of homestead property, 2302.
- widow's rights, 855, 858.
  - bar by antenuptial contract, 858.
  - loss by abandonment, 857.
  - loss by remarriage, 857.
  - nature, 854, 855.
  - priority as against husband's debts, 859.
  - release, 858.
  - transfer, 856.

[REFERENCES ARE TO PAGES.]

**HOMESTEAD**—Continued.

- wife's joinder in husband's conveyance, necessity, 850.
- acknowledgment, 851.
- wife's rights during coverture, 853.

**HOMICIDE**

- acquisition of property by means of, 2354.

**HOPS**

- as fructus industriales, 876, 877, 890.
- as subject to doctrine of emblements, right of outgoing tenant, 890.

**HORSES**

- easement of tying on another's land, 1256.

**HOSPITALS**

- use of adjoining land for, right to object, 1118

**HOTCHPOT**

- nature, 1912.

**HOUSE**

- boundary by, whether edge of eaves intended, 1652.
- conveyance of in terms, extends to land, 1647.
- see, also, "Building."

**HUNTING**

- landowner's right, 1035.
- license for, 1216.
- profit à prendre of, right to control land, 1390.
- public right, as incident to right of navigation, 1547.
- right as profit à prendre, 1388, 1390.
- right not incidental to right of navigation, 1036.
- right not incidental to right of passage on highway, 1036.

**HUSBAND AND WIFE**

- acknowledgment by married woman, 1735.
- adverse possession by, 1986.
  - as between, 2025, 2027.
  - by survivor, 2022.
- as coheirs, 647.
- as taking single share under conveyance, 648, 649.
- as tenants by entireties, 645.
- as tenants in common, 648.
- as witnesses to conveyance by or to consort, 1728.
- as witnesses to will in which other interested, 1825.
- chattels real of wife, husband's common law interest, 728.
- community property, 656.
  - separate property distinguished, 657.

[REFERENCES ARE TO PAGES.]

**HUSBAND AND WIFE**—Continued.

- competency as witness to will in favor of consort, 1825.
- contract relinquishing curtesy, 841.
- conveyance by husband, as bar of dower, 761, 766.
  - to self and wife, 648.
- conveyance by husband and wife, of interest under tenancy by entireties, 653.
  - of homestead, 2302.
- conveyance to, resulting trust to wife paying purchase money, 649.
  - tenancy by entireties not necessarily created, 647.
- conveyances by and between, 730, 732, 850, 1592, 2330, 2332.
- conveyances to wife, 2330.
- curtesy of husband, 826.
- death, as terminating tenancy by entireties, 195.
- debts of husband, enforcement against property held by entireties, 654
- descent as between, 1895.
- desertion, as forfeiting jointure, 795.
- devise by husband to wife, in lieu of dower, 783.
- devise by wife, 730.
- devise to, 646.
- disseisin of wife's land, right of action, 847.
- dower, 733.
- gift by husband to wife as trust, 377.
- gift to, remainder to heirs of one, 632.
- homestead, 850, 854.
- homestead exemption, 2291.
- husband's rights in wife's chattels real, 728.
  - freehold estates of wife, 726.
  - property held by entireties, 652.
- inheritance between, 1895.
- invalid gift as trust, 377.
- joinder in husband's conveyance, effect of fraud, 801, 802.
- joint seisin, curtesy initiate, 845, 847.
- jointure, as bar of dower, 789.
- mortgage by wife, 2408.
- possession as notice, 2233.
- power in wife, husband's concurrence in exercise unnecessary, 1066.
- power of attorney from wife to husband, 2330.
- purchase of paramount title, by husband or wife of cotenant, 697.
- release of dower, by wife to husband, 777.
  - husband's joinder necessary, 775.
- representations by wife to purchaser, as bar of dower, 797.
- resulting trust as between, 404.
- resulting trust on conveyance to, 649.
- separate as distinguished from community property, 657.
- survivor as heir, 1895.

[REFERENCES ARE TO PAGES.]

**HUSBAND AND WIFE**—Continued.

- tenancy by entireties, husband's rights of control, 652.
  - not recognized in all states, 650, 651.
  - rights of creditors, 654.
- unity of ownership, merger of mortgage, 2606.
- widow's quarantine, 807.
- wife acting by attorney, 1801, 2330.
- wife's freehold estates, conveyance, 730, 732, 2332.
  - equitable separate estate, 729.
  - equity to a settlement, 728.
  - husband's rights at common law, 726.
  - statutory separate estate, 731.
- wife's joinder in husband's conveyance, insufficient if not named as grantor, 1592.
  - to release dower, 779.
    - see, also, "Curtesy"; "Dower"; "Entireties, Tenancy by"; "Homestead"; "Marriage"; "Married Women."

**I****ICE**

- as real or personal property, 1031.
- conveyance of land for ice business, implied grant of easement in pond, 1296.
- formed by flowage of another's land, 1031.
- imposition by state of license fee, 1031.
- prescriptive right to take, 2036.
- profit à prendre, 1389.
  - appurtenant to land, 1393.
- public right, 1031.
- resulting from easement of flooding another's land, 1351.
- rights of owner of land on which formed, 1030, 1351.

**ILLEGALITY**

- debt secured by mortgage, effect, 2419.
- of business for which lease made, defense to rent, 1505.
  - of condition, 279.

**ILLEGITIMATE CHILDREN**

- descent to and from, 1906.

**ILLUSORY APPOINTMENT**

- under power, 1094.

**IMPLIED AGREEMENT**

- as to boundary line, 999.

**IMPLIED CONDITIONS**

- nature, 265.

[REFERENCES ARE TO PAGES.]

### IMPLIED CONTRACT

- to pay for use of party wall, 1246.
- see "Implied Covenant."

### IMPLIED COVENANT

- as to existence of street, from reference to street in description, 1316.
- duration, 127.
- for rent, nature, 169.
- in case of lease, 124-127.
- in favor of tenant, 124-130.
- lessee's liability after assignment, 169.
- nature, 125, 127.
- of quiet enjoyment, 125, 126.
- of title, statutory provisions, 1677.
- on conveyance, 1677.
- on lease, 124-130.
- on partition, 708, 723.
- to give possession under lease, 131-133.
- to make repairs, 971.

### IMPLIED GRANT OF EASEMENT

- as properly rule of construction, 1271, 1273.
- as used before severance of tenements, 1281.
- by cotenant of land, 1290.
- by necessity, 1295.
- contemporaneous conveyances, 1288.
- continuous adaptation of tenements, 1282, 1283.
- conveyance for factory, 1295.
- conveyance for railroad, 1296.
- corresponding to pre-existent quasi easement, 1272.
- easement of necessity, 1295.
- in accordance with previous user, 1272.
- in land of third person, 1290, 1316.
- of necessity, 1295.
- of right of way, by reference to nonexistent highway or passage-way, 1313, 1314.
- on lease, 1288.
  - devise, 1288.
  - judicial sale, 1289.
  - mortgage, 1289.
- relation to express grant, 1271, 1386.
- severance of tenements, pre-existing user, 1274.
- way of necessity, 1297.

### IMPLIED RELEASE

- of easement, 1378.
- see "Implied Grant."

[REFERENCES ARE TO PAGES.]

### IMPLIED RESERVATION

- of easement, 1270, 1272, 1292, 1299.
  - corresponding to existing user, 1292.
  - effect of covenant for title, 1299, 1685.
- properly rule of construction, 1272, 1273.
- way of necessity, 1299.
  - see, also, "Implied Grant."

### IMPLIED TRUST

- nature, 391, 406.
- in connection with partnership property, 664.
  - see "Constructive Trusts"; "Resulting Trusts."

### IMPOSSIBILITY

- of condition, 276, 278, 296.
  - exercise of easement, extinction, 1364, 1365, 1368, 1369, 1378.
  - performance of condition precedent, 278.
  - performance of condition subsequent, 276.

### IMPROVEMENTS

- as evidence of claim of right, for purpose of adverse possession, 1942.
- by claimant under invalid lease, 111.
  - cotenant, contribution, 687, 2751.
  - holder of later equity, 2180.
  - husband's alienee, in connection with assignment of dower, 814.
  - innocent purchaser, compensation, 943, 2135, 2255.
- by licensee, duration of license, 1214.
  - effect on easement, 1381.
  - effect on right to revoke, 1208.
- life tenant, 84.
- mortgagee, 2449.
- oral grantee of easement, 1211.
  - land, 2140.
  - profit à prendre, 1398.
- tenant under invalid oral lease, 111.
- wrongful possessor of land, 943, 2135, 2255, 2750, 2795.
- compensation by statute, 943.
  - in equity, 943.
- destruction of, on land sold, 459.
  - on land leased, 1497.
- dower in, 813, 814.
- lien for, 2750, 2795.
- making on supposition of easement, estoppel to deny easement, 1327.
- mortgage of, 2368.
- part performance by making of, 2140.
- recovery of value, in action on covenant for title, 1710.
- under oral release of easement, 1382.

[REFERENCES ARE TO PAGES.]

**INADEQUACY OF PRICE**

- as charging purchaser with notice of adverse title, 2217, 2218, 2243, 2253.
- as ground for setting aside sale under power in mortgage, 2725.

**INCAPACITY**

- mental, 2342.
- of alien, 2350.
  - corporation, 2347.
  - criminal, 2353.
  - infant, 2332.
  - married woman, 2329.

**INCHOATE DOWER**

- as entitling to share in proceeds of judicial sale, 801.
  - valuable right, 802.
  - within covenant against incumbrances, 1687.
- effect of condemnation of land, 800.
- entitles to injunction against waste, 988.
- nature, 798.
- not breach of covenant of warranty or for quiet enjoyment, 1698.
- not transferable, 803.
  - see, also, "Dower."

**INCORPOREAL THINGS**

- dower in, 746.
- easements appurtenant to, 1225.
- estate for years in, 96.
- grant of, 34, 1229, 1257, 1328, 1397, 1567.
- lease of, 1568.
- nature, 9.
- prescription for, 2028.
- rent reserved out of, 1465.
- reservation of rent on lease of, 1466.
- running of covenant on transfer, 1111, 1474.
  - see, also, "Easements"; "Franchises"; "Highways"; "Profits à Prendre"; "Rent."

**INCUMBRANCE**

- payment by cotenant, 691.
  - life tenant, 85, 88.
  - tenant in dower, 823.
  - tenant in tail, 73.
- see, also, "Incumbrances, Covenant Against"; "Liens"; "Mortgages."

**INCUMBRANCES, COVENANT AGAINST**

- as running with land, 1720.
- covenantee's knowledge of incumbrance, ordinarily no defense, 1689, 1690.

[REFERENCES ARE TO PAGES.]

**INCUMBRANCES, COVENANT AGAINST—Continued.**

- damages, 1711.
  - easement, 1684.
  - easement of fencing, 1686.
  - easement of flowage, 1685.
  - highway, 1686, 1689.
  - implied easement, 1685.
  - inchoate dower, 802.
  - judgment lien, 1684.
  - lease for years, 1712.
  - lien, 1683.
  - mortgage, 1684, 1688, 1689.
  - natural right, 1685.
  - private way, 1685.
  - profit à prendre, 1686.
  - restrictive agreement, 1686.
  - right to appropriate water, 1685.
  - special assessment lien, 1684.
  - stipulation restricting damages for public improvement, 1687.
  - tax lien, 1684, 1689.
- oral evidence of assumption of incumbrance, 1632, 1691.
  - exception, 1690, 1691.
- what are incumbrances, covenant as to use of land, 1685, 1686.
  - dower, inchoate or consummate, 1687.
  - drain or aqueduct, 1685.

**INDEBITATUS ASSUMPSIT**

- for use and occupation, 1514.

**INDEMNITY**

- mortgage for purpose of, 2404, 2627.
  - foreclosure, 2679.
- of lessee by assignee, 169.

**INDEMNITY LANDS**

- in case of railroad grant, 1554.

**INDENTURE**

- deed of, nature, 1590.

**INDEX**

- to records, 2187, 2192, 2200.

**INFANTS**

- adverse possession against, 1973.
- as donees of powers, 1067.
- as trustees, 370, 2333.
- conveyances by, 2332-2337.



## [REFERENCES ARE TO PAGES]

**INFANTS**—Continued.

- conveyances to, 2341.
  - no acceptance necessary, 1793.
- death unmarried, descent of land, 1905.
- devise by, 2341.
- disaffirmance of conveyance, laches, 2337-2339.
- en ventre sa mere, injunction against waste, 988.
- equitable jointure, to bar dower, 790.
- exercise of powers by, 1067.
- partition sought by infant, 711.
- prescription against, 2068.
- purchase money mortgage by, 2340.
- release of dower by, 775.
- sale of land of, by order of court, 2153.
  - proceeds regarded as land, 454.
- who are, 2332.
- wills of, 2341.

**INHERITANCE**

- by and from aliens, 2350.
  - blood of ancestor from whom property derived, 1902.
  - by collateral kindred, 1896.
  - illegitimate children, 1906.
  - issue, 1894.
  - kindred of half blood, 1898.
  - murderer of ancestor, 2354.
  - parent, 1896.
  - surviving consort, 1895.
  - unborn children, 1907.
- dower estate not acquired by, 734.
- estates of, 38.
- necessity of words of, 45-51.
  - in exception of easement, 1269.
  - in grant of easement, 1259.
  - in reservation of easement, 1268.
- persons entitled by, 1894-1914.
  - see "Descent"; "Heirs."

**INHERITANCE TAX**

- assessment on dower right, 734.
- curtesy, 827.
- gift to wife, 734.

**INJUNCTION**

- against breach of agreement as to use of land, 1425, 1427, 1437.
  - breach of covenant, 264, 309, 310.
  - excavation causing subsidence of land, 1188.
  - obstruction of easement, 1360.

[REFERENCES ARE TO PAGES.]

**INJUNCTION—Continued.**

- against breach of agreement as to use of land—continued.
  - permissive waste, 974.
  - sale under power in mortgage, 2721.
  - unauthorized use of land dedicated, 1886.
  - waste, 974, 979, 982, 987, 990.
    - who entitled, 987.
  - waste by cotenant, 990.
  - waste by mortgagee, 2465.
  - waste by mortgagor, 2460.
- mandatory, to compel restoration of things wasted, 984.

**INQUEST OF OFFICE**

- to enforce forfeiture, 2144.

**INQUIRY**

- information putting on, 2115, 2242.

**INSANE PERSONS**

- adverse possession against, 1973.
- bar of estate tail of, 72.
- conveyances by, 2342, 2346.
- conveyances to, 2342, 2346.
  - acceptance not necessary, 1793.
- devises by, 2347.
- election between dower and testamentary provision, 786.
- insanity of grantor, after conditional delivery, 1779, 1780.
- prescription against, 2068.
- release of dower of, 775.
- sale of land by order of court, 2153.
  - proceeds regarded as land, 454.

**INSOLVENCY**

- limitation over on, 2316.

**INSTALLMENTS**

- of rent, not apportionable, 1479.
  - when payable, 1475.

**INSTRUMENTS**

- see "Alterations of Instruments."

**INSURANCE**

- by mortgagor, 2455.
  - mortgagee, 2457, 2458.
  - mortgagor, for mortgagee's benefit, 2456.
- covenants for, as running with the land, 178.
- foreclosure for non-insurance, 2678.
- forfeiture for failure to insure, relief in equity, 322.

[REFERENCES ARE TO PAGES.]

**INSURANCE**—Continued.

- mortgage not alienation, 2455.
- premiums paid by mortgagee, reimbursement, 2448, 2651.
- subrogation of insurer to mortgagee's rights, 2458.

**INTERESSE TERMINI**

- as estate, 116.
- as meaning interest of lessee before entry, 115.
- as meaning interest under lease in futuro, 115.
- as subject of transfer, 115.
- as supporting action on covenant for quiet enjoyment, 132.
- does not prevent merger, 92.
- entitles to injunction against waste, 988.
- holder cannot take release, 1569.
- in case of lease in reversion, 156.
- nature, 115, 117, 156, 604.
- release to holder of, 1569.
- transfer, 115.
- within rule against perpetuities, 604.
  - see "Landlord and Tenant"; "Lease."

**INTEREST**

- as created by license, 1202.
- as disqualifying official to take acknowledgment, 1729.
- as disqualifying witness to conveyance, 1728.
- as disqualifying witness to will, 1824.
- license coupled with, 1215.
- on incumbrance, payment by life tenant, 85, 87.
- on purchase price, element in damages for breach of covenant for title, 1713.
- power as interest in land, 1041.
- power coupled with, 1054.
  - see "Estate"; "Future Estates"; "Possibility."

**INTERFERENCE**

- with easement, 1351.
- with user of land, as excluding prescriptive right, 2064-2066.

**INTERPRETER**

- acknowledgment through, 1732.

**INTESTACY**

- limitation over on, 576.

**INTESTATE SUCCESSION**

- see "Descent"; "Executors and Administrators."

**INTOXICATING LIQUORS**

- mortgage to secure debt for liquor illegally sold, 2419.
- prohibitory legislation, effect on rent, 1506.
- refusal of license at landlord's instigation, as eviction, 203.

[REFERENCES ARE TO PAGES.]

**INTOXICATION**

incapacitating grantor, 2342.

**IRRIGATION**

appropriation of water of stream for, 1133.

construction of works on private land, 1310.

ditch, as within covenant against incumbrances, 1687.

**ISLANDS**

accretions to, 2110.

newly formed, ownership, 2115.

what are, 2111.

**ISSUE**

as heirs, 1894.

as meaning heirs of the body, 64.

as word of limitation or of purchase, 63, 64.

birth, as necessary to curtesy, 822.

death without, limitation over on, 65, 567, 575, 576.

descent to, 1894.

devise over on failure of, 65.

estate in favor of, modification of fee tail estate, 56.

of devisee, as substituted on death, 1832, 1834.

omitted from will, statutory provisions, 1849.

remainder in, by force of fee tail legislation, 56.

remainder to, application of rule in Shelley's case, 529-544.

word of limitation creating fee tail, 63.

**J****JOINDER**

by husband in wife's conveyance, 841.

wife in husband's conveyance, of homestead, 851.

wife in husband's conveyance, to release dower, 768, 775, 779.

wife in husband's mortgage, to release dower, 754.

in action by cotenants, 698.

**JOINT ADVENTURE**

in raising crops, 897, 900.

**JOINT EXECUTORS**

death, survivorship of power, 1075.

exercise of power, necessity of joinder, 1076.

see "Community Property"; "Co-Ownership"; "Coparcenary"; "Entireties, Tenancy by"; "Joint Tenancy"; "Partnership Property"; "Tenancy in Common."

**JOINT TENANCY**

accounting for rents and profits by tenant in possession, 674

acquisition of adverse title by joint tenant, 693.

[REFERENCES ARE TO PAGES.]

**JOINT TENANCY**—Continued.

- action by joint tenants, 698.
- between husband and wife, 646.
  - joint mortgagees, 2697.
  - joint trustees, 421, 637, 1076.
- by adverse possession, 635.
- conveyance by joint tenant, 637, 679.
  - of minerals by joint tenant, 685.
  - of timber by joint tenant, 685.
- conveyances between joint tenants, 639.
- corporation cannot take in, 636.
- creation, 630, 634.
- curtesy in joint tenant's share, 837.
- dower in joint tenant's share, 758.
- for life, merger of joint tenant's interest, 640.
- for lives, 632.
- gift to two and the heirs of their bodies, 631.
- gift to two for life, 632.
- grant of easement by joint tenant, 684.
- improvements by tenant, contribution for, 687.
- intention to create, declaration, 634.
- joinder in actions by, 698.
- joint tenant, accounting by, 674.
  - acquisition of paramount title by, 692.
  - contract by, 678.
  - conveyance by, 637, 678.
  - conveyance of minerals, 685.
  - conveyance of timber, 685.
  - corporation cannot be, 636.
  - execution sale of interest, 639.
  - failure of gift as to one, 629.
  - improvements by, 687.
  - lease by, 637, 683.
  - mortgage by, 639.
  - ouster of, 671, 692.
  - payment of incumbrance by, 691.
  - release by, 639.
  - repairs by, 689.
  - sale by, 638.
  - waste by, 990.
- language showing intention to create, 634.
- lease by joint tenants, 638.
- modification and abolition by statute, 633.
- nature, 625.
- not favored by courts, 631.
- one estate jointly owned, 625, 627.
- or tenancy in common, 634.
- ouster of cotenant, 671.

[REFERENCES ARE TO PAGES.]

**JOINT TENANCY**—Continued.

- partition, 700, 709.
- payment of incumbrance by joint tenant, 691.
- release as between joint tenants, 639.
- resulting trust in proportion to contributions to purchase, 627.
- severance, 637.
  - effect on dower right, 758.
- statutes creating presumption against, 633.
- survivorship, 627.
  - statutory provisions, 628.
- termination, 637.
- unities, 626.
- with remainder to heirs, 632.

**JOINT TRUSTEES**

- express power, joinder in execution, 1076.
- survivorship, 421, 637, 1076.

**JOINTURE**

- bar of dower by, 789.
- forfeiture by misconduct, 794.
- inadequacy, effect, 792.
- legal and equitable, 790.
- statutory provisions, 791.
- under statute of uses, 789.

**JUDGMENT**

- against grantor estopped to assert after acquired title, priority of  
lien, 2133.
- against husband, enforcement against land held by entireties, 654, 655.
- against trustee, rights of oral cestui que trust, 381.
- as to title, conclusiveness as against person notified to defend, 1705.
- creditor, as protected by recording law, 2212, 2215.
  - effect of notice, 2215.
- enforcement against homestead after conveyance by debtor, 2303.
- for dower, 822.
- for possession, as interrupting adverse possession, 1956.
- for taxes, as prerequisite to sale, 2158.
- lien of, 2775, 2776.
  - as within covenant against incumbrances, 1684.
  - character of judgment, 2777.
  - divested by appointment under prior power, 1048.
  - interests subject, 2779.
  - on interest under trust for sale, 443.
  - on land held by entireties, 655.
  - on partnership land, 667.
  - on undivided interest, effect of partition, 707.

[REFERENCES ARE TO PAGES.]

**JUDGMENT**—Continued.

- lien of—continued.
  - priorities, 2133, 2782.
    - as against delivery in escrow, 1780.
    - as against dower claim, 773.
    - as against purchase money mortgage, 2564, 2566.
    - as against unaccepted conveyance, 1788.
    - as against vendor's lien, 2757.
- sale under, 2148.
  - protection of purchaser against defects in title, 2260.

**JUDICIAL PROCESS**

- transfers under, 2146.

**JUDICIAL SALES**

- curtesy in proceeds, 833.
- direction by court of equity, in case of trust property, 1059.
- dower in proceeds, 742, 773.
- easement passing on, 1289, 1305.
- effect of adverse possession of land, 2290.
- execution sale distinguished, 2150.
- implied grant of easement, 1274.
- in equity at instance of creditors, 2150.
- in partition proceeding, 721, 2153.
- of decedent's land, 2150-2152.
- of infant's land, 2153.
- of lunatic's land, 2153.
- possession of former owner as notice, 2238, 2239.
- possession of purchaser, tacking to previous possession, 1970.
- proceeds treated as land, 454, 455, 773, 833.
- purchase by cotenant, 694.
- purchaser affected by lis pendens, 2270.
- purchaser holding title as security, 2392.
- redemption from sale, operation as mortgage, 2393.
- under execution, 2146.

**K****KEYS**

- as fixtures, 911.
- return by tenant to landlord, effect as surrender of leasehold, 1585.

**KINDRED**

- computation of degrees of, 1897.
- of half blood, descent to, 1898.

**KNOWLEDGE**

- see "Notice."
- 3 R. P.—78

[REFERENCES ARE TO PAGES.]

**L****LABORERS**

lien of, 2767, 2795.

**LACHES**

as defense to enforcement of restrictive agreement, 1452.  
as element in tenancy at sufferance, 246.  
in applying for injunction against obstruction of easement, 1362.  
    asserting forfeiture for breach of condition, 304.  
    demanding dower, 820.  
    foreclosing mortgage, 2680.  
    proceeding to enforce restrictive agreement, 1452.  
    redeeming from mortgage, 2659.

**LAKE**

as boundary, 1657.  
    change by natural causes, 2093.  
bed of, division among adjoining owners, 1020.  
change in conditions, right to restore, 1160.  
change of margin, 2114.  
depletion of water by taking of ice, 1031.  
distinguished from surface water, 1160.  
drying up of, division of bed, 2114.  
ice in, right to take, 1030.  
outflow of water, not to be changed, 1158.  
ownership of land under, 1018.  
rights as to water, 1157.  
underground lake, reasonable user, 1179.  
water in, rights of adjoining owners, 1157.

**LAND**

as appurtenant to land, 1674, 1675.  
as including fixtures, 903.  
    manure, 946.  
    vegetation, 876.  
as the object of rights, 1, 14.  
classes of rights in, 4.  
description in conveyance, 1645.  
directed to be sold, proceeds personalty, 438.  
    remains realty, 438.  
estates in, 35-39.  
gift of land to be purchased, gift of land, 440, 441.  
minerals separately owned, 867.  
not appurtenant to land, 1673.  
rights as to space above, 864.  
rights of ownership, 40.  
riparian, what is, 1139.  
sold, proceeds occasionally regarded as land, 454.



[REFERENCES ARE TO PAGES.]

**LAND—Continued.**

- subsidence of, caused by excavations, 1188.
- support of, by neighboring land, 1187.
- to be purchased, regarded as realty, 441.
- under water, ownership, 1007, 1056.

**LANDLORD AND TENANT**

- acceptance of sublessee as tenant, 1587.
- adverse possession between, repudiation of tenancy, 1998.
- adverse possession by tenant, 1983, 1996.
  - tenant's acknowledgment of true title, 1966.
- adverse possession of landlord, interruption by tenant, 1966.
- agreement for division of crops, effect, 901.
- agreement to relinquish possession on contingency, 269.
- agricultural fixtures, removability, 930.
- assertion of adverse title by tenant, as ground of forfeiture, 266.
- assignment of leasehold, 160.
  - by operation of law, 164.
  - by way of mortgage, 2424.
  - effect on assignor's liabilities, 166.
  - effect on liability for rent, 1471, 1510.
  - liability of assignee, 168, 169, 1471, 1510.
  - necessity of writing, 163.
  - part performance, 164.
  - stipulation against, 161, 162.
  - sublease distinguished, 170.
  - sufficiency to make covenant run, 180.
- attornment, as precluding denial of title, 191.
  - equivalent to acceptance of lease, 102.
  - to mortgagee, 2447.
  - to paramount title, 198.
  - to transferee of reversion, 34, 151, 157, 1568.
- boundary line, tenant's duty to preserve, 995.
- breach of condition, enforcement of forfeiture, 305, 316.
- breach of covenant, effect on rent, 1504.
- change of landlord, 149.
- concurrent lease, 155.
- condemnation of leased premises, effect on rent, 1495.
- condition of re-entry, 262-325.
- continued nonpayment of rent, effect, 1487.
- control of door by landlord, implied from necessity, 1305.
- covenant, effect of transfer of leasehold, 165, 169, 174.
  - effect of transfer of reversion, 157, 158, 174.
  - for quiet enjoyment, 125-127, 129, 132.
  - for rent, runs with the land, 1471.
  - for repairs, effect of breach on rent, 1505.
  - implication, 125, 126.
  - not to commit waste, 982.

[REFERENCES ARE TO PAGES.]

**LANDLORD AND TENANT—Continued.**

- covenant—continued.
  - of power to demise, 125.
  - of quiet enjoyment implied, 126.
  - running with land, 177, 1222, 1401, 1471.
  - to allow entry by lessor, 1222.
  - to repair, 139-143, 1505.
- covenants, dependent and independent, 130, 1504.
- creation of relation by lease, 100, 102.
- cropper distinguished from tenant, 121, 897.
- crop-sharing contract, 897.
- cultivation on shares, 121.
- damage by stranger's act, liability of tenant, 975.
- dangerous conditions on premises, 137.
- death of landlord, descent of reversion, 154.
- death of party, effect on covenant, 185.
- defects in leased premises, liabilities, 136, 137, 141.
- dependent and independent covenants, 130, 1504.
- destruction of building, effect on rent, 1497.
- liability of tenant, 976, 978.
- disclaimer of tenancy by tenant, 266, 1998, 1999.
- distress for rent, 1516.
- domestic fixtures, removability, 929.
- duty of repair, permissive waste, 968.
- easement of light, implied grant, 1277.
- ejectment by tenant against landlord, 119.
- elevator, liability for mismanagement, 147.
- emblems, 888-893.
- enforcement of forfeiture, effect, 318.
- entry by landlord, 119.
- entry by lessee, 114.
- entry under invalid lease, 108.
- estoppel of tenant to deny title, 185-196, 2000.
- estovers, 961.
- eviction of tenant, 196, 199, 204, 206.
  - acts of omission on part of landlord, 204.
  - effect, 205.
  - effect on rent, 1500, 1501.
  - interference with use of premises, 199.
  - under paramount title, 196.
  - untenantable condition of premises, 1503.
- exclusion of lessee from possession, 131-136, 1488.
  - by holder of paramount title, 134.
- expiration of landlord's estate, right of tenant to show, 195.
- failure of tenant to take possession, effect on rent, 1488.
- failure to supply heat, effect on rent, 1504.
- failure to supply water, effect on rent, 1504.
- fences, duty of repair, 973.

[REFERENCES ARE TO PAGES.]

**LANDLORD AND TENANT—Continued.**

- fixtures annexed by tenant, right to remove, 926.
- forcible entry by landlord, 253, 255.
- foreclosure of mortgage on premises, 213, 2446.
- forfeiture by tenant, 212, 225, 262, 267, 308.
  - effect on rent, 1485, 1493, 1516.
  - effect on right to remove fixtures, 938.
  - for disclaimer of landlord's title, 266.
  - for illegal use of premises, 267.
  - for nonpayment of rent, 1516.
  - mode of enforcement, 308.
  - statutory provisions, 267.
- heating apparatus, liability for mismanagement, 147.
- heating of premises, effect of failure on rent, 1504, 1505.
- holding over by tenant, 241. See "Holding Over."
- illegality of business for which lease made, effect on rent, 1506.
- implication of covenant, 125, 133.
  - as to condition of leased premises, 136-138.
  - to put lessee in possession, 133.
- implication of easement of light, 1277.
- improvements by tenant, lien for compensation, 2751.
- injuries for defective condition of premises, liability, 141-148.
- injuries to leased premises, liability, 138, 949.
- interference with tenant's enjoyment as eviction, 199, 201.
- landlord's covenant to repair, resulting liability, 142, 146.
- landlord's duty to give possession, 131.
- lease at will of lessor, 221.
  - at will of lessee, 219.
  - by life tenant, remainderman not in privity with lessee, 83.
  - for illegal purpose, 1505.
  - for indefinite period, 219, 231.
  - in reversion, 155.
  - invalidity, resulting periodic tenancy, 233.
  - invalidity, resulting tenancy at will, 216.
  - of mortgaged land, 2446, 2703.
- license to landlord to enter, 1222.
  - as passing with reversion, 1222.
- licensee and tenant distinguished, 120.
- liens for rent and supplies, 2794.
- manure, removal by tenant, 947.
- mechanic's lien, under contract with tenant, 2770.
- merger of leasehold, 211, 1490.
- minerals, extraction by tenant, 955.
- misuse of property by tenant, 949.
- mortgage of leasehold, 2424.
- mortgage of reversion, 2446.
- nature of relation, 100.
- negligence of landlord, defects in premises, 141.

[REFERENCES ARE TO PAGES.]

**LANDLORD AND TENANT**—Continued.

- negligent user of building, as waste, 966.
- no right of entry ordinarily in landlord, 119.
- nonpayment of taxes as waste, 952.
- option to terminate relation, 209, 265, 334.
  - of purchase, rule against perpetuities, 608, 611.
  - of renewal, rule against perpetuities, 610.
- ornamental fixtures, removability, 929.
- payment of taxes, 58.
- payments by tenant not necessarily rent, 1468.
- periodic tenancy, creation, 231.
  - nature, 228.
  - termination, 238.
  - transfer of interest, 238.
- personal injuries, liability of landlord, 141-148.
- possession by tenant, notice of landlord's rights, 2234.
  - notice of tenant's rights not under lease, 2236.
- possessory rights of tenant, 118.
- prescription in favor of tenant as against landlord, 2044.
- privity of contract, 157.
- privity of estate, 157, 158, 165-169, 1510.
- provision for re-entry, 265, 308.
- provision for reversion of property on contingency, 268.
- provision terminating tenancy for tenant's default, election of landlord, 301.
- provision terminating tenancy on sale by landlord, 209.
- quiet enjoyment, covenant for, 131.
- reassignment of leasehold, effect on liability under covenant, 184.
- re-entry by landlord, 212, 1485, 1493, 1584.
- release of rent, 1487.
- reletting by landlord on tenant's abandonment, 1493, 1587.
- relinquishment of possession by tenant, 1584.
- removable fixtures, agricultural, 930.
  - domestic and ornamental, 929.
  - loss of right of removal, 934.
  - realty or personalty, 931.
  - restrictions on right of removal, 932.
  - time for removal, 934.
  - trade fixtures, 927.
- removal of stone by tenant, 955, 957.
- renewal of tenancy, 256.
- rent, 157, 158, 1459.
- repairs by tenant, duty apart from contract, 139, 968, 969.
  - covenant to make, 1505.
- repudiation of tenancy by tenant, 1998.
- reservation of rent, 1460, 1465, 1469.
- restoration of building destroyed, duty under covenant to repair, 139.
- return of key by tenant, effect, 1585.

[REFERENCES ARE TO PAGES.]

**LANDLORD AND TENANT**—Continued.

- right of re-entry, as passing on transfer of reversion, 316.
- running of covenants in lease, 174, 177, 179.
- stipulation against assignment of leasehold, 161, 162.
- sublease, 173.
- sublease, prohibition, 161.
- sublessee not in privity with landlord, 173.
- subsequent lease by landlord, 155.
- subtenant holding over, responsibility of head tenant, 251.
- surrender of leasehold, 210, 211, 1490, 1492, 1578, 1588.
  - as terminating right to remove fixtures, 937.
  - as terminating tenancy, 210, 1588.
  - by operation of law, 1581.
  - does not affect rights of third person, 210.
  - effect on rent, 1490.
  - express, 1580.
  - of subversion, 210, 211.
- tacking adverse possessions, 1971.
- tenancy at sufferance, 241.
- tenancy at will, 214-223.
  - for years, 100.
  - from month to month, 235.
  - from year to year, 228-234.
- tenant distinguished from cropper, 121.
  - holding over, rights of landlord, 247-256.
  - unable to obtain possession, 131, 133.
- tenant's failure to take possession, effect on rent, 1488.
- tenant's right to emblements, 888.
  - estovers, 961.
  - fixtures, 903, 926.
  - manure, 947.
  - minerals, 955.
  - timber, 957.
- tenure existent as between, 100.
- termination of landlord's estate, 195, 212.
  - tenancy, 206-214, 223, 238, 1479.
- termination of tenancy, right to crops, 888.
  - right to remove fixtures, 934.
- transfer of leasehold, 159, 170.
- transfer of reversion, 149, 157, 158.
  - by operation of law, 153.
  - effect, 157, 158.
  - necessity of attornment, 151.
  - notice to tenant, 152.
  - transferee entitled to rent, 1471, 1510.
- untenantable condition of premises, effect on rent, 1499, 1502.
- waste by tenant, 138, 949, 967.
- water pipes, liability for mismanagement, 147.

[REFERENCES ARE TO PAGES.]

**LANDLORD AND TENANT**—Continued.

- withholding of possession, effect on rent, 1488.
- see, also, "Attornment"; "Conditions"; "Covenants"; "Crops"; "Distress"; "Emblements"; "Eviotions"; "Fixtures"; "Forfeiture"; "Holding Over"; "Interesse Termini"; "Lease"; "License"; "Rent"; "Sublease"; "Sufferance, Tenancy at"; "Surrender"; "Waste"; "Will, Tenancy at"; "Year to Year, Tenancy at"; "Years, Estate for."

**LAPSE**

- of devise, by death of devisee, 1831.

**LATERAL LINES**

- between proprietors on water, 1032, 2113.

**LATERAL SUPPORT**

- of building, by adjoining building, 1191, 1243.
- by party wall, 1244.
- easement, 1243, 1349.
- no natural right, 1190.
- prescriptive right, 2039.
- of land, easement as to, 1242.
- impairment by work on highway, 1193.
- injury to building, 1190.
- natural right of, 1187.

**LEASE**

- acceptance as attornment, 102.
- acceptance from true owner, as interrupting adverse possession, 1963.
- action by lessee to recover possession, 135.
- as between cotenants, 673, 677.
- as breach of covenant for title, 1682, 1687, 1689, 1694.
- as conveyance, 98, 99.
- as signifying instrument of lease, 99.
- as signifying interest created by lease, 96.
- as within statute of frauds, 103.
- at will of one party, 219.
- by cotenant, 638, 673, 683.
- husband, effect on dower, 768.
- joint tenant, 638.
- life tenant, 82.
- mortgagee, effect of redemption of mortgage, 213.
- mortgagee to mortgagor, 2432.
- mortgagor, 213, 2422, 2446, 2703.
- effect of foreclosure of mortgage, 213.
- mortgagor to mortgagee, 2433.
- purchaser at execution sale, effect of redemption, 214.
- tenants in common, 640.
- trustee, 1060.

[REFERENCES ARE TO PAGES.]

**LEASE**—Continued.

- cancellation by consent, 1579.
- concurrent lease, 156, 1490.
  - running of covenant on, 182.
- condition in, forfeiture for breach, 308, 311.
  - passes with reversion, 316.
- conflicting leases by same lessor, 136.
- construed in favor of lessee, 1619.
- covenant against assignment, 161.
- covenant for renewal, rule against perpetuities, 611.
- covenants of, 99, 124-131, 157, 165, 169, 174.
  - dependent or independent, 130, 1504.
- covers land added by accretion, 2108.
- creating estate for years, 98.
- distinguished from contract for lease, 104, 112.
  - cropping contract, 121-124, 897.
  - license, 120.
- entitles lessee to possession, 131.
- entry pending negotiations, tenancy at will, 217.
- entry under, necessary to create tenancy, 114.
- entry under invalid lease, periodic tenancy, 107, 234.
  - tenancy at will, 216, 217.
- estate before entry under, 116.
- exclusion of lessee by lessor, 136.
  - by paramount claimant, 134.
  - by wrongdoer, 135.
- expression used in different senses, 98, 99.
- for agricultural purposes, lessee's right to remove stones, 957.
  - illegal purpose, liability for rent, 1505.
  - life, 101.
  - mining purposes, 868, 869.
    - effect of lessee's failure to mine, 871.
  - oil and gas, 874.
  - purpose of renewal, effect on right to remove fixtures, 938.
  - uncertain period, 217, 231.
  - years, 98.
  - years, must specify length, 117.
- hidden defects in premises, liability of lessor, 137.
- implied covenant to put lessee in possession, 133.
- implied grant of easement by, 1288, 1305.
- in fraud of dower, 765.
- in futuro, validity, 583, 604.
- in reversion, 155, 156.
- invalid, adverse possession under, 1983.
- invalid lease for years, effect, 107-110.
- is conveyance, 98, 103, 1568.
- lessee with notice bound by contract as to use of land, 1426.
- lessor's duty to reveal hidden defects, 137, 138.

[REFERENCES ARE TO PAGES.]

**LEASE—Continued.**

- lessor's obligation to give possession, 131.
- nature, 1568.
- necessity of writing, 102-112.
- not naming duration, effect, 217, 233.
- notice from record, 2184.
  - tenant's possession, 150.
- of apartment, effect of destruction of building, 1498.
  - chattels with land, how rent regarded, 1467.
  - furnished house, implied covenant as to condition, 137.
  - incorporeal thing, 1568.
  - land and chattels, 1466.
  - land bounding on water, change in location of water, 2108.
  - minerals, 744, 868.
  - mortgaged land, 213, 2422, 2446, 2447, 2703.
  - natural gas rights, 874.
  - oil rights, 874.
  - reversion, 155.
  - rooms, 120.
  - trees, 882.
- option to terminate, as creating tenancy at will, 220, 221.
- power in trustees to make, 1060.
- provision for re-entry, 263.
- provision for sharing of crops, 121-124.
- record, 150.
- renewal by trustee, 418.
- renewal lease, effect on right to remove fixtures, 938.
- rescission by consent, effect, 1579.
- reservation of rent, creates rent service, 1465.
- sale of land under prior lien, 154.
- sale of land under subsequent lien, 154.
- statutory restriction as to length, 100.
- substitution of new lease, as surrender, 1582.
- transfer of, meaning of expression, 153.
- within recording law, 2184.
- without impeachment of waste, 967.
  - see, also, "Attornment"; "Covenants"; "Distress"; "Emblements"; "Fixtures"; "Interesse Termini"; "Landlord and Tenant"; "Lessee"; "License"; "Sublease"; "Surrender"; "Will, Tenancy at"; "Year to Year, Tenancy from"; "Years, Estate for."

**LEASE AND RELEASE**

- conveyance by, nature, 350, 1573.

**LEASEHOLD ESTATES**

- what are, 8, 39.
  - see, also, "Will, Tenancy at"; "Year to Year, Tenancy from"; "Years, Estate for."



[REFERENCES ARE TO PAGES.]

**LEGACIES**

- charged on land, 2735, 2737.
- personal obligation of devisee of land, 2742.

**LEGAL TITLE**

- for purpose of mortgage, 2361, 2371.
- for purpose of priorities, 2169, 2170, 2173.
- in case of conveyance intended as mortgage, 2382.
- in mortgagee or mortgagor, 2423.
- in trustee, 362, 419, 422, 428.

**LESSEE**

- continuing liability after assignment, 165-169, 1471, 1510.
- distinguished from tenant, 101.
- effect of death, 164, 169.
- entitled to indemnity from assignee, 168.
- necessity of entry by, 114-117.
- position before entry, 116.
- tacking of possession to that of lessor, 1971.
- within protection of recording statute, 2212.
  - see "Landlord and Tenant"; "Lease."

**LEVY**

- execution, 2790.
- of attachment, 2786.

**LEX REI SITAE**

- controls in case of land, 3.

**LICENSE**

- abandonment, 1220.
- adverse possession by licensee as against licensor, 2006.
- annexations by licensee, 921.
- assignment, not usually permissible, 1221.
  - terminates license, 1221.
- by cotenant, 685.
- by lessee to lessor, transfer with reversion, 1222.
- by oral grant of easement, 1212, 1258.
  - right of profit, 868, 1216, 1217, 1397.
- by sale of growing trees, 885, 887, 1216, 1217.
- consideration for, as preventing revocation, 1206.
- construction, as to acts allowed, 1205.
- coupled with an interest, 1215, 1222.
  - irrevocability, 1215.
- death of licensor, 1220.
- dispensing with condition, 295.
- distinguished from easement, 1202, 1212.
  - lease, 120.
  - profit à prendre, 1215, 1391.

[REFERENCES ARE TO PAGES.]

**LICENSE**—Continued.

- does not give possession, 1202.
- dower in, 747.
- duration, 1206, 1219.
- easement distinguished, 1202, 1212.
- expenditures under, 2141.
- express provision for revocation, 1213.
- extinguishment, abandonment, 1220.
  - assignment, 1220.
  - death of licensee, 1220.
  - lapse of time, 1219, 1220.
  - licensor's death, 1220.
  - revocation, 1206.
  - sale of land, 1220.
  - violation of condition, 1219.
- extinguishment of easement by, 1381.
- for breach of condition, 295, 298.
- for liquor business, inability to obtain for leased premises, 203, 1507.
- for mining purposes, 868.
- for named period, 1213.
- form of, 1204.
- general nature, 1201.
- implication from acquiescence in user of land, 1205, 1213.
- improvements by licensee, as part performance, 1217.
  - assertion against subsequent purchaser, 1218.
  - duration of license, 1214.
  - effect on right of revocation, 1208.
  - reimbursement of cost, 1214.
- in lease, from lessee to lessor, 1222.
- interest, coupled with, 1215, 1222.
- interference by third person, no right of action, 1202.
- issuing from single cotenant, 685.
- joint licensees, death of one, 1220.
- lease distinguished, 120.
- licensee distinguished from tenant, 120.
  - of tenant, landlord's liability for injuries, 143.
  - possession not adverse, 2006.
  - user not prescriptive, 2042.
  - with notice bound by contract as to use of land, 1426.
- nature, 1201.
- no dower in, 747.
- no formality necessary, 1204.
- no right of action against third person, 1202.
- operative in favor of licensee's servants, 1206.
- ordinarily revocable, 1206.
- profit à prendre distinguished, 1215, 1391.
- protection to servants of licensee, 1206.
  - refused at instigation of landlord, as eviction, 203.

[REFERENCES ARE TO PAGES.]

**LICENSE**—Continued.

- resulting from invalid grant of easement, 1212, 1258.
  - invalid grant of profit à prendre, 868, 1216, 1217, 1397.
  - sale of growing trees, 885, 887, 1216, 1217.
- revocation, 1206, 1220.
  - as breach of contract, 1221.
  - conveyance to third person, 1218.
  - death of licensor, 1218.
  - effect of improvements, 1382.
  - grant of inconsistent right of user, 1219.
  - making exercise impossible, 1218.
  - restoration of previous conditions, 1221.
  - right to remove property, 1221.
- scope, 1205.
- suspension of natural right by, 1195.
- termination, abandonment, 1220.
  - assignment, 1220.
  - death, 1220.
  - does not affect previous acts, 1221.
  - lapse of time, 1219, 1220.
  - licensee not bound to restore previous conditions, 1221.
  - revocation, 1206.
  - sale of land, 1218, 1220.
  - violation of condition, 1219.
- time of acting under, 1205.
- to annex article to land, right of removal, 921.
  - as against prior mortgagee of land, 924.
  - as against subsequent purchaser of land, 922.
- bury the dead, 1253.
- commit waste, necessity of deed, 968.
- cut timber, 885, 968, 1200.
  - as coupled with interest, 1216, 1217.
  - oral contract of sale, 887, 888.
- enter on leased premises, 120, 1222.
- enter premises to do business, 1204.
- erect building, 1203.
- erect structure, as extending to contractor for erection, 1206.
- flow land, 1203.
- hunt, as coupled with interest, 1216.
- maintain drainage ditch, 1203.
- obstruct easement, effect of improvements under, 1381.
- occupy church pew, 1252.
- pass over land, 1203.
- place structure on land, as extending to subsequent structure, 1205.
- remove articles purchased, 1205.
- take minerals, 868, 968.

[REFERENCES ARE TO PAGES.]

**LICENSE**—Continued.

- to annex article to land—continued.
  - use land, inference from absence of enclosure, 2046.
  - violate condition, 295, 298.
- user of land under license, not basis for prescriptive right, 2043.
- writing not necessary, 968.
- see, also, "Easements."

**LIEN**

- acquisition by cotenant, effect, 693.
- agreement for security, 2743.
- agreement to give mortgage, 2746.
- as involving breach of covenant for title, 1681, 1684, 1698.
- as ordinarily involving right of forced sale, 6.
- attachment lien, inception, 2787.
  - interests subject to, 2788.
  - priorities, 2788.
- creation by words of covenant, 1403, 1423, 1430.
- dedication by landowner does not affect, 1861.
- defective mortgage, 2745.
- deposit of title deeds, 2749.
- effect of partition on, 707, 723.
- enforcement, effect on dower, 772.
- equitable lien, 2734.
- equitable mortgage, 2743.
- execution lien, 2790.
  - priorities, 2790.
- express charge on land, 2734.
- express lien for price of land, 2761.
- extinguishment by purchaser of land as eviction, 1703.
- for compensation for land taken for public use, 2165.
  - decendent's debts, 2793.
  - excessive sums received by cotenant, 676.
  - improvements made by cotenant, 2751.
    - made by tenant, 2751.
    - on another's land, 2750, 2795.
  - owelty of partition, 2751.
  - price of land, 2752, 2761.
  - rent, 1522, 2794.
  - support to be furnished, 329.
  - taxes and assessments, 2791.
  - value of land condemned, 2165.
  - widow's allowance, 2795.
- foreclosure, effect on dower, 773.
- informal mortgage, 2745.
- judgment lien, 2775, 2776.
  - as within covenant against incumbrances, 1684.
  - character of judgment, 2777.

[REFERENCES ARE TO PAGES.]

**LIEN**—Continued.

- judgment lien—continued.
  - interests subject, 2779.
  - on interest under trust for sale, 443.
  - on land held by entireties, 635.
  - on partnership land, 667.
  - priorities, 2782.
    - as against delivery in escrow, 1780.
    - as against purchase money mortgage, 2564, 2566.
    - as against vendor's lien, 2757.
- lienors as parties to foreclosure suit, 2704, 2706.
- mechanic's lien, assertion and enforcement, 2773.
  - contract or consent of owner, 2769.
  - estate or interest subject, 2769.
  - nature, 2766.
  - persons entitled, 2767.
  - priorities, 2564, 2771.
  - release or waiver, 2774.
  - time of attachment, 2772.
- mortgage, 2356.
- on crops, for labor, 2795.
  - for rent, 2794.
  - for supplies, 2794.
- on particular estate, not affected by surrender, 1588.
- on undivided interest, effect of partition, 707, 723.
- statutory, 2766.
- to secure annuity, 2735.
  - legacy, 2735-2742.
  - payment of decedent's debts, 2735-2742.
  - support, 2735.
- under system of registration of title, 2278.
- vendee's lien, 2765.
- vendor's lien, 2752.
  - express reservation, 2761.
  - for sum assumed, 2755.
  - in favor of third person, 2756.
  - not favored, 2753.
  - origin, 2753.
  - passes to personal representative, 2759.
  - persons affected by, 741, 2756.
  - price must be certain, 2753.
  - transfer, 2758.
  - waiver, 2759.
- vendor's lien before conveyance, 2763.
  - see, also, "Equitable Liens"; "Mortgages"; "Statutory Liens."

**LIFE**

- in being, within rule against perpetuities, 600.

[REFERENCES ARE TO PAGES.]

**LIFE ESTATE**

- adverse possession by tenant, as against remainderman, 2012, 2023.
  - in favor of remainderman, 1984.
- alienation, 81, 2313.
- as created by gift until marriage, 80.
- as created by lease not naming duration, 218.
- as created by lease with option in lessee to terminate, 219.
- as created by will, 49.
- as excluding inference that easement appurtenant, 1231, 1232.
- as resulting from delivery conditioned on death, 1784.
- as subject of mortgage, 2367.
- classes of, 38.
- computation of value of dower interest, 812.
- conventional or legal, 38, 74.
- creation, 49, 76-81, 218, 219.
  - effect of power of disposition, 80.
  - grantee's life presumably intended, 75.
  - presumption as to intention, 76.
- crops, right to, 891.
- curtesy estate, 847.
- dower estate, 823.
- enforcement of incumbrance, purchase by life tenant, 88.
- entitled to homestead exemption, 2298.
- estate for another's life, 74, 75.
- failure to pay taxes as waste, 952.
- fixtures annexed by life tenant, 905, 929, 930.
- gift to two for lives, 74.
- improvements by life tenant, 84.
- in easement in gross, 1226, 1269.
- lease by life tenant, 82.
  - apportionment of rent, 1480.
  - effect of death, 937.
  - holding over after death, 252.
  - lessee's right to crop on death of life tenant, 891.
  - rights of remainderman, 213.
- merger, 89-93.
- nature, 74.
- no dower in, 747, 756.
- outstanding, as breach of covenant for seisin, 1682.
- payment of incumbrance, 85, 87.
  - municipal assessments, 87.
  - taxes, 85.
- power given tenant, construction, 1063.
- power of sale in tenant, implication, 1058, 1081.
- power of sale, reservation of life estate on exercise, 1064.
- presumption against intention to create, 76.
- pur autre vie, less than estate for tenant's own life, 75.
- purchase of paramount title, 88.

[REFERENCES ARE TO PAGES.]

**LIFE ESTATE**—Continued.

- rent reserved on transfer, running of covenant to pay, 1474.
- repairs by tenant, 84, 969.
- reservation by grantor, 551.
  - in favor of third person, 1613.
- restraints on alienation, validity, 2313.
- right of emblements, personal representative entitled to crop, 891.
- sale of property, apportionment of proceeds, 88.
- shown by habendum, premises conveying fee simple, 1621.
- subject to special limitation, 75, 333.
- tenancy in tail after possibility of issue extinct, 95, 979.
- tenant for life, conveyance of timber, 1083.
  - entitled to crops, 891.
  - entitled to profits, 83.
  - fixtures annexed by, 905, 929, 930.
  - improvements by, 84, 2751.
  - lease by, 82, 252, 937, 1480.
  - must pay taxes, 85, 952.
  - payment of incumbrance, 85, 87.
  - power of sale in, 1058, 1081.
  - purchase of paramount title, 1474.
  - repairs by, 84, 969.
  - right to crops, 891.
  - right to fixtures, 905, 929, 930.
  - right to partition, 713-715.
  - right to royalties under mining lease, 956.
  - waste by, 84, 953, 979.
- tenant holding over, as tenant at sufferance, 242.
  - see, also, "Pur Autre Vie, Estate."

**LIGHT**

- easement of, 1233, 1278.
  - abandonment, 1378.
  - by necessity, 1276, 1277.
  - by prescription, 2039.
  - extinction, 1366, 1378, 1382.
  - implied grant, 1276, 1296.
  - location, 1338.
- extinction of easement, by consent to obstruction, 1382.
  - destruction of building, 1366.
- from highway, rights of abutting owner, 1531.
  - effect of reference to supposed highway, 1313, 1314.
- grant of easement, practical location, 1330.
- interference with, as eviction, 203.
- no natural right of, 1121.
- obstruction, 1121, 1233, 1276, 1296.
- prescriptive rights as to, 2039.

[REFERENCES ARE TO PAGES.]

**LIGHTNING**

- as act of God, 977.
- damage by, liability of tenant, 977.

**LIMITATION OF ESTATES**

- alternative limitations, 581.
- cross limitations, 582.
- fee simple estate, 44.
- fee tail estate, 58.
- in restraint of alienation, 2306.
- life estate, 76.
- words of limitation, distinguished from words of purchase, 37.
  - by force of rule in Shelley's case, 529.
  - see, also, "Estates"; "Special Limitation."

**LIMITATION OVER**

- as repugnant, 568-577, 1623.
- divesting remainder, remainder not contingent, 493.
- effect of failure, 587.
- effect on dower, 770.
- failure of preceding limitation, 586.
- not to be orally shown as evidence of consideration, 1631.
- of property undisposed of, 571, 575, 576.
- on death, 565, 1621.
- on death, substitutional clause, 565, 566.
- on death intestate, 576.
- on death without issue, remainder on fee tail, 567.
- on failure of issue, 65, 482, 567, 575, 611.
- on marriage, 283.
- operation, 557-561.
- validity, 568, 1623.
  - see "Defeasance Clause"; "Executory Limitations."

**LIMITATIONS, STATUTES OF**

- adverse possession of land for statutory period, 1917.
- bar of debt as extinguishing mortgage, 2620.
- cestui que trust barred when trustee barred, 368, 2001.
- disaffirmance of infant's conveyance, 2339.
- enforcement of trust, 2001.
- foreclosure of mortgage, 2516, 2620, 2679.
- not against reversioner or remainderman, 1951.
- part payment, foreclosure of mortgage, 2518.
- prescriptive user of land for statutory period, 2028.
- recovery of dower, 820.
- recovery of land, 1917.
- redemption from mortgage, 2656.
- withdrawal of support of land, 1188.
  - see, also, "Adverse Possession"; "Prescription."



[REFERENCES ARE TO PAGES.]

**LIS PENDENS**

- applies at law and in equity, 2268.
- applies in favor of defendant or plaintiff, 2269.
- enforcement of unrecorded instrument, 2272.
- in another county as notice, 2271.
- statutory provisions for record, 2269.

**LITIGATION**

- expenses as element of damages, action on covenant for title, 1714.

**LITTORAL OWNERS**

- accretion, 2093.
- apportionment of shore between, 1034.
- boundary lines between, 1032.
- necessity that land abut on water, 1023.
- rights of access, 1022.
  - fishing, 1011, 1037, 1545, 1547.
  - reclamation, 1024.
  - transfer to stranger, 1029.
- subject to public rights, 1011, 1545.
  - see, also, "Riparian Owners"; "Rivers"; "Sea"; "Shore"; "Tide Waters"; "Water"; "Watercourse."

**LIVE STOCK**

- duty to fence against, 1003.
- exemption from distress, 1520.
- fence laws, 1003.
- gates against, over right of way, 1356, 1357.
- pasturing on private right of way, 1352.
- pollution of water by, 1143.
- trespass by, effect of absence of fence, 1003.
- trespassing on railroad track, liability for injuries, 1005, 1006.

**LIVERY OF SEISIN**

- in case of estate to commence in futuro, 500.
- nature, 33, 1566.

**LOCAL OPTION**

- as defense to rent, 1507.

**LOCATION**

- of boundary line, 997.
  - claim on public land, 1557, 1559.
  - mineral claim, 1556.
  - terms of description, 1652-1655.
- way, construction of grant, 1335.

[REFERENCES ARE TO PAGES.]

**LODE**

within statute as to mineral lands, 1556.

**LODGING CONTRACT**

does not create tenancy, 120.

equivalent to license, 1204.

no right of possession, 120.

**LOGGING**

erection of booms in navigable streams, 1024.

trespasses on banks of stream, 1547.

**LOSS**

of executed conveyance, effect, 1805.

of will, presumption of revocation, 1841.

risk of, in case of sale of land, 459.

**LOUISIANA TERRITORY**

acquisition by United States, 1551.

**LOW-WATER MARK**

as boundary, 1014, 1015, 1659.

what is, 1015.

**LUNATICS**

conveyances by, 2342.

conveyances to, 2346.

**M****MACHINERY**

as trade fixture, 928.

**MAGNA CHARTA**

provision as to alienation, 25.

**MAINTENANCE**

as basis of nontransferability of right of entry, 314.

**MALICE**

as element in tort, 1122.

in creating condition harmful to neighbor, 1122.

in drawing off water to destruction of ice, 1031.

in erection of wall or fence, statutory provision, 1123, 1124.

in interception of percolating water, 1180.

in withdrawing support of land, 1192.

**MANDATORY INJUNCTION**

against purchase, with notice of agreement as to land, 1427.

to compel restoration of things wasted, 984.

[REFERENCES ARE TO PAGES.]

**MANOR**

under feudal system, 21.

**MANUFACTURES**

appropriation of water for, 1133.  
erection of dam for mill, statutory authority, 1149.  
water for, appropriation from stream, 1133.

**MANURE**

as between grantor and grantee, 946.  
    landlord and tenant, 947.  
    mortgagor and mortgagee, 946.  
as real or personal property, 948.  
as subject of execution, 949.  
constructive severance from land, 949.  
easement of mixing on another's land, 1256.  
not resulting from crops raised on premises, 946, 947.  
on highway, 949.  
passing on conveyance of land, 946.  
tenant's right to remove, 947.

**MAP**

description by reference to, 1650.

**MARGIN**

of highway, referred to as boundary, 1662.  
of stream or lake, referred to as boundary, 1658.

**MARK**

signing by, 1723, 1818.

**MARKET**

in highway, as additional servitude, 1530.

**MARRIAGE**

as condition precedent, 283, 284.  
as condition subsequent, 283-285.  
as consideration for covenant to stand seised, 1574.  
as revoking will, 1844, 1846.  
condition in restraint of, 281.  
condition requiring consent to, 282.  
effect on woman's property, 726.  
estate determinable upon, 75, 79, 286, 333, 497.  
gift until, life estate created, 79.  
husband's estate during, 726, 827, 844.  
of ward, under feudal system, 23.  
of widow or widower, validity of condition against, 284.  
revocation of will by, 1844.  
settlement, effect on dower, 789.

[REFERENCES ARE TO PAGES.]

**MARRIAGE**—Continued.

- sufficiency for curtesy, 828.
- dower, 733, 735.
- with consent, as condition, 282, 284.
- see, also, "Community Property"; "Curtesy"; "Dower"; "Entireties, Tenancy by"; "Homestead"; "Husband and Wife"; "Married Women."

**MARRIED WOMEN**

- acknowledgments by, 851, 1735.
- acting by attorney, 1801, 2330.
- adverse possession against, 1973.
- as donees of powers, 1066.
- as trustees, 371.
- community property, 656.
- conveyances between husband and wife, 2330.
- conveyances by, 732, 2329, 2334.
- conveyances to, 2330.
- devises by, 2332.
- disabilities as to transfer of land, 732, 2329, 2334.
- dower, 733.
- entireties, tenancy by, 645.
- equitable separate estate, 729.
  - restraints on alienation, 2319.
- equity to a settlement, 729.
- execution of deed by agent, 1801, 2330.
- exercise of power by, 1066, 1094.
- homestead rights, 853, 855, 2294.
- inheritance from husband, 825, 1895.
- mortgage on separate property, 2408.
- possession as notice to purchaser, 2233.
- prescription against, 2068.
- property acts, effect on husband's rights, 731, 848.
- property of, husband's rights in, 726, 731.
- separate use for, execution by statute of uses, 356.
- sole and separate property, 729, 2319.
- statutory separate estate, 731.
- tenancy by entireties, 645.
- trusts for, 356, 429, 729, 2319.
- wills by, 2332.
  - see, also, "Community Property"; "Curtesy"; "Dower"; "Entireties, Tenancy by"; "Homestead"; "Husband and Wife"; "Marriage."

**MARSH**

- drainage on neighbor's land, 1165.

**MARSHALLING**

- decedent's estate, payment of mortgage from personalty, 2590.
- inverse order of alienation, 2507, 2740.
- of securities, 2644, 2674.

[REFERENCES ARE TO PAGES.]

## MASTER AND SERVANT

- cultivation on shares, 121, 897.
- license as extending to licensee's servant, 1206.
- relation created by cropping contract, 898.
- servant as licensee, 1204.
- servants of owner of right of way, right of user, 1333.
- taking of acknowledgment by employer, 1731.

## MATERIALMEN

- rights under mechanics' lien law, 2769.
- see "Mechanics' Liens."

## MATERIALS

- on land, as passing by conveyance of land, 1674.

## MEADOW LAND

- ploughing, as waste, 954, 955.

## MEANDER LINES

- on waters, as boundaries, 1015, 1020, 1649.

## MECHANICS' LIENS

- assertion and enforcement, 2773.
- contract or consent of owner, 2769.
- estate or interest subject, 2770.
- nature, 2766.
- persons entitled, 2767.
  - materialmen, 2769.
  - subcontractors, 2767.
- priorities, 2564, 2771.
- release or waiver, 2774.

## MELIORATING WASTE

- injunction refused, 983.
- what is, 950, 963.

## MENTAL CAPACITY

- as regards conveyances, 2342.
- to make will, 2347.

## MERGER

- as terminating estate for years, 211.
- as to undivided share in land, 90.
- basis of doctrine, 89.
- conditions of application of doctrine, 89-93.
- effect on rent, 1490.
- equitable interest, as terminating trust, 425.
  - estate for years, 211.
- estate for years in like estate, 212.

[REFERENCES ARE TO PAGES.]

**MERGER**—Continued.

- estate pur autre vie in life estate, 90.
- estates held in different rights, 93.
- fee tail estates, 73.
- in connection with rule in Shelley's case, 530.
- in equity, 92.
- interest of joint tenant, 640.
- leasehold, 211, 1496.
  - effect on rent, 1485, 1486, 1490.
  - on taking under eminent domain, 1496.
- life estate, 89.
- mortgage, 2604, 2615.
  - protection of innocent purchaser, 2619.
- not if intervening estate, 91.
- of easement, in ownership, 1371.
  - equitable in legal title, 425-427, 1904, 2318.
- particular estate, effect on remainder, 506.
- powers, 1106.
- rent, in land, 1490.
- subversion, effect on rent, 1492.
  - see, also, "Surrender."

**MESNE LORD**

- meaning of term, 18.

**MESNE PROFITS**

- cotenant entitled if excluded, 676.
- determining liability for interest, action on covenant for title, 1713.
- liability of tenant holding over, 245, 252.
- set-off of value of improvements, 944.
- trespass for, by disseisee, 244, 1516.
  - see "Rents and Profits."

**MEXICAN GRANTS**

- previous to treaty of cession, 1560.

**MEXICAN TREATY**

- acquisition of territory by United States, 1551.

**MILITARY TENURES**

- abolition, 27.
- nature, 19.

**MILL**

- conveyance of in terms, extends to land, 1647.
- water for, appropriation from stream, 1133.

**MILL ACTS**

- authorizing flowage of land, 1149, 1310.

[REFERENCES ARE TO PAGES.]

**MINERAL LAND**

acquisition from United States, 1555.

**MINERAL OIL AND GAS**

ownership, 872.

**MINERAL WATER**

appropriation to detriment of neighbor, 1178.

**MINERALS**

adverse possession of, 1993.

conveyance, implied grant of right to sink shafts, 1296, 1300.

conveyance by cotenant, effect, 685.

cotenant of land, rights as to minerals, 292, 685, 686, 992.

dower in, 743.

excepted in conveyance, 1609, 1614.

grant of right to take minerals till exhaustion, 867.

in federal domain, grant of rights, 1556.

in highway, reservation by dedicator, 1883.

right to appropriate, 1525.

in place, adverse possession, 1993.

conveyance of, incidental necessary easements, 1296, 1299, 1300.

cotenant's rights, 292, 685.

excepted from conveyance, 867, 1614.

for purpose of dower, 744.

leases and conveyances, 868.

licenses to extract, 868, 1396.

mortgagor's rights, 2460.

not sold by mining lease, 870.

oral sale, 1217.

separate ownership, 867, 1299, 1609, 1614.

separate transfer, 867.

in underground water, right to abstract, 1179.

lease for purpose of extracting, effect of failure to work, 870, 871.

license to take, 868, 968, 1396.

grant by one cotenant, 686.

oil and gas, 872.

ownership, 866.

profit à prendre as to, distinguished from license, 1391, 1397.

common or several, 1394.

necessary incidental rights, 1389.

not presumably exclusive, 1396.

removal by landlord not eviction, 202.

removal by tenant, injunction to prevent, 983.

rents and royalties, 1462.

reservation of portion to be extracted, 1462.

of share as rent, 1462.

on statutory dedication, 1883.

[REFERENCES ARE TO PAGES.]

**MINERALS**—Continued.

- rights of cotenant, 292, 685, 992.
  - mortgagor of land, 2460.
- rights to take from another's land, 1396.
- sale of, as involving license to remove, 1216, 1217.
- sale of, as license coupled with interest, 1217.
- separate ownership of surface and minerals, 866, 1299, 1609, 1614.
- severance, as making them personalty, 867.
- severed by stranger, rights of tenant, 989.
- sovereign rights, 872.
- taken by cotenant, duty to account, 992.
- under right of way, servient owner entitled, 1352.
- waste in, 955, 2460.
- way of necessity to remove, 1299.
- withdrawal of support by mining, 1193.
  - see "Mines"; "Waste."

**MINES**

- dower in, 743, 809.
- lease as equivalent to opening, 744.
- leases and licenses, 868, 1396.
- mining rights in another's land, 1396.
- opening as waste, 955.
- operation, withdrawal of support of surface, 1193.
- ownership, 866.
- right of support for surface, 1194.
- royalties under lease, rights of life tenant, 956.
- sinking new shafts not waste, 957.
- working by tenant as waste, 955.
  - see, also, "Minerals."

**MINING LEASE**

- forfeiture for failure to mine, 870.
- nature, 868.

**MINORS**

- see "Infants."

**MISREPRESENTATIONS**

- as estopping one to claim land, 2136.
- as to boundary line, estoppel by, 1002.
- as to title of lessor, no estoppel to deny title, 191.
- conveyance obtained by, 1639.
- estoppel by, reference to non existent way, 1317, 1318.
- trust arising from, 406.

**MISTAKE**

- as ground for reformation of instrument, 1634.
  - deed of gift, 1624, 1636, 1637.
  - relief from forfeiture, 323.



[REFERENCES ARE TO PAGES.]

**MISTAKE**—Continued.

- as ground for reformation of instrument—continued.
  - rescission of instrument, 1636.
- as to character of instrument executed, 1638.
- as to line of highway, effect of deviation, 2080.
- failure to insert exception in covenant, relief in equity, 1691.
- in annexing article to land, 916.
  - assumption of mortgage, 2497.
  - cancellation or destruction of will, no revocation, 1838.
  - conveyance, 1633.
  - executing release of mortgage, 2640.
  - execution of power, rectification, 1094.
  - issue of patent by government, 1563.
  - language of conveyance, 1633.
  - locating boundary line, 998.
    - adverse possession, 1946.
  - omission of power to revoke trust, 423.
  - payment of mortgage, subrogation, 2672.
  - recording instrument, 2197.
  - releasing mortgage, 2640.
  - revoking will, 1843.
- necessity of mutuality, 1634.
- of law and fact, as ground for reformation, 1635.
  - in election as to dower, 785.
- revocation of will under, 1841, 1843.

**MOB**

- destruction of building, liability of tenant, 974.
- effect on rent, 1498.

**MONEY**

- as subject of distress, 1520.
- curtesy in, 833.
- dower in, 742.
- gift of money to be obtained by sale of land, not gift of land, 439.
- land regarded as, 440.
- treated as land, 438.

**MONTH TO MONTH, TENANCY FROM**

- entry under invalid oral lease, 108.
- inference in case of renewal tenancy, 258.
- notice to terminate, 240.
- one continuous tenancy, 230.
- when arises, 108, 235, 236.

**MONTHLY TENANCY**

- see "Month to Month, Tenancy from."

**MONUMENTS**

- as element of description, 1650.
- building or land as, 1651.

[REFERENCES ARE TO PAGES.]

**MONUMENTS**—Continued.

control courses and distances, 1652.  
highways as, 1660.  
natural and artificial, 1651.  
occasionally to be disregarded, 1670.  
private ways as, 1665.  
public monument on private land, 1255.  
subsequently to be located, 1652.  
waters as, 1656.

**MORTGAGES**

acceptance, necessity, 2377.  
acknowledgment, 2374.  
action to enforce personal liability, 2679.  
adverse possession, as between mortgagor and mortgagee, 2020.  
    against mortgagor, 1980.  
    between mortgagor and foreclosure purchaser, 2022.  
after-acquired property as subject of, 2369.  
agreement for collateral advantage, 2366.  
    extending security to other debt, 2418.  
    giving possession to mortgagee, 2433.  
    giving possession to mortgagor, 2432.  
    restricting right of redemption invalid, 2364.  
    to execute, as creating lien, 2746.  
alteration of instrument, effect, 1644.  
alteration of note, no effect on mortgage, 2407.  
appointment of receiver, 2441, 2445.  
as within covenant for title, 1684, 1688, 1693, 1698.  
assignment of mortgage, 2518, 2527.  
    as subject to equities, 2536, 2542.  
    by legal conveyance, 2530.  
    by transfer of debt, 2522.  
    consideration, 2535.  
    delivery and acceptance, 2534.  
    exercise of power of sale, 2712.  
    in part, 2551.  
    notice to mortgage debtor, 2592, 2593, 2598.  
    omission to refer to debt, 2527.  
    priorities, 2545, 2550.  
    record as notice to mortgagor, 2593, 2594.  
    right to foreclose, 2695.  
    securing negotiable note, 2539.  
    subsequent payment to assignor, 2592.  
    without debt, 2527.  
assignment of part of debt, priorities, 2551.  
assumption of mortgage, by junior mortgagee, 2495.  
    by transferee of land, 2485.  
    enforcement by mortgagee, 2493.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- assumption of mortgage—continued.
  - enforcement by transferor, 2499.
  - release by transferor, 2497.
- at common law, 2359.
- attorney's fees, stipulation for payment, 2733.
- bar of debt by limitations, effect on mortgage, 2620.
- bond evidencing debt secured, 2409, 2529.
  - inconsistency with mortgage, 2410.
  - regarded as collateral security, 2410.
- by claimant under contract of sale, 2188.
  - husband, as bar of dower, 767.
  - infant, 2336, 2340.
  - joint tenant, 638.
  - landlord, 151, 213.
  - lessee, burden of covenant running, 2424.
  - way of gift, validity, 24.
- change in note or bond, does not extinguish mortgage, 2623.
- clog on right of redemption, validity, 2365.
- collateral advantage to mortgagee, validity of agreement, 2366.
- consideration, effect of recital, 2415.
  - necessity, 2400.
- consideration for transfer of mortgage, 2535.
- consolidation, 2582.
- construed in favor of mortgagee, 1619.
- conveyance by mortgage creditor to owner of land, effect, 2633.
- conveyance by mortgagee having legal title, 2530.
- conveyance by mortgagor to mortgagee, 2472-2476.
- conveyance intended as mortgage, 2380, 2387, 2389.
  - execution levy on grantor's interest, 2466.
  - made by third person, 2391.
  - oral relinquishment of right of redemption, 2474.
- conveyance with right of repurchase as mortgage, 2389.
- cotenant, purchase at foreclosure sale, 694.
- crops, mortgage by mortgagor of land, 2435, 2438.
  - sale by mortgagor, 2435, 2438.
- curtesy in mortgaged land, 835.
- curtesy in surplus proceeds of foreclosure sale, 833.
- death of mortgagee, exercise of power of sale, 2714.
  - who entitled to foreclosure, 2520, 2697.
- dedication by landowner immaterial, 1861, 2422.
- deed of trust to secure debt, 2394.
  - foreclosure, 2698, 2699.
  - power of sale, 2711, 2713, 2715.
  - release by trustee, 2635.
- defeasance, separate instrument, 2474.
- defective mortgage, as creating lien, 2745.
- delivery, 2375.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- descent of mortgaged land, 2422, 2702.
- description of obligation, 2411.
- devise of mortgaged land, 2422.
- discharge by merger, 2604.
  - tender, 2599.
- discharge in bankruptcy of personal liability, mortgage still valid, 2407.
- does not preclude partition, 717.
- dower in mortgaged land, 752, 767.
- dower in surplus proceeds of sale, 742, 754, 772, 815.
- easement passing under, 1289.
- effect of foreclosure on dower, 742, 772.
- enforceable against adverse possessor of land, 1980.
- entry by mortgagee, effect, 2427, 2431.
- equitable mortgage, 2743.
- equity of redemption, 2359, 2421.
  - dower in, 752.
  - mortgage of, 2371.
- estoppel of mortgagor to assert after-acquired title, 2125.
- execution, 2373.
  - by agent, 2746.
  - insufficient, resulting equitable mortgage, 2745.
- execution levy on mortgagor's interest, 2464.
  - for debt secured, 2467.
- expenditures by mortgagee, reimbursement, 2448.
- extinction, 2582.
  - acceptance of new mortgage, 2628.
  - accord and satisfaction, 2587.
  - change in note or bond, 2622.
  - condition subsequent, 2585.
  - conveyance by mortgagee to mortgagor, 2633.
  - discharge in bankruptcy, 2586.
  - discharge of debt, 2584.
  - effect on dower, 753.
  - merger, 2604.
  - payment, 753, 2482, 2586, 2645.
  - performance of obligation secured, 2585.
  - personal judgment, 2622.
  - redelivery of note, 2584.
  - release, 2583, 2630, 2634.
  - satisfaction, 2630, 2634.
  - substituted performance, 2587.
  - tender, 2599.
- fiduciary relation between mortgagor and mortgagee nonexistent, 2424.
- fixtures, annexed after mortgage of land, 919, 925.
  - annexed prior to mortgage of land, 919, 922.
  - right of removal in third person, 922.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- for illegal purpose, 2419.
- for purchase money, by infant, 2340.
  - estoppel to assert after acquired title, 2129.
  - priorities, 2563.
  - priority to dower, 740.
- foreclosure, accounting for waste, 2462.
  - accrual of right, 2675.
  - adverse claimants as parties, 2708.
  - adverse possession by purchaser at sale, 2022.
  - bar by lapse of time, 2679.
  - by assignee, 2695.
  - by beneficiary under trust deed, 2698.
  - by personal representative, 2679.
  - by surviving joint mortgagee, 2697.
  - curtesy in surplus proceeds of sale, 833.
  - dower in surplus proceeds of sale, 801, 815.
  - effect of assignment of mortgage, 2695.
  - effect of invalidity of sale, 2428.
  - effect of transfer of land, 2516.
  - effect on dower, 742, 772.
  - entry, 2684.
  - equitable proceeding for sale, 2686.
  - exercise of power of sale, 2686.
  - for failure to insure, 2678.
  - for nonpayment of interest, 2675, 2676.
  - for nonpayment of taxes, 2678.
  - for part of debt, 2688.
  - junior lienor as party, 2704.
  - mortgagor's wife as party, 800.
  - nature, 2360.
  - of indemnity mortgage, 2679.
  - option as to method, 2686.
  - owner of land as party, 2699.
  - part of debt not due, 2688.
  - parties to proceeding, 2693, 2695.
  - right of redemption from sale, 2694.
  - sale in parcels, 2690.
  - sale ordinarily passes crops, 2436.
  - scire facias, 2686.
  - senior lienor as party, 2706.
  - stipulation for attorney's fees, 2733.
  - strict foreclosure in equity, 2682.
  - subrogation of purchaser, 2672.
  - surplus proceeds of sale, 2693.
  - tenant under lease as party, 2703.
  - who may foreclose, 2695.
  - wife of mortgagor as party, 2703.
  - writ of entry, 2685.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- form of instrument, 2371.
  - absolute conveyance, 2377.
  - conveyance on condition, 2371.
  - conveyance with right of repurchase, 2389.
  - description of land, 2374.
  - description of obligation, 2411.
  - execution, 2373.
  - necessity of writing, 2373.
  - separate defeasance, 2377.
  - words of inheritance, 2374.
- gift by way of mortgage, 24.
- impairment of security, right of action in mortgagee, 2462.
- implied grant of easement by, 1289.
- improvements by mortgagee, allowance for, 2449.
- informal mortgage, as creating equitable lien, 2745.
- insurance by mortgagee, 2457.
  - by mortgagor, 2455.
  - mortgage not alienation within policy, 2455.
- interests subject to, 2367.
  - after-acquired property, 2369.
  - crops, 883, 2368.
  - crops to be planted, 2370.
  - equitable interests, 2368.
  - estate for years, 2367.
  - fixtures, 2368.
  - fixtures subsequently annexed, 2370.
  - future acquisitions, 2368.
  - life estate, 2367.
  - married woman's separate property, 2408.
  - remainder, 2367.
  - rent, 2367.
  - reversion, 2367, 2446.
  - trees, 883.
  - vendee's interest under contract, 2368.
- inverse order of alienation, liability of parts of land, 2507, 2513, 2692.
- joinder by wife, dower in proceeds of foreclosure sale, 754.
  - to release dower, 779.
- joint ownership of debt, survivorship, 2697.
- junior lienor, as party to foreclosure proceeding, 2704.
  - payment of prior mortgage, 2669.
  - right to question prior mortgage, 2580.
- junior mortgage, right to make, 2422.
  - "subject" to prior mortgage, 2485.
- junior mortgagee, assumption of prior mortgage, 2425, 2485, 2595.
  - foreclosure by, 2371.
  - purchase at tax sale, 2452.
  - right to accounting, 2440.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- junior mortgagee—continued.
  - right to question prior mortgage, 2580.
  - right to redeem from prior mortgage, 2648.
- land primarily liable, effect of release of mortgage, 2643.
- lease before mortgage, 2446.
  - by mortgagee, 213.
  - by mortgagor, 213, 2446, 2447, 2703.
- legal title in mortgagee, 2422, 2423, 2530.
- lien and title theories, 2360.
- manure on land, removal by mortgagor, 946.
- marshalling, 2692.
- merger in ownership, 2604.
  - distinguished from payment, 2613.
  - effect of intention, 2608, 2609.
  - presumption in favor of purchaser of land, 2619.
- mortgagee, accounting for rents and profits, 2425, 2438, 2440.
  - acquisition of mortgagor's interest, 2472.
  - acquisition of new lease, 2425.
  - allowance for personal services, 2448.
  - annual rests in accounting, 2440.
  - as bona fide purchaser, 2559.
  - as purchaser for value, 2248.
  - assignment by, 2518.
  - collateral advantage to, 2366.
  - death of, 2423, 2520, 2714.
  - ejectment by, 2423.
  - expenditures by, 2448.
  - has legal title in some states, 2422, 2426.
  - improvements by, 2449.
- mortgagee, injuries to land by, 2464.
  - interest is personal property, 2423.
  - interest mere chose in action, 2423.
  - interest not subject to execution, 2423.
  - not affected by dedication by mortgagor, 1861, 2422.
  - not affected with notice by subsequent record, 2515.
  - not trustee for mortgagor, 2424.
  - of leasehold, liability on covenant, 2424.
  - payment of incumbrance, 2448.
  - payment of insurance premiums, 2448, 2457.
  - payment of taxes, 2448, 2454.
  - protected as against abandonment of easement, 2422.
  - protected as against creation of easement, 2422.
  - protected as against dedication, 2422.
  - protected as against mortgagor's conveyance, 2422.
  - purchase at tax sale, 2453.
  - purchase of paramount title, 2425.
  - remedies for injury to land, 2460, 2461.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- mortgagee—continued.
  - repairs and improvements by, 2448.
  - right to crops, 2438.
  - right to possession of land, 2426.
  - right to rents and profits, 2434, 2435, 2438.
- mortgagee in possession, liability as for rent, 2439.
  - obligation to account, 2439.
  - right to remain, 2428.
- mortgagor, abandonment of easement by, 2422.
  - consort entitled to curtesy or dower, 752, 835.
  - conveyance to mortgagee, 2472.
  - creation of easement by, 2422.
  - dedication by, 1861, 2422.
  - descent from, 2422.
  - devise by, 2422.
  - ejectment by, 2424.
  - injuries to land by, 2459.
  - insurance by, 2455.
  - interest subject to execution, 2464.
  - interest subject to judgment lien, 2780.
  - is owner of land, 2420, 2421.
  - may convey, 2422.
  - may make junior mortgage, 2422.
  - may make lease, 2422, 2446.
  - possession not adverse to mortgagee, 2020.
  - purchase at tax sale, 2452.
  - remedies for injuries to land, 2464.
  - right to crops, 2435, 2436.
  - right to possession of land, 2425, 2427.
  - right to rents and profits, 2433.
  - rights as to fixtures, 919-925, 2460.
  - rights as to manure, 946.
  - sale of crops, 2435, 2438.
  - waste by, 2459.
- motive in foreclosure immaterial, 2687, 2723.
- note evidencing debt secured, 2409, 2529.
  - inconsistency with mortgage, 2410.
  - regarded as collateral security, 2410.
- obligation secured, 2403.
  - balance that may be found due, 2412.
  - bar by limitations, 2620.
  - change in amount, 2418, 2584, 2631.
  - change in note or bond, 2623.
  - description in mortgage, 2411, 2413.
  - future advances, 2404, 2411.
  - illegality, 2419.
  - indemnity contract, 2404, 2411, 2627, 2679.



[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- obligation secured--continued.
  - misdescription, 2415.
  - necessity of stating amount, 2411.
  - negotiable note, 2539.
  - nonexistent debt, 2402, 2538.
  - oral evidence to show, 2416.
  - partial illegality, 2420.
  - personal liability, 2406, 2583.
  - pre-existing debt, 2404.
  - support, 2404, 2519.
  - to person other than mortgagee, 2407.
- of grasses, as chattels, 883.
- of homestead, 2302.
- of land includes accretions, 2108.
  - includes crops, 2434.
  - may include rents and profits, 2433, 2434.
- of leasehold, 165.
  - liability of mortgagee, 2424.
- of trees, interest in land, 883.
- on undivided interest, effect of partition, 707, 723.
- option of purchase in mortgagee, 2365.
- oral evidence that conveyance is mortgage, 2380, 2392.
- oral mortgage. validity, 2373.
- oral relinquishment of right of redemption, 2474.
- partial illegality of debt secured, 2420.
- parties to foreclosure proceeding, 2695.
- payment, after maturity, 2589.
  - as extinguishing power of sale, 2717.
  - at maturity, 2587.
  - before maturity, 2587.
  - by conveyance of mortgaged land, 2586, 2607, 2615.
  - by cotenant, subrogation, 691.
  - by delivery of chattels, 2586.
  - by substituted performance, 2587.
  - contribution, 2505, 2665.
  - distinguished from merger, 2613.
  - distinguished from purchase of mortgage debt, 2614.
  - effect on dower, 753.
  - evidence, 2587.
  - exoneration of land, 2590.
  - in part from proceeds of sale of part, 2587.
  - presumption from lapse of time, 2588, 2680.
  - presumption from possession of note or bond, 2587.
  - remoteness of time named for, 2366.
  - subrogation on, 2664.
  - subsequent agreement as to medium, 2627.
  - to assignor after assignment, 2592.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- payment—continued.
  - to holder of negotiable note secured, 2597.
- personal liability, enforcement, 2684, 2731, 2732.
  - necessity, 2406, 2583.
- power of sale, accrual of power, 2711.
  - application of proceeds, 2731.
  - as coupled with an interest, 2719.
  - as equitable power, 2710.
  - as notice of sale thereunder, 2241.
  - as power of agency, 2711, 2719, 2726.
  - as power of appointment, 2710, 2725.
  - assignment, 2712-2714.
  - bona fide purchaser under, 2729.
  - conveyance to purchaser, 2725, 2727, 2728.
  - death of mortgagee, 2714.
  - death of mortgagor, 2718.
  - does not authorize mortgage, 1064.
  - exercise with ulterior motive, 2723.
  - extinguishment, 2717, 2722.
  - in deed of trust, 2715.
  - inadequacy of price, 2725.
  - injunction against exercise, 2721.
  - insanity of mortgagor, 2718.
  - mode of proceeding, 2720.
  - propriety of exercise, 2721, 2724.
  - purchase by mortgagee, 2721.
  - purchase by trustee, 2721.
  - revocation, 2717.
  - title of purchaser, 2727.
- prior to lease, 154.
  - foreclosure sale, 197.
- priorities, apart from recording law, 2559.
  - assignees of parts of debt, 2550.
  - assignment of mortgage, 2545, 2550, 2551.
  - contemporaneous mortgages, 2559.
  - dower right, 752, 767.
  - future advances, 2567.
  - judgment lien, 2550.
  - mechanic's lien, 2773.
  - mortgage unrecorded, 2559.
  - prior unrecorded instrument, 2559.
  - purchase money mortgage, 2563.
  - right to question mortgage, 2571.
  - vendor's lien, 741.
  - waiver, 2561.
- purchase at foreclosure by life tenant, rights of remainderman, 88.
- purchase at judicial sale as mortgage, 2392.
- purchase money mortgage, priorities, 2563.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- purchase of paramount title by mortgagee, 2425.
- purchaser at invalid sale as mortgagee in possession, 2662.
- record, notice from, 2190, 2375, 2559.
  - of assignment, 2546.
  - of defeasance, 2379.
- redemption, 2359, 2589, 2645.
  - allowance for improvements by mortgagee, 2449.
  - amount to be paid, 2650.
  - bar by lapse of time, 2021, 2656, 2659.
  - by cotenant, 695.
  - by widow, 755.
  - by wife, 800.
  - clog on right, 2365.
  - combination towards, 2505, 2506.
  - decree for, 2663.
  - enforcement of right, 2660.
  - exoneration of person redeeming, 2506.
  - foreclosure of right, 2654, 2675.
  - in case of deed of trust, 2395.
  - persons entitled, 2645.
  - provision restricting invalid, 2364.
  - release of right nugatory, 2472.
  - right essential to mortgage, 2364.
  - statutory right after foreclosure, 2694.
  - subrogation of person redeeming, 2664.
  - tacking unsecured claims, 2652.
- redemption from judicial sale as mortgage, 2393.
- reissue of mortgage, effect, 642.
- release, 2583.
  - as discharge of obligation or lien, 2631.
  - as revesting title in mortgagor, 2632.
  - conclusiveness, 2640.
  - duty to give, 2630, 2639.
  - execution by agent, 2634.
  - execution by assignor of mortgage, 2636.
  - for purpose of subsequent purchaser, 2636.
  - not conclusive, 2611, 2629.
  - of part of mortgaged land, disturbance of equities by, 2515.
  - of personal liability, effect, 2584.
  - of primary liability, effect as releasing secondary liability, 2644.
  - of right of redemption, 2472.
  - protection of bona fide purchaser, 2637, 2641.
- rents and profits, right to, 2433, 2438.
  - mortgagee must account, 2438, 2440.
  - sequestration by receiver, 2441.
- retention of possession by mortgagor, by force of agreement, 2433.

[REFERENCES ARE TO PAGES.]

**MORTGAGES**—Continued.

- satisfaction, conclusiveness, 2629, 2640.
  - for purpose of subsequent purchaser, 2637, 2641.
- senior lienor, as party to foreclosure proceeding, 2706.
- severance of timber, remedy of mortgagee, 2463.
- signing, necessity, 2374.
- statutory power of sale in mortgagee, 1044.
- subrogation of junior to rights of senior mortgagee, 2668.
- subrogation of person paying, 2664.
- subsequent extension to other debts, 2418.
- subsequent to lease, 154.
- substitution of different note or bond, 2622.
- substitution of new mortgage, 2628.
- successive mortgages, 2422.
  - of parts of land, order of liability, 2513.
- tacking of mortgages, 2174, 2581.
- tacking of unsecured claims, 2652.
- taxes, payment by mortgagee, 2451, 2650.
  - payment by mortgagor, 2450.
- tender of debt secured, effect, 2599.
- title and lien theories, 2360, 2426, 2427.
- to protect indorser, substitution of other instrument, 2627.
- to secure future advances, 2404, 2411, 2413, 2417, 2567.
  - illegal debt, 2419.
  - indemnity, 2404, 2411, 2679.
  - nonexistent debt, 2402, 2538.
  - pre-existing debt, 2404.
    - mortgagee as purchaser for value, 2248.
  - support, 330, 2404, 2519.
  - suppression of criminal prosecution, 2419, 2420.
- transfer of mortgage, acceptance, 2534.
  - assignment omitting reference to debt, 2527.
  - by endorsement of negotiable note secured, 2539.
  - by transfer of debt, 2522.
  - consideration unnecessary, 2535.
  - delivery, 2534.
  - formal assignment, 2526.
  - legal conveyance, 2530.
  - ordinarily permissible, 2519.
  - record and notice, 2545, 2548, 2558.
  - subject to equities, 2536, 2542.
  - warranty of debt, 2521.
- transfer of mortgaged land, assumption of mortgage, 2485.
  - effect on bar of limitations, 2516.
  - liabilities as between transfer and transferee, 2477, 2485.
  - necessity of record, 2699.
  - oral assumption of mortgage, 2486.
  - position of transferee, 2471.

[REFERENCES ARE TO PAGES.]

**MORTGAGES—Continued.**

- transfer of mortgaged land—continued.
  - primary and secondary liability, 2478.
  - resulting relation of principal and surety, 2492, 2501.
  - right to question mortgage, 2571.
  - rights of exoneration, 2477.
  - subject to mortgage, 2122, 2477, 2571, 2666.
  - to mortgagee, 2472, 2615.
- transfer of part of land, residue primarily liable, 2505, 2692.
- transfers of parts of mortgaged land, notice from record, 2508.
  - liability in inverse order of alienation, 2506, 2507, 2692.
  - primary and secondary liability, 2505.
- under system of registration of titles, 2278.
- waiver of right of redemption, 2364.
- waste, by mortgagee, 2464.
  - by mortgagor, 2459.
  - remedies of mortgagee, 2460-2462.
  - remedies of mortgagor, 2464.
- within covenant for title, 1684, 1688, 1693, 1698.
- words of inheritance, effect of absence, 2746.

**MORTMAIN, STATUTES OF**

- nature, 2348.
- uses brought within, 340.

**MOTIVE**

- as element in tort, 1123, 1180, 1192.
- in exercising power of sale in mortgage, 2723.
- in foreclosing mortgage, 2687.
- in interception of percolating water, 1180.
- in withdrawal of support for land, 1192.

**MOVABLES**

- as distinguished legally from land, 1, 3.
- pass to executor or administrator, 2.
- see, also, "Crops"; "Fixtures"; "Personal Property."

**MOVING PICTURES**

- cancellation of ticket, liabilities, 1208.
- lease of theatre, insufficiency of heat, 137.

**MUNICIPAL ASSESSMENTS**

- lien for, 2791.
  - as within covenant against incumbrances, 1684.
- payment by life tenant, 87.

**MUNICIPAL CORPORATIONS**

- acceptance of dedication, 1872, 1875.
- adverse possession against, 1976.
- appropriation of water from stream, 1138.

[REFERENCES ARE TO PAGES.]

**MUNICIPAL CORPORATIONS**—Continued.

- dedication by, 1861, 1878.
- dedication in favor of, 1859.
- dedication for public building, 1856.
- encroachment on land, estoppel, 2139.
- estoppel to assert encroachment on street, 2139.
- existence unnecessary for purpose of dedication, 1859.
- gift to, not dedication, 1860.
- powers over streets, 1526.
- prescription against, 2033.
- prescription in favor of, 2034.
- recognition of highway, 2088.
- use of water from stream, 1138.
- withdrawal of lateral support by, 1192.
  - see, also, "Dedication"; "Highways."

**MURDER**

- of ancestor by heir, 2353.
- of testator by devisee, 2353.

**N****NAKED POWER**

- nature of, 1054.

**NAME**

- of grantee in deed, 1593.
  - authority to fill blank, 1598.
  - change after execution, 1603.
- of grantor in deed, 1591.

**NATURAL GAS**

- covenant as to, running with land, 1412, 1414.
- lease, 874.
- opening of well as waste, 955.
- ownership, 872.
- profit à prendre, 1397.
- rights of cotenant of land, 992.
- way of necessity for pipe line, 1304.

**NATURAL HEIRS**

- sufficiency of expression for creation of fee tail, 59.

**NATURAL RIGHTS**

- as between neighboring landowners, 1117.
- as to air, 1124.
  - percolating water, 1173.
  - support of land, 1187, 1193.

[REFERENCES ARE TO PAGES.]

**NATURAL RIGHTS**—Continued.

- as to air—continued.
  - surface water, 1160.
  - underground water, 1175.
  - water artificially accumulated, 1184, 1186.
  - water in lake or pond, 1157.
  - water in stream, 1128, 1181.
- distinguished from easements, 1201.
- infringement under power of eminent domain, 2161.
- not within covenant against incumbrances, 1685.
- suspension, by creation of easement, 1195.
  - by license, 1195.
  - by unity of ownership, 1194.
- to sink well through coal belonging to another, 1300.
  - see "Adjoining Owners"; "Air"; "Easements"; "Lateral Support"; "Nuisance"; "Percolating Water"; "Surface Water"; "Watercourses."

**NAVIGABLE WATERS**

- access to, 1022.
- bed of navigable lake, state ownership, 1018.
- change of character, effect, 1019.
- description of land as bounded by, 1656.
- division of shore or flats, 1032.
- land under, ownership, 1007, 1009, 1012, 1018.
  - conveyance by littoral owner, 1029.
  - grant by state, 1009, 1020.
  - platting by littoral owner, 1029.
- reclamation of land under, 1024, 1026.
- right to erect booms, 1024.
- rights as between contiguous proprietors, 1033.
- state ownership of bed, control of rights of access, 1023.
- what are, 1017, 1019.
  - see, also, "Navigation"; "Shore"; "Tide Water."

**NAVIGATION**

- access to water, 1023.
- dedication for, 1854.
- fishing as incidental right, 1038, 1547.
- grant of shore by state as subject to, 1009, 1010, 1020.
- hunting as incidental right, 1036, 1547.
- interference by littoral owner, 1013.
- interference by reclamation work, 1026, 1028.
- public rights, 1008-1010, 1014, 1546.
- right of landing as incidental, 1547.
- towage as incidental right, 1547.

**NECESSITY**

- as affecting grant of easement, 1293
- easements of, 1255, 1295.

[REFERENCES ARE TO PAGES.]

**NECESSITY**—Continued.

- of light, as creating inference of easement of light, 1277, 1278.
- of right of way, effect of cessation, 1366.
- of user, for implied grant of easement, 1284.
- way of, across railroad right of way, 1304.
  - contemporaneous conveyances, 1305.
  - degree of necessity, 1303, 1306.
  - effect of change of necessity, 1308.
  - effect of subdivision of dominant tenement, 1347.
  - existence determined as of time of conveyance, 1303, 1308.
  - extinction by cessation of necessity, 1368.
  - lack of access except by water, 1307.
  - lack of other access insufficient, 1300.
  - location by servient owner, 1335.
  - not excluded by right of eminent domain, 1309.
  - not if contrary intention appears, 1302.
  - not of convenience, 1306.
  - on condemnation of part of land, 1305.
  - on conveyance of land, 1297.
  - on conveyance of minerals, 1299, 1300.
  - on conveyance of timber, 1299.
  - on devise, 1305.
  - on execution sale, 1305.
  - on foreclosure sale, 1305.
  - on grant by state, 1301, 1302.
  - on grant by United States, 1301.
  - on lease of part of premises, 1305.
  - on partition deed, 1303.
  - only on severance of ownership, 1301.

**NEGLIGENCE**

- as ground of tenant's liability for damage to premises, 976.
- as to condition of leased premises, 137-148.
- in allowing escape of water, 1184.
- in causing fire, 978.
- in executing improper instrument as barring relief, 1638.
- in recording instrument, 2197.
- in repairing leased premises, 142-146.
- in repairing party wall, 1342, 1343.
- in use by tenant of building, 966.
- in withdrawing support, 1191.
- of railroad company, injury to trespassing cattle, 1006.

**NEGOTIABLE NOTE**

- payment by, purchase for value, 2255.
- secured by mortgage, payment to holder, 2597.
  - rights of bona fide holder, 2539-2542.
  - transfer, 2539.



[REFERENCES ARE TO PAGES.]

**NEMO EST HÆRES VIVENTIS**

application of maxim, 488.

**NEW YORK**

rule against perpetuities, 621.

system of trusts, 413.

powers, 1108.

**NOISE**

right of immunity from, on neighboring land, 1118, 1125.

**NOMINAL DAMAGES**

for appropriation of water from stream, 1135.

breach of covenant against incumbrances, 1712.

breach of covenant for seisin, 1707, 1708.

breach of covenant of quiet enjoyment, 130.

disturbance of easement, 1358.

drainage of surface water on neighbor's land, 1166.

increase of flow of stream, 1150.

interference with watercourse, 1135.

obstructing flow of surface water, 1169.

obstructing stream, 1145.

overflow of land, 1146.

pollution of air, 1127.

pollution of water of stream, 1144.

withdrawal of support, 1188.

**NON COMPOS MENTIS**

see "Insane Persons."

**NON-NAVIGABLE STREAM**

apportionment of bed between riparian owners, 1034.

change in character of stream, 1017.

land under, ownership, 1010, 1016, 1018.

**NONRIPARIAN LAND**

appropriation of water for use on, 1136, 1157.

grant of water power for benefit of, 1239.

see "Nonriparian Owner."

**NONRIPARIAN OWNER**

assertion of riparian rights, 1138, 1150.

**NONTIDAL WATERS**

description of land as bounded by, 1656.

ownership of bed, 1012, 1016, 1018.

right to ice, 1030.

[REFERENCES ARE TO PAGES.]

**NONUSER**

- of easement, 1379-1381.
- of highway, 1537, 1538, 1887.

**NORTHWEST TERRITORY**

- land in, 1550.

**NOTE**

- given for price of land, purchase for value, 2255.
- secured by mortgage, 2409, 2416.
  - substitution of different note, 2622.
- transfer, 2525.

**NOTICE**

- actual and constructive, 2216, 2221, 2245.
- after part payment of consideration, 2253.
- as depriving purchaser of priority, 2171.
- as determining priorities, 2169.
- as prerequisite to abatement of nuisance, 1363.
- as substitute for record, 2213.
- by condition of land, 2217.
  - inadequacy of consideration, 2217, 2218.
  - index to record, 2200.
  - information putting on injury, 2215, 2218, 2228, 2240, 2242.
  - lack of covenants in chain of title, 2244.
  - lis pendens, 2267.
  - possession, 2220.
  - record of instrument, 2181, 2190, 2191.
    - assignment of mortgage, 2593, 2594.
    - instrument not in chain of title, 2186.
    - of terms of transfer of mortgaged land, 2508, 2515.
    - to mortgagee making advances, 2571.
  - statements in chain of title, 1439, 2240.
- constructive and actual, 2216, 2221, 2245.
- of adverse use of land, for purpose of prescription, 2052.
  - adverseness of possession by cotenant, 2017.
  - agreement restrictive of use of land, 1439.
    - effect on purchaser, 1425.
  - assignment of mortgage, 2545.
  - condition, as prerequisite to forfeiture for breach, 294.
  - covenant, as requisite to running of burden, 1407.
  - easement, 2226.
    - by record of conveyance of other land, 2188.
    - to purchaser of servient tenement, 1386.
  - equitable restriction on use of land, 1439.
  - equities affecting mortgage, 2544, 2545.
  - general plan of improvement, 1451.
  - judicial proceeding, referred to in chain of title, 2242.

[REFERENCES ARE TO PAGES.]

**NOTICE**—Continued.

- of adverse use of land—continued.
  - landlord's rights, from tenant's possession, 2234.
  - lease, 150.
  - mistakes in record, 2198.
  - partnership character of land, 670.
  - party-wall agreement, as requisite of running of burden, 1422.
  - power of sale in mortgagee, as notice of sale thereunder, 2241.
  - prescriptive user of lands, 2052.
  - proposed excavation, to adjoining owner, 1192.
  - public user of land, as element of prescriptive right in public, 2086.
  - record of instrument, 2185.
  - title based on adverse possession, 1986.
  - transfer of reversion, 152.
  - vendor's lien, 2758, 2762.
- purchaser with notice from purchaser without notice, 2257.
- purchaser without notice, protection, 2171-2217.
  - burden of proof, 2264.
- purchaser without notice from purchaser with notice, 2238.
- to agent, 2219.
- to cease exercise of easement, not actionable, 1385.
  - defend suit asserting paramount title, effect as against covenantor, 1705.
  - remove obstruction to easement, as prerequisite to action, 1358.
  - terminate tenancy, 223, 238, 239, 259.

**NOXIOUS TRADE**

- how far a nuisance, 1121, 1124.

**NUISANCE**

- appropriation of water, 1132.
- articles passing over land, 864, 1119.
- coming to, 1127.
- creation for public purpose, damages, 2161.
- deprivation of light, 1121.
- discharge of surface water, 1164.
- diversion of water, 1140.
- dust, 1124.
- easement of maintaining nuisance, 1261.
- eavesdrip, 1186.
- effecting eviction of tenant, 203.
- encroachment on space above land, 864.
- escape of water, 1183, 1185.
- excessive appropriation of water from stream, 1135.
- excessive heat, 1125.
- flooding land, 1145, 1162.
- hospital in neighborhood, 1119.

[REFERENCES ARE TO PAGES.]

**NUISANCE**—Continued.

- interception of percolating water, 1175.
- interference with easement, 1351, 1358.
- interference with natural right, 1116.
- intrusion above land, 864.
- judgment for damages for, as establishing easement, 1261.
- malicious erections, 1122.
- necessity of actual damage, 1127, 1135, 1145, 1150, 1166, 1169, 1188.
- noise, 1118, 1127.
- obstruction of easement, 1351.
  - flow of surface water, 1167.
  - percolating water, 1175.
  - watercourse, 1144.
- odors, 1124.
- overlooking windows, 1121.
- pollution of air, 1120, 1124.
  - water, 1142, 1175.
- prescriptive right to maintain, 2035, 2038.
- projections over land, 1119.
- public, no prescriptive right to maintain, 2031.
- smoke, 1118.
- storage of explosives, 1120.
- suspension of liability, 1194.
- to neighboring property, 1116.
- trees extending over another's land, 896.
- vibration, 1118.
  - see "Adjoining Owners"; "Air"; "Easements"; "Natural Rights"; "Water."

**O****OBSTRUCTION**

- of easement, action for, 1358.
  - erection under license, 1383.
  - injunction against, 1360.
  - notice to cease exercise insufficient, 1385.
- of light, 1121, 1133, 1276, 1296, 1531.
  - easement allowing, 1233, 1277.
  - percolating water, 1175.
  - surface water, 1167.
  - watercourse, 1144.
  - way, under license, 1383.

**OCCUPANCY**

- special and general, 93.

**OCCUPATION**

- notice by reason of, 2220.

[REFERENCES ARE TO PAGES.]

**OCCUPYING CLAIMANT'S ACTS**

application in favor of life tenant, 85.  
compensation under, 944.  
lien for compensation, 2795.

**ODORS**

nuisance of, as between neighboring owners, 1124.

**OFFICE BUILDING**

defects in hallways and elevators, liability of owner, 1351.  
destruction, effect on office rents, 1498.  
rights of way through halls, 1250.

**OFFICE FOUND**

purpose of proceeding, 2144, 2350.

**OFFICER**

to take acknowledgment, 1729.

**OFFICES**

as property, 10.

**OIL**

covenant as to, running with land, 1412.  
in ground, ownership, 872.  
lease of rights, 874.  
    failure to operate, 875.  
opening of well as waste, 955.  
profit à prendre, 1397.  
right of cotenant, 992.  
right to take from another's land, 1397.

**OMISSION**

of child from will, statutory provision, 1849.

**OPTION**

as to mode of foreclosing mortgage, 2686.  
contract, application of rule against perpetuities, 607.  
in landlord as to forfeiture, 297, 299-301.  
    as to tenant holding over, 247, 250.  
not properly given under power of sale, 1065.  
of purchase, as effecting conversion, 128.  
    death of vendor, 463.  
of purchase in lease, as running with land, 179.  
of repurchase, as indicating mortgage, 2389, 2392.  
to declare mortgage debt due, 2676, 2678.  
to terminate estate, as creating determinable fee, 220.  
to terminate tenancy, 208, 209.  
    as covenant running with land, 209.  
    as creating tenancy at will, 219, 221.  
to use party wall, 1264.

[REFERENCES ARE TO PAGES.]

**ORAL AGREEMENT**

see "Frauds, Statute of."

**ORAL EVIDENCE**

see "Parol Evidence."

**ORE**

see "Minerals."

**ORNAMENTAL FIXTURES**

annexed by life tenant, removability, 930.

annexed by tenant under lease, removability, 929.

loss of right of removal, 934.

forfeiture, 938.

renewal lease, 938.

surrender, 937.

restrictions on right of removal, 932.

**OUSTER**

as breach of covenant for quiet enjoyment, 129.

of cotenant, 671, 2014.

not presumed from conveyance by other, 673.

not presumed from nonpossession, 672.

what constitutes, 673.

see, also, "Adverse Possession"; "Eviction."

**OWELTY OF PARTITION**

lien for, 2751.

nature, 720.

**OWNERSHIP**

as between disseisor and disseisee, 32.

as extending above surface of land, 864.

as extending below surface of land, 865.

cestui que trust as owner, 362.

equitable, 338.

of animals, 1035.

articles projecting over land, 864.

crops, 876.

earth and minerals in place, 866.

equitable interest, 368.

fish, 1036.

fixtures, 903.

ice, 1630.

land, 4, 5, 40.

by grantor, as aid in locating description, 1668.

extending upwards, 864.

presumptively includes soil and minerals, 866.

rights of enjoyment, 864.

[REFERENCES ARE TO PAGES.]

**OWNERSHIP**—Continued.

- of animals—continued.
  - land under water, 1007.
  - manure, 946.
  - minerals, 867.
  - oil and gas under ground, 872.
  - part of building, 945.
  - proceeds of waste, 988.
  - space above land, 864.
  - trees, 876.
  - vegetable products of the earth, 876.
  - water in lake or pond, 1158, 1159.
  - water of watercourse, 1130.
- powers distinguished, 1041.

**P****PARAMOUNT TITLE**

- acquired from landlord, eviction of tenant under, 197.
- acquisition by cotenant, 692.
  - life tenant, 88.
  - life tenant's husband, 89.
  - mortgagee, 2425.
- adjudication, conclusiveness for purpose of action on covenant, 1705.
- as breach of covenant for title, 1699.
- as defeating dower claim, 738, 761, 768.
- assertion by tenant, as ground for forfeiture, 266.
- attornment to, as eviction, 198.
- burden of proof, in connection with covenant, 1704.
- constructive eviction under, 1702.
- costs of litigation as to, element in damages for breach of covenant of title, 1714.
- eviction of tenant under, 196, 1501.
  - effect on estoppel to deny title, 194.
  - necessity of assertion of title, 1701.
- excluding lessee from possession, 134.
- lease from, as constructive eviction, 1702.
- of head landlord, eviction of sublessee, 197.
- purchase of, as constructive eviction, 1702.
  - price as measure of damages for breach of covenant, 4710.
- what constitutes, 53, 134, 196, 197, 1704.

**PARCENARY**

- see "Coparcenary."

**PARENT AND CHILD**

- adverse possession as between, 2024.
  - parent as heir, 1896.
  - resulting trust in favor of parent, presumption against, 405.
- 3 R. P.—81

[REFERENCES ARE TO PAGES.]

**PARKS**

- for use of public, nature, 1539.
- dedication of land for, 1854, 1884.

**PAROL EVIDENCE**

- of assumption of mortgage, 2487.
- consideration for deed, 1626.
- debt secured by mortgage, 2416-2418.
- exception from covenant, 1632, 1691, 1733.
- exception from deed, 879, 942.
  - crops and trees, 879.
  - fixtures, 942.
- mortgage character of conveyance, 2380, 2384.
- scope of covenant against incumbrances, 1691.
- to contradict certificate of acknowledgment, 1733.
- to show deed an advancement, 1629.

**PAROL LEASE**

- validity and effect, 102.

**PARSONAGE**

- dedication of land for, 1857.

**PART PERFORMANCE**

- in case of oral lease, 111.
  - oral assignment of leasehold, 164.
  - oral grant of easement, 1209, 1211, 1217, 1253, 1327.
  - oral grant of profit à prendre, 1398.
  - oral release of easement, 1382.
  - oral transfer of land, 2140.
- of agreement as to boundary line, 997.
  - as to use of land, 1433.
  - as to party wall, 1265.
  - for security, 2748, 2749.
- of oral partition agreement, 701, 702.
- of transfer of land, improvements by grantee, 2140.

**PARTICULAR ESTATE**

- condition on, effect on remainder, 482.
- creation by reservation, 1613.
- destruction, effect on remainder, 506.
- failure of limitation, effect on remainder, 519, 520.
- in connection with remainder, 481.
- in connection with reversion, 469.
- merger, 89, 91, 211.
  - effect on remainder, 506.
- nature, 469, 470, 481.
- not part of grantor's estate, 478, 479.



[REFERENCES ARE TO PAGES.]

**PARTICULAR ESTATE**—Continued.

- of freehold, necessary for contingent remainder, 501.
- origin of expression, 469.
- particular tenant and remainderman, adverse possession between.  
2013.
- subject to special limitation, 481.
- successive particular estates, 480.
- surrender, 1578.
  - effect on remainder, 506.
- termination before vesting of remainder, 500-503.
- what is, 469.
  - see "Estates"; "Future Estates"; "Life Estate"; "Remainders";  
"Reversions."

**PARTIES**

- to action in regard to land jointly held, 698.
  - action for waste, 984.
  - statutory provisions, 987.
- to conveyance, 1591.
  - capacity, 2329.
  - must be named, 1592, 1594, 1597.
- to foreclosure of mortgage, 2693, 2695.
  - partition proceeding, 721.
  - suit regarding trust property, 365.
  - trust, capacity, 369.
    - see "Grantor and Grantee"; "Personal Capacity."

**PARTITION**

- allotment includes growing crops, 878.
  - in case of easement granted by cotenant, 1261.
  - of easement, words of inheritance unnecessary, 1259.
  - to cotenant who made improvements, 687.
  - to transferee, of specific part of land, 681.
- as against tenant in dower, 824.
- as creating easement, 1306.
- as matter of right, 710.
- assertion of dower right by widow, 816.
- cestui que trust not entitled to, 717.
- character of decree, 720.
- compensation to cotenant for improvements, 688.
- compulsory, 709.
  - way of necessity on, 1306.
- conveyance for purpose of, no estoppel to assert after-acquired title,  
2129.
- decree, 720.
- decree in favor of cotenant's husband, effect, 725.
- easement created on, 1261, 1289.
- easement included in allotment, appurtenant or in gross, 1233.

[REFERENCES ARE TO PAGES.]

**PARTITION**—Continued.

- effect on dower, 722, 758.
  - lien on undivided interest, 707, 723.
  - mortgage on undivided interest, 707, 723.
- exclusion by agreement, 711.
- exclusion by language creating cotenancy, 712.
- implication of warranty, 708, 723.
- implied grant of easement, 1289.
- judicial proceeding, 709.
- lien for owelty, 2751.
- necessity of possession in plaintiff, 719.
- not of land held by entireties, 655.
- of bed of lake, 1022.
  - land held by entireties not permitted, 655.
  - partnership land, 671.
- oral agreement of partition, 700.
- owelty of, 720.
- parol partition, 700.
- parties to proceeding, widow of cotenant, 816.
- persons bound by proceeding, 721.
- persons entitled, 713.
- possession by plaintiff as necessary, 719.
- proceeding by tenant against landlord, estoppel to deny title, 191.
- profit à prendre does not entitle to, 716.
- questions arising as to title, 718.
- right to, outstanding estate for years, 714.
- rights of widow of cotenant, 816.
- sale for purpose of, 721, 2153.
  - effect on dower, 742, 759, 801, 816.
  - proceeds as personalty, 455.
  - rights of wife of cotenant, 801.
- suit as *lis pendens*, 2268.
- voluntary, 700.
  - by conveyance to husband of cotenant, 705.
  - effect on title, 703.
  - implication of warranty, 708.
  - way of necessity, 1303.
- warranty implied, 708, 723.
- way of necessity on, 1303, 1306.
- who entitled to demand, 713.
- wife as necessary party, 759.

**PARTITION FENCES**

- duty to maintain, 357, 1414, 2036.
- easement of maintaining, 1247.

**PARTNERSHIP LAND**

- conversion by agreement, no right of dower, 760.
- conveyance of partner's interest, 671.

[REFERENCES ARE TO PAGES.]

**PARTNERSHIP LAND**—Continued.

- conveyance to firm, effect, 661.
- death of partner, 669, 671.
- distinguished from individual property, 660, 662.
- dower in, 759, 767.
- equitable conversion, application of doctrine, 666-668.
- homestead exemption in, 2299.
- is not personalty, 665, 666.
- judgment against partner as lien, 667.
- legal title, immaterial in whom vested, 669.
- lien of judgment against partner, 667.
- mortgage to firm, 2746.
- nature of partner's interest, 666.
- partition, 671.
- partner's interest is personalty, 666.
- partner's widow ordinarily entitled to dower, 759.
- purchaser from partner, notice of extent of interest, 2228.
- qualifying partner as freeholder, 668.
- resulting trust in land purchased with partnership funds, 664.
- surplus after payment of debts, rights of partners, 670.
- surviving partner's powers, 669.
- title not ordinarily in firm, 660.
- transfer, joinder of partners' wives, 667.
- transfer of partner's interest, 667.
- what is, payment from partnership funds, 662.
  - protection of individual creditors, 663.
  - question of intention, 662, 663.
  - trust for firm purposes, 660.
  - use for partnership purposes, 663.

**PARTY WALLS**

- addition to, rights of user, 1340, 1341.
- agreement as to, 1261, 1262.
- alterations by one owner, 1342.
  - covenant running with land, 1416.
  - rule against perpetuities as applied to, 1262-1264.
  - writing necessary, 1264.
- as part of law of easements, 1245.
- classes, 1244.
- contribution to cost, 1246, 1262, 1340.
- contribution to repairs, 1343.
  - assignment of right to, 1417.
  - running of burden, 1421.
- destruction, extinction of easement, 1366-1368.
  - obligation to rebuild, 1350.
- destruction and reconstruction, 1350.
- destruction of buildings, extinction of easement, 1366-1368.
- erection on another's land, 1245, 1261.

[REFERENCES ARE TO PAGES.]

**PARTY WALLS**—Continued.

- erection on another's land, liability of landowner in case of user, 1246.
- erection of building against as user, 1312.
- statutory provisions, 1310.
- extension of wall, 1265.
- extent of easement, 1340.
- extent of insertion of girders, 1341.
- extinction of easement, 1366.
- flues in, 1344.
- express or implied grant of right, 1344.
- for part of height of wall, 1245.
- grant of easement, 1416.
- incidental covenant as running, 1412.
- implied grant and reservation of easements, severance of ownership, 1275, 1294.
- increase of height, 1340.
- nature and classes, 1244.
- not created by grant of right to insert girders in wall, 1340.
- openings in, 1341, 1343.
- prescriptive rights, 2040, 2072, 2073.
- reconstruction, 1342, 1343.
- repairs, 1342, 1343, 1350.
- rights in, 1341.
- statutory provisions, 1310.
- windows in, 1311, 1341, 1343.
- see, also, "Walls."

**PASSAGE**

- license for, 1203.
- see "Way."

**PASSIVE TRUSTS**

- nature, 412.
- under New York law, 413.

**PASTURE**

- common of, 1394.
- appendant, 1395.
- appurtenant and in gross, 1396.
- because of vicinage, 1396.
- rights of, on another's land, 1394.

**PATENT**

- for government land, 1561.
- as evidence of title, 1561, 1563.
- fraud or mistake in issue, 1563.
- necessity for passing of title, 1562.
- relation back to date of entry, 1577.

[REFERENCES ARE TO PAGES.]

**PAYMENT**

- as waiver of breach of condition, 304.
- notice of defects in title before full payment of consideration, 2253.
- of mortgage debt, 2586-2589.
  - after assignment, 2592-2596.
  - after maturity, 2589.
  - as extinguishing power of sale, 2717.
  - at maturity, 2587.
  - before maturity, 2587.
  - by conveyance of mortgaged land, 2586, 2607, 2615.
  - by delivery of chattels, 2586.
  - by substituted performance, 2587.
  - contribution, 2505, 2665.
  - distinguished from merger, 2613.
  - distinguished from purchase of mortgage debt, 2614.
  - effect on dower, 753.
  - evidence, 2587.
  - exoneration of land, 2590.
  - in part from proceeds of sale of part, 2587.
  - presumption from lapse of time, 2588, 2680.
  - presumption from possession of note or bond, 2587.
  - remoteness of time named for, 2366.
  - subrogation on, 2664.
  - subsequent agreement as to medium, 2627.
  - to assignor after assignment, 2592.
  - to holder of negotiable note secured, 2597.
  - what constitutes, 2664.
- of price, resulting trust to payor, 397-406.
- of rent, medium, 1461.
  - time for, 1475.
- sufficiency to raise resulting trust in favor of payor, 400.

**PENALTY**

- upon tenant wrongfully holding over, 248, 252.

**PENDENTE LITE**

- see "Lis Pendens."

**PERCOLATING WATER**

- appropriation, 1175.
  - for purpose of sale, 1178.
  - for purpose of waste, 1179.
  - in diminution of natural watercourse, 1176.
- as surface water, 1174.
- damage by, as result of obstruction of stream, 1146.
- easement precluding interception, 1235.
- from reservoir, 1186.
- interception by landowner, to neighbor's detriment, 1176, 1178.
- interference with, 1175.

[REFERENCES ARE TO PAGES.]

**PERCOLATING WATER**—Continued.

- malicious interference, 1180.
- natural rights as to, 1175.
- pollution, detriment to neighbor, 1182.
- prescriptive right, 2038.
- right to exhaust, 1189.
- withdrawal, resulting subsidence of land, 1189.

**PERIODIC TENANCY**

- as result of entry under invalid lease, 107.
- at option of landlord, in case of tenant holding over, 248.
- creation, 231, 248, 257.
- death of party, tenancy not terminated, 237.
- entry under invalid oral lease, 108.
- implied in case of invalid lease for years, 107-110.
- implied in case of lease for no definite period, 232, 233.
- implied on holding over by tenant, 248, 257.
- inference from monthly payment of rent, 236.
- inference from payment of periodic rent, 232.
- inference from reservation of periodic rent, 109.
- is one continuous tenancy, 230.
- lease by tenant, 237.
- nature, 228.
- notice to terminate, 259.
  - express provision as to, 240, 241.
- sublease and assignment, 170, 237.
- tenant's duty as to repairs, 894.
- tenant's right of emblements, 894.
- termination, 230, 238.
  - express provision for, 238.
  - not by death, 237.
  - not by insanity, 239.
  - notice to terminate, 238, 259.
- transfer of interest, 237.
  - see "Month to Month, Tenancy from"; "Year to Year, Tenancy from."

**PERMISSIVE POSSESSION**

- as creating tenancy at will, 216.

**PERMISSIVE USER**

- of land, not basis for prescription, 2041, 2046.

**PERMISSIVE WASTE**

- as involving duty to repair, 968.
- failure to repair building, 968.
  - keep building wind and water tight, 972, 973.
  - repair dike, 973.
  - turn off water, 972.

[REFERENCES ARE TO PAGES.]

**PERMISSIVE WASTE**—Continued.

- injunction against, 974.
- liability of mortgagee, 2464.
  - tenant at will, 971.
  - tenant for life, 969.
  - tenant for years, 139, 968.
  - tenant from year to year, 970.
- waste by person other than tenant, 975.
- what is, 968.

**PERPETUITIES, RULE AGAINST**

- accumulations, 619.
- alienability of interest immaterial, 597.
- applicability to charitable gift, 617.
  - condition, 603.
  - contingent remainder, 517, 605.
  - conveyance of land to be selected, 1672.
  - covenant for perpetual renewal of lease, 610.
  - duration of trust, 431, 609.
  - equitable interest, 606.
  - exception to be subsequently located, 1615.
  - interesse termini, 604.
  - lease in futuro, 605.
  - limitation after estate tail, 610, 612.
  - limitation in control of landowner, 610.
  - limitation over on failure of issue, 611.
  - option of purchase, 608, 611.
  - powers, 1110.
    - by which remote limitations creatable, 1111.
    - leasing, 1111.
    - of sale in trustee, 1111.
    - remote limitations by exercise, 1113.
    - to be exercised at remote time, 1110.
    - to be exercised in reasonable time, 1110.
  - remainder to issue of person unborn, 518.
  - resulting trust, 608.
  - trust enduring indefinitely, 609.
  - vested interests, 602.
- directed against remoteness of vesting, 591.
- effect of invalidity of limitation, 614.
- interests subject to, 602.
- life in being within, 600.
- nature, 591.
- period allowed for vesting, 599.
- period of gestation allowed, 600.
- probability of vesting within required time insufficient, 596.
- purpose of rule, 592.
- separation of limitations, 615.
- statutory modifications of rule, 621.

[REFERENCES ARE TO PAGES.]

### PERPETUITY

- charitable trust not void as, 435.
- remainder to issue of person unborn, 517.
- trust of indefinite duration, validity, 432, 435.
- what constitutes, 598.
- see "Perpetuities, Rule Against."

### PERSONAL ACTIONS

- nature, 6.

### PERSONAL CAPACITY

- alien, acquisition of land, 2350, 2353.
  - as cestui que trust, 370.
- descent to, from, or through, 2350, 2351.
- corporation, as cestui que trust, 370.
  - as trustee, 370.
- conveyance by, 1803, 2347.
- conveyance to, 2347, 2348.
- criminal, holding of land, 2354.
- for purpose of prescription, 2068.
- for purpose of statute of limitations, 1979.
- infant, as donee of power, 1067.
  - as grantor or grantee, 2333, 2337, 2340, 2341.
  - as testator, 2341.
  - as trustee, 370, 2333.
- insane person, conveyance, 2342, 2346.
  - devise, 2347.
  - election as to dower, 786.
  - release of dower, 775.
- married woman, acting by attorney, 1801, 2330.
  - as trustee, 371.
  - conveyance, 732, 2329, 2334.
  - devise, 2332.
  - exercise of power, 1066.
  - mortgage, 2408.
- party to trust, 369.

### PERSONAL DISABILITIES

- as extending period of limitation, 1972.
- as preventing the running of limitation statute, 1973, 2068.
- for purpose of adverse possession, 1979.
- for purpose of prescription, 2068.
- see "Personal Capacity."

### PERSONAL INJURIES

- from defects in leased premises, 141-143.

### PERSONAL PROPERTY

- chattels real as, 8.
- church pews as, 1252.



[REFERENCES ARE TO PAGES.]

**PERSONAL PROPERTY**—Continued.

- crops as, 877.
- distinguished from real property, 6, 7.
- estates for years as, 8, 97.
- fixtures as, 903, 931.
- fructus industriales, 877, 1031.
- interest under trust for sale as, 442.
- manure as, 948.
- mortgage as, 2423.
- not subject of entail, 70.
- proceeds of sale of land directed, 438-454.
- removable fixtures as, 931.
- rent as, 1476.
- succession on death, 1889.
- water as, 1130, 1391.
- wills of, 1809.
- see "Crops"; "Fixtures."

**PERSONAL REPRESENTATIVES**

- as bound by covenant against assignment of leasehold, 162.
- as witness to will, 1825.
- crops passing to, 877.
- death of joint executor, 1076.
- distress by, 1519.
- duty to pay mortgage from personalty, 2590.
- estate for years passes to, 98.
- foreclosure of mortgage by, 2697.
- joint power, 1075.
- jurisdiction over land, 2.
- of mortgagee, exercise of power of sale, 2714.
  - right to foreclose, 2520, 2697.
- power of sale in, 1042.
  - control by court, 1053.
  - exercise by administrator c. t. a., 1071.
  - exercise prior to time named, 1087.
  - implication, 1057.
  - joinder in execution, 1075.
  - renunciation by coexecutor, 1075.
  - when coupled with interest, 1054.
- rent passing to, 1475.
  - distress for rent, 1519.
- right to crops, 877.
  - fixtures, 917.
  - leasehold, 165.
  - mortgage, 2697.
  - rent, 1475.
  - rent, lease of chattels with land, 1467.
- rights on death of purchaser under contract of sale, 461.
- vendor under contract of sale, 461.

[REFERENCES ARE TO PAGES.]

**PERSONAL REPRESENTATIVES**—Continued.

- sale of decedent's land, by decree of court, 2151, 2152.
  - under testamentary power, 1042, 1053, 1057, 1072, 1101.
- succession to personal property, 1889.
  - real property in some states, 1890.
- within prohibition of assignment of leasehold, 162.
  - see "Decedent's Land"; "Exoneration"; "Powers."

**PEWS**

- as real or personal property, 1251.
- interference with right, form of action, 1359.
- nature of right, 1250, 1359.

**PIPE**

- as included in "appurtenances," 1674.
- for gas or water, as additional servitude on highway, 1529.

**PISCARY**

- common of, 1394.
- see "Fishing."

**PLACER CLAIMS**

- on public lands, 1556.

**PLANTS**

- in nursery as trade fixtures, 928.
- legal character, 876.

**PLAT**

- dedication by record of, 1871, 1883, 1885.
  - necessity of acceptance, 1873.
  - partial acceptance, 1879.
- description by reference to, 1650.
  - as creating easements in purchaser, 1319.
- exhibition on sale, effect, 1319, 1326.
- of land under navigable waters, effect, 1029.
- sales with reference to, resulting dedication, 1868, 1873.

**PLEDGE**

- of land, as creating lien, 2744.
- see "Equitable Mortgage"; "Mortgages."

**PLOUGHING**

- of land subject to right of way, 1352.
- of meadow land, injunction to prevent, 983.

**POLICE POWER**

- regulations as to excavations on private land, 1193.

[REFERENCES ARE TO PAGES.]

**POLLUTION**

- of air, 1120, 1124, 1134.
  - easement to pollute, 1234.
  - implied grant of easement to pollute, 1295.
- of surface water, 1175.
  - underground water, 1182.
  - water in stream, 1142.
    - by cattle, 1143.
    - prescriptive right, 2070.
    - when necessary for utilization of land, 1143, 1295.
- prescriptive rights, 2035.

**PONDS**

- bed of, division among adjoining owners, 1020, 2114.
- boundary on, 1657, 2095.
  - effect of change in location, 2096.
- change in conditions, right to restore, 1160.
- distinguished from surface water, 1160.
- drainage on neighbor's land, 1165.
- ice in, right to, 1030.
- outflow of water, not to be changed, 1158.
- ownership of land under, 1018.
- referred to as boundary, 1657, 2095.
- water in, as subject of ownership, 1158.
  - easement of right to take, 1390.
  - easement to have level of water preserved, 1276.
  - rights of abutting owners, 1157.

**POSSESSIO FRATRIS**

- meaning of phrase, 1891.

**POSSESSION**

- adverse, 1917.
  - effect on conveyance of land, 2288.
- as given by statute of uses, 350.
- as notice of adverse claim, 2220-2224.
  - when consistent with record title, 2226, 2232.
- as species of title, 1978.
- by cotenant, 672, 673.
  - as notice, 2226, 2227, 2231.
- cropper, 121.
- grantor, necessity, 2288.
  - notice to purchaser from grantee, 2238.
- holder of later equity, gives no priority, 2180.
- licensee, 120, 1202.
- mortgagee, 2425.
- particular tenant, in behalf of remainderman, 36.
- tenant or agent in behalf of another, 1927.

[REFERENCES ARE TO PAGES.]

**POSSESSION**—Continued.

by cotenant—continued.

tenant under lease, 111, 118-121.

abandonment, 194, 1584.

as notice, 150, 2234.

holding over, 241-259.

notice of landlord's rights, 2234.

resumption by landlord, 252.

by force of statute of uses, 115.

by relation, after reentry by disseisee, 243.

constructive, 31, 36.

as limited by color of title, 1987.

of minerals in land, 1993.

distinguished from right of possession, 31.

effect of statute of uses, 350.

estate deprived of right of, reversion or remainder, 467, 476.

exclusion of lessee from, 131, 132, 1488.

exclusive and nonexclusive, 2230.

extending to agreed boundary line, effect, 997.

for purpose of limitation statute, 1924.

in assignee of leasehold, not necessary to liability under covenants, 181.

in tenant under lease, 118.

intention as element in, 1939.

joint, as notice of adverse claim, 2230.

long continued, as basis for presumption of grant, 1920.

mortgagee's right to, 2425.

nature of, 30, 31, 119.

necessarily exclusive, 119.

not in licensee, 120, 1202.

not in person merely asserting easement, 1945.

not under contract for lease, 112.

not under cropping agreement, 121.

not under lodging agreement, 120.

notice from, 2220-2238.

of mortgaged land, 2425.

retention by mortgagee after acquiring, 2427.

permissive, as tenancy at will, 215.

presumption of grant based on, 1920.

recovery by landlord from tenant, 252.

relinquishment by tenant, effect on estoppel to deny title, 194.

loss of right to remove fixtures, 935.

right of cestui que trust, 416.

species of title, 1978.

tacking of, for purpose of statute of limitations, 1968.

under invalid lease, 111, 112.

under lease, 118, 119, 131, 132.

unity of, as extinguishing easement, 1372.

[REFERENCES ARE TO PAGES.]

**POSSIBILITY OF ESTATE**

- contingent remainder, 484.
- does not entitle to recovery for waste, 986.
- due to condition precedent, 261.
- executory interest, 545-591.
- in case of determinable fee, 335.
- inchoate dower, 798.
- limitation in favor of uncertain persons, 486.
- nature, 261, 315, 467, 472, 473.
- not usually transferable, 474, 525.
- right of re-entry, not transferable, 315.
  - see, also, "Future Estates and Interests"; "Possibility of Reverter."

**POSSIBILITY OF REVERTER**

- devise, 474.
- nature, 472.
- not an estate, 473.
- not within rule against perpetuities, 603.
- on conditional fee, 53, 473.
- on determinable fee, 472.
  - injunction against waste, 988.
- on dissolution of corporation, 475.
- transfer, 474.

**POSTHUMOUS CHILDREN**

- as remainderman, 503, 517.
- descent to, 1907.
- for purpose of rule against perpetuities, 600.

**POST-NUPTIAL SETTLEMENT**

- effect on dower, 777.

**POUND**

- conveyance in terms of, extends to land, 1647.

**POWER OF SALE IN MORTGAGE**

- as constituting notice of sale thereunder, 2241.
- as coupled with interest, 2718.
- as equitable power, 2710.
- as power of agency, 2711, 2719, 2726.
- as power of appointment, 2710.
- assignment, 2712-2714.
- bona fide purchaser, 2729.
- by substituted trustee, 2715.
- conditions precedent to exercise, 2711.
- conveyance to purchaser, 2726.
- death of mortgagee, 2714.

[REFERENCES ARE TO PAGES.]

**POWER OF SALE IN MORTGAGE**—Continued.

death of mortgagor, 2718.  
election as to exercise, 2686.  
extinguishment, 2716.  
in deed of trust, 2711, 2715.  
injunction against sale, 2721.  
procedure, 2720.  
proceeds of sale, 2730.  
revocation, 2717.  
setting aside sale, 2724.  
statutory provisions, 2709.  
subrogation of purchaser, 2728.  
who may exercise, 2712-2716.  
who may purchase, 2720.

**POWER TO DEMISE**

implication of covenant, 126.

**POWERS**

animosity in exercise, 1097.  
appendant, 1067, 1104.  
    effect of alienation by donee, 1104.  
    effect of forced sale of donee's estate, 1104.  
    exercise by infant, 1067.  
    release by donee, 1105.  
appointed property as assets, 1106.  
appointees under, 1061.  
appointment under, 1047, 1078.  
    for life with remainder, power to appoint to class, 1063, 1091.  
    of excessive estate, 1091.  
    of nominal share, 1094.  
    on trust for sale, power to appoint to class, 1063.  
    relates back to creation of power, 1048.  
    remoteness of limitations, 1114.  
    subject to improper condition, 1091.  
    to trustees, power in favor of class, 1062.  
appurtenant, 1067, 1104.  
as defeating limitation over, 568.  
as indicative of estate devised, 49, 80.  
assignment, 1068.  
at common law, 1042, 1045.  
beneficial, 1109.  
by way of contingent remainder, 1046.  
cessation of purpose, 1100.  
coexisting with estate, 1054, 1103.  
collateral, 1104.  
conditions of execution, 1086.  
contract by donee not to execute, 1106.

[REFERENCES ARE TO PAGES.]

**POWERS**—Continued.

- contract to exercise, 1051.
  - validity in equity, 1093.
- coupled with an interest, 1054, 2718, 2719.
  - not terminated by donor's death, 1055.
- creation, no technical language necessary, 1057.
  - by will, 1056.
  - inter vivos, necessity of declaration of use, 1056.
- creator of power as donee, 1050.
- death of donee, effect, 1070, 1101.
- death of donor, effect, 1101, 2718.
- defeasance of fee simple by exercise, effect on dower, 770, 772.
- defective execution, aider in equity, 1091.
- delegation of, not ordinarily permissible, 1068.
  - express provision for, 1068.
  - general power of appointment, 1069.
  - power of sale in mortgage, 2712.
- discretion in donee as to exercise, 1051.
- distinguished from estates, 1041.
- donor and donee, 1047, 1066.
- donor's death immaterial, 1044, 1101.
- dower as affected by exercise of power, 770, 772, 1049.
- equitable, 1046.
- estate appointable, 1062, 1091.
- excessive execution, 1090.
- exclusive and nonexclusive, 1061, 1094, 1095.
- execution, aider in equity, 1051, 1069, 1091.
  - anticipation of time named, 1088.
  - at different times, 1100.
  - by administrator *c. t. a.*, 1073, 1074.
  - by conveyance, 1083.
  - by devise, 1083, 1086.
  - by will of married woman, 1066.
  - by will prior to creation of power, 1079.
  - character of estate created, 1062.
  - compliance with terms prescribed, 1078.
  - conditions of, 1086.
  - conveyance of fee simple by life tenant, 1084.
  - conveyance or devise as, 1078, 1081, 1091.
  - dictated by animosity, 1097.
  - discretion as to, 1051.
  - effect on dower, 770, 772, 1049.
  - effect on judgment lien, 1048.
  - excessive, 1090.
  - for improper purpose, 1096.
  - fraud in, 1095.
  - gift in default of, 1048, 1052, 1098.
  - in favor of wrong persons, 1090.

[REFERENCES ARE TO PAGES.]

**POWERS**—Continued.

- execution—continued.
  - in fraud of power, 1095.
  - mode of execution, 1078, 1091.
  - not within scope of power, 1090.
  - partial, 1100.
  - quantum of estate appointed, 1062.
  - relates back to creation of power, 1048.
  - rule against perpetuities, 1114.
  - showing of intention, 1081.
  - time of, 1088, 1102.
  - who may execute, 1067.
- exercisable by deed, cannot be exercised by will, 1078, 1093.
- exercisable by will, cannot be exercised by deed, 1078, 1093.
  - donee cannot contract as to exercise, 1078.
  - release, 1105.
  - rule against perpetuities, 1115.
- exercisable on contingency, effect of prior exercise, 1087.
- exercisable with consent, 1088, 1102.
- expiration, 1100.
- extinguishment, 1100.
  - acquisition by donee of fee simple, 1106.
  - alienation of donee's estate, 1104.
  - cessation of executorship, 1101.
  - cessation of purpose, 1100.
  - cessation of trust, 1101.
  - conveyance of donee's estate, 1104.
  - covenant not to exercise, 1106.
  - death of donee, 1070, 1101.
  - death of donor, 1101, 2718.
  - execution, 1100.
  - lapse of time, 1102.
  - merger, 1106.
  - release, 1103, 1105.
  - resignation from office, 1070, 1102.
- fraud on, 1095.
- general, application of rule against perpetuities, 1114.
- general and special, 1047, 1061, 1109.
- gift in default of execution, 1048, 1052, 1098.
  - dower claim, 770, 772.
  - implication, 1098.
- given donee "and his assigns," 1069.
- given executor, exercise by administrator c. t. a., 1071, 1074.
  - retirement from office, 1101.
- given executors jointly, how exercised, 1075.
- given life tenant, construction, 1063.
  - as creating fee simple, 80.
  - to sell for support, 1058.



[REFERENCES ARE TO PAGES.]

**POWERS**—Continued.

- given trustee, as passing on transfer of legal title, 1070.
- given unborn person, 1110.
- illusory appointment, 1094.
- imperative, 1051, 1110.
- implication, 1057, 1074.
- impropriety of purpose of exercise, 1095.
- in executors, to sell land, 1042, 1057, 1071.
- in favor of class, death of member before appointment, 1100.
  - failure to exercise, 1052.
  - illusory appointment, 1094.
  - title prior to appointment, 1099.
- in gross, 1104.
  - exercise by infant, 1067.
  - release by donee, 1105.
- in nature of trust, 1051, 1052, 1055, 1099, 1109.
  - execution by equity, 1069.
  - release, 1105.
- infant as donee, 1067.
- instrument executing, 1078, 1081, 1091, 1092.
- insufficient execution, aider in equity, 1091.
- intention to exercise, sufficiency of showing, 1081.
- joint donees, joinder in exercise, 1074, 1077.
  - death of joint donee, 1076.
- limited, 1047.
- mandatory, 1051.
- married woman as donee, 1066.
- merger, 1106.
- naked or bare power, 1054.
- nature, 1040.
- non exclusive, illusory appointment, 1094.
- of agency, 1043, 1055, 2717, 2718.
  - alienation, effect on executory interest, 568.
  - appointment, 1045-1047.
    - as indicating quantum of estate devised, 49.
    - operating on equitable interest, 1046.
- of attorney, 1043, 1197, 1745, 2184.
  - given by married woman, 1801, 2330.
  - revocability, 2717.
- of leasing, 1060, 1100.
  - rule against perpetuities, 1111, 1113.
- of revocation, 1049.
  - does not make instrument testamentary, 1811.
  - of trust, 423.
  - release, 1103.
- of sale, 1042, 1046.
  - as authorizing conveyance of fee simple, 1064.
  - as indicating quantum of estate, 49.

[REFERENCES ARE TO PAGES.]

**POWERS**—Continued.

## of sale—continued.

- capricious exercise, 1051.
- colorable exercise, 1097.
- delegation of ministerial duties, 1068.
- directions as to application of proceeds, 1053.
- exchange not authorized, 1065.
- exercise by donee's administrator, 1071.
- exercise for improper purpose, 1097.
- exercise in satisfaction of pre-existing claim, 1066.
- for named purpose only, 1088.
- for purpose of division, 1101.
- for support, death of beneficiary, 1101.
- gift not authorized, 1066.
- given executor, control by court, 1053.
  - effect of resignation, 1071.
  - exercise by administrator c. t. a., 1071, 1074.
- given executors jointly, 1075.
- given life tenant, 1058.
- given trustee, 1046, 1053, 1059.
  - exercise by substituted trustee, 1070.
  - rule against perpetuities, 1111.
  - termination of trust, 1101.
- imperative or discretionary, 1054.
- implication, 1057, 1059.
  - in favor of administrator, 1074.
  - in life tenant, 1058.
- in mortgage, 2709.
- mortgage not usually authorized, 1064.
- option contract not authorized, 1065.
- restriction as to time of exercise, 1102.
- rule against perpetuities, 1111.
- to be exercised after life tenant's death, 1088.
- to pay debts, non-existent if no debts, 1089.
- to raise money, as authorizing mortgage, 1065.
- of sale and exchange, as authorizing partition, 1066.
- operating as executory limitations, 1044.
- ownership of land until exercise, 1048.
- particular and special, 1048, 1109.
- personal capacity, 1066.
- presence as invalidating limitation over, 569.
- release of, 1103, 1105.
- remoteness of limitations in exercise, 1114.
- restriction as to time of exercise, 1102.
- rule against perpetuities as applied to, 1110.
- simply collateral, as subject of release, 1103.
  - exercise by infant, 1067.
- special and general, 1047, 1061, 1109.

[REFERENCES ARE TO PAGES.]

**POWERS**—Continued.

- statutes subjecting to claims of donee's creditors, 1108.
- statutory, 1044.
  - execution not aided in equity, 1093.
  - in bankruptcy trustee to sell, 1044.
  - in executor to sell land, 1044.
  - in life tenant to make leases, 1044.
  - in sheriff to sell under execution, 1044.
  - to sell under mortgage, 1044.
- statutory systems, 1044, 1108.
- survivorship, death of joint donee, 1076.
- taking effect as executory limitation, 1044, 1047.
- testamentary, 1056.
- to appoint fee simple, as including less estate, 1062.
  - appoint to class, fee simple need not be given to each, 1062.
  - convey, reservation in favor of creator of power, 1050.
  - devise, reservation in favor of creator of power, 1050.
  - dispose of property at death, necessity of will, 1081.
  - divest remainder, does not make remainder contingent, 492.
  - make leases of trust property, 1060.
  - mortgage, as included in power in general terms, 1062.
  - mortgage, reservation in favor of creator of power, 1050.
  - revoke trust, 423.
  - sell, as authorizing partition, 1066.
  - sell and reinvest, mortgage not authorized, 1065.
  - sell and use proceeds, mortgage authorized, 1064.
  - terminate estate, condition subsequent, 260.
- transfer, 1067, 1070, 2712.
- ulterior purpose in appointment, 1095.
  - see "Power of Sale in Mortgage"; "Powers of Attorney."

**POWERS OF ATTORNEY**

- death of principal, 2718.
- distinguished from power of disposition, 1043.
- execution of conveyance under, 1797.
- nature, 1043.
- necessity for delivery of conveyance by agent, 1745.
- operating as equitable mortgage, 2745.
- record, 2184.
- revocability, 2717.
  - necessity of seal, 1797.
- to deliver conveyance, 1745.
  - represent married woman, 1801, 2330.
  - secure debt, as creating lien, 2744.
- to execute conveyance, 1797.

**PRACTICAL CONSTRUCTION**

- of grant of easement, 1329.

[REFERENCES ARE TO PAGES.]

**PRACTICAL LOCATION**

of boundary line, 1001, 1655.  
of way, 1336.

**PRECATORY WORDS**

as creating trust, 375.

**PRE-EMPTION**

right of, in public land, 1552.

**PRE-EXISTING DEBT**

as valuable consideration, 2248.  
mortgage to secure, 2401.

**PREFERENCES**

in favor of creditors, validity, 2281, 2288.

**PREMISES**

of conveyance, 1590.  
language controlling, 1620.

**PRESCRIPTION**

acquisition of right by, duty to continue user, 2076.  
actual user necessary, 2040.  
adverse user necessary, 2041, 2046-2049, 2082.  
against state, 2032.  
against United States, 2032.  
beneficial user, necessity, 2041.  
burden of proof as to adverseness of user, 2045.  
change in mode of user, 2061.  
claim of right, necessity, 2049, 2084.  
continuity of user, necessity, 2059, 2064, 2086.  
creating easement, 1309.  
    *profit à prendre*, 1398.  
easement created by, *appurtenant* or *in gross*, 1232.  
    cessation of purpose, 1364.  
    extent and mode of user, 1344, 2069.  
    protection of innocent purchaser of land, 1386, 1387.  
evidence as to character of user, 2046-2048.  
exclusiveness of user, 2053.  
extent of right acquired, 1344, 1347, 2069.  
for aqueduct or drain, 2035.  
    appropriation of water, 2035, 2036.  
    carriage stand, 2037.  
    changed flow or channel of stream, 1154.  
    discharge of drainage, 2036.  
    easement *in gross*, 2033.  
    fencing against trespassing cattle, 1003.

[REFERENCES ARE TO PAGES.]

**PRESCRIPTION**—Continued.

- for aqueduct or drain—continued.
  - ferry landing, 2037.
  - flow of surface water, 2038.
  - flowage of land, 2031, 2035.
  - gates on private way, 1355, 1356, 2037.
  - highway, 2034, 2079.
  - light and air, 2039.
  - maintenance of fence, 1003, 2036.
  - party wall rights, 2040.
  - openings in party wall, 1343.
  - percolation of water, 2038.
  - pollution of atmosphere, 2037.
    - water, 2035.
  - profit à prendre, 1398, 2036.
  - projection over another's land, 2037.
  - right of way, 2034.
  - rights in watercourse, 1154, 2057.
  - sign on building, 2037.
  - support, 2039.
  - taking of ice, 2036.
  - taking of seaweed or fish, 2036.
- history of doctrine, 2028.
- hostile character of user, 2041, 2046-2049, 2082.
- in favor of fee simple owner, 2033.
  - municipality, 2034.
  - public, 1542.
    - to take water from spring, 1543.
  - tenant under lease, 2044.
- interference with user, 2066.
- interruption of user, 2064.
- necessity of claim of right, 2049, 2084.
- not as between properties in possession of same person, 2044.
- not for public nuisance, 2031.
- notice of user to landowner, 2052, 2085.
- peaceable user, necessity, 2055.
- permissive user insufficient, 2042.
- personal disabilities, 2068.
- presumption as to user, 2045, 2049.
- presumption of lost grant, 2029, 2033.
- protests against user by landowner, effect, 2066, 2087.
- reciprocal prescriptive easements, 2075.
- right must have been grantable, 2033.
- right of action requisite, 2055.
- tacking of successive users, 2067.
- user must be adverse, 2063.
- user of land in excess of grant 2058.

[REFERENCES ARE TO PAGES.]

**PRESUMPTION**

- as to acceptance of deed, 1789.
- adverse character of possession, 1933.
- adverseness of user of another's land, 2045, 2049.
- bona fide purchase, 2260.
- boundary of land on water, 1656.
- claim of right for purpose of prescription, 2050.
- conditional delivery, 1783.
- conveyance intended as mortgage, 2386, 2390.
- delivery of conveyance, 1748.
- paramount title, action for breach of covenant, 1704.
- prescription for highway, 2083.
- purchase for value without notice, 2260, 2264.
- in favor of vesting, 495, 497, 499, 577.
- of conveyance, from long continued possession, 1920.

**PRICE**

- see "Purchase Price."

**PRINCIPAL AND AGENT**

- acknowledgment by agent, 1802.
- adverse possession by agent, 1927, 2006.
- delivery of deed by agent, 1600, 1745.
- execution of deed by agent, 1797, 2330.
- filling of blank by agent, 1597.
- notice to, 2219.
- powers of agency, 1043, 2711, 2719, 2726.
- see, also, "Powers of Attorney."

**PRINCIPAL AND SURETY**

- mortgage to indemnify surety, 2404, 2627.
- relation between mortgagor and his grantee, 2492, 2501.
- subrogation of surety, 2664.

**PRIOR APPROPRIATION**

- of water of stream, 1155.

**PRIORITIES**

- apart from recording acts, between legal interests, 2169.
  - between equitable interests, 2175.
  - between legal and equitable interests, 2170.
- as against mortgage lien, 2558.
- as between conveyances, 2168.
  - equities, 2175, 2257.
  - legal and equitable interests, 2170.
  - legal interests, 2169, 2180.
  - mortgagees of land, 2558.
  - oral trust and creditors of trustee, 381.
  - transferees of parts of mortgage debt, 2551.

[REFERENCES ARE TO PAGES.]

**PRIORITIES**—Continued.

- as dependent on notice, 2213.
- as dependent on payment of value, 2247.
- as regards delivery in escrow, 1771, 1779.
- based on recording acts, 2180.
- of judgment lien, 2778, 2782, 2783.
  - mechanic's lien, 2771.
  - mortgage, waiver, 2561.
- on assignment of mortgage, 2545, 2550, 2551.
- prescriptive easement, purchaser of servient tenement, 1386, 1387.
- rights of grantee in quitclaim, 2204.
- waiver by mortgagee, 2561.
  - see "Bona Fide Purchaser"; "Mortgages"; "Notice"; "Purchaser for Value"; "Purchasers"; "Record."

**PRISONERS**

- adverse possession against, 1973.

**PRIVACY**

- invasion by overlooking window, 1122.

**PRIVILEGE**

- see "Easements"; "License"; "Profits à Prendre."

**PRIVITY OF CONTRACT**

- as passing on transfer, 174, 1401.
- between lessor and lessee, 157, 166.

**PRIVITY OF ESTATE**

- action for rent based on, 1470, 1511.
- between landlord and tenant, 157.
  - lessee of life tenant and remainderman, 83.
  - successive possessors of land, 1968.
  - successive users of land, for purpose of prescription, 2067.
- debt for rent based on, 1510.
- effect of assignment of leasehold, 165, 169.
  - reassignment of leasehold, 183.
  - transfer of reversion, 158.
- for purpose of tacking adverse possessions, 1968.
- in connection with running of covenants, 1404, 1407.
- not affected by sublease, 174.
- not between sublessee and head landlord, 173.
- not in case of tenant at sufferance, 244.
- terminated by reassignment, 183.
- what constitutes, 1407.

**PROBATE**

- of will, 1823.

[REFERENCES ARE TO PAGES.]

**PROBATE COURT**

- assignment of dower by, 818.
- control of executor's discretion as to sale under power, 1053.
- jurisdiction of decedent's movables, 2.
- sale of land to pay decedent's debts, 2150, 2152.

**PROBATE HOMESTEAD**

- allotment by court, 859, 860.
- what is, 855.
- see "Homestead."

**PROCEEDS**

- of land actually sold, occasionally regarded as land, 454, 455.
- of land to be sold, regarded as personalty, 441.

**PROCESSIONERS**

- to determine disputed boundary, 995.

**PROFITS**

- conveyance in terms of, as covering land, 1647.

**PROFITS A PRENDRE**

- apportionment, 1398.
- appurtenant to land, 1393.
  - available only to dominant tenement, 1393.
- common and several rights, 1393.
- creation, by grant, 1397.
  - by prescription, 1398, 2036.
  - by reservation, 1398.
- descent, 1393.
- distinguished from easement, 1201.
  - license, 1391, 1215.
- does not entitle to partition, 716.
- dominant and servient tenements, 1392.
- dower in, 746.
- duration, 1389.
- exception of, 1398.
- extinction, by apportionment, 1399.
  - by merger of ownership, 1399.
  - by release, 1399.
  - by unity of title, 1399.
- grant of, 1397.
- in gross, 1392.
- incidental rights, 1389.
- inseparable from dominant tenement, 1393.
- interference with, action of trespass, 1389.
- merger in ownership of land, 1399.
- nature, 1226, 1388.
- not created by custom, 1543.



[REFERENCES ARE TO PAGES.]

**PROFITS A PRENDRE**—Continued.

- of fishing, 1038.
  - hunting, 1036, 1388.
  - pasture, 1396.
  - taking gravel, 1389.
    - herbage, 1388.
    - ice, 1389.
    - minerals, 868, 1396.
    - sand or soil, 1389.
    - seaweed, 1388.
    - timber, 884, 1388, 1394.
    - water, 1236, 1390.
    - wood, 884, 1388, 1394.
- prescription for, 1398, 2036.
  - not in favor of public, 1543.
- release of, 1399.
- reservation of, 1398.
- transfer, 1393.
- unity of ownership, extinguishment by, 1399.
- within covenant against incumbrances, 1686.

**PROHIBITION**

- of liquor sales, effect on rent, 1506.

**PROJECTIONS**

- above way, rights of servient owner, 1353.
- over another's land, as tort, 864, 1119, 1255.

**PROMISSORY NOTE**

- for debt secured by mortgage, 2409.

**PROOF**

- of execution of instrument, 1729, 1753.

**PROPERTY**

- benefit of restrictive covenant as, taking for public use, 1428.
- powers not, 1041.
- real and personal, 6.
- right of reclaiming land under water, 1027.
- rights of access to navigable waters as, 1022.

**PROSPECT**

- no natural right of, 1122.

**PROTESTS**

- against user of one's land, as precluding prescription, 2066.

**PUBLIC BUILDING**

- dedication for, 1855.
- passage through grounds of, as permissive rather than hostile, 2047.

[REFERENCES ARE TO PAGES.]

**PUBLIC ENEMY**

- damage to premises by, tenant not liable, 977.
- destroying building, effect on rent, 1498.

**PUBLIC GRANT**

- by state, of land under water, 1008, 1010, 1020.
- forfeiture, 307.
- see "Public Lands."

**PUBLIC LANDS**

- cattle grazing on, obligation to fence against, 1004.
- grants to states, 1554.
- homestead law, 1553.
- mineral land grants, 1555.
- no way of necessity to reach, 1304.
- patents, purpose and effect, 1561.
- pre-emption law, 1552.
- railroad grants, 1553.
- Spanish and Mexican grants, 1560.
- swamp land grants, 1555.
- townsites, 1555.
- of states, 1552.
- of United States, 1552.

**PUBLIC POLICY**

- as basis for way of necessity, 1297, 1299.

**PUBLIC PREMISES**

- liability of landlord for defects, 144.

**PUBLIC RIGHTS**

- abandonment, 1887.
- arising by custom, 1542.
  - dedication, 1854.
  - prescription, 2079.
- as to shore, 1011.
  - bathing, 1011.
  - fishing, 1010.
  - navigation, 1010.
  - taking of sand and gravel, 1011.
- commons, 1540.
- customary rights, 1542.
  - not erection of building, 1543.
  - not piling wood, 1543.
  - not wharf, 1543.
- fishing, 1037, 1544.
- highways, 1523.
  - by prescription, 2079.

[REFERENCES ARE TO PAGES.]

**PUBLIC RIGHTS**—Continued.

- navigation, 1008, 1011, 1014, 1545.
  - cannot be excluded by grant by state, 1020.
  - no incidental right of fishing, 1038.
  - no incidental right of hunting, 1036.
  - not to be infringed, 1009.
- squares and parks, 1539.
- to take ice, 1031.
- to take water, based on long continued exercise, 1543.
- turnpikes, 1523.
  - see, also, "Dedication"; "Highways"; "Navigable Waters"; "Navigation."

**PUBLIC USE**

- appropriation for, 2160.
- cessation, in case of land condemned, 2166.
  - see "Eminent Domain."

**PUBLICATION**

- of will, 1821.

**PUMP**

- removable as domestic fixture, 929.
- use to exhaust water in ground, 1177.

**PUR AUTER VIE, ESTATE**

- adverse possession by tenant, 244, 2014.
- as realty or personalty, 94.
- creation, 75, 76, 81.
- death of tenant, right of succession, 93-95.
- doctrine of emblements, death of cestui que vie, 891.
- holding over by tenant, 242, 244, 2014.
- merger in life estate, 90.
- nature, 74, 75.
- no dower in, 747.
- special occupancy on death of tenant, 94, 95.

**PURCHASE**

- as distinguished from descent, 471.
- words of, 37.
  - see "Contract of Sale"; "Purchase Money"; "Sale."

**PURCHASE MONEY**

- acknowledgment of receipt in deed, 1626.
- application by trustee, 420.
- implied lien for, 2752.
- mortgage for, by infant, 2340.
  - no estoppel to assert after-acquired title, 2129.
  - priority over dower, 740.

[REFERENCES ARE TO PAGES.]

**PURCHASE MONEY**—Continued.

- mortgage for—continued.
  - priority over earlier mortgage, 2132, 2563.
  - priority over homestead right, 2564.
  - priority over judgment, 2785.
  - priority over mechanic's lien, 2564.
  - to third person, 2565.
- payment by third person, resulting trust, 397.
- right to, on death of vendor, 461.

**PURCHASER FOR VALUE**

- burden of proof as to value, 2264.
- consideration partly paid, 2252.
- execution purchaser as, 2258.
- inadequacy of consideration immaterial, 2251.
- judgment creditor as, 2783.
- mortgagee as, 2559.
- payment by note, 2255.
- who is, 420, 2247.

**PURCHASERS**

- as affected by agreements as to use of land, 1425.
- as affected by estoppel based on conduct of grantor, 2138.
- as affected by estoppel to assert after-acquired title, 2132.
- as affected with notice by record, 2180.
- at execution sales, protection against defects in title, 2258.
- bound by covenants running with land, 1405.
- creditors as purchasers for value, 2783, 2789, 2791.
- for value, who are, 2247.
- of equity, protection as against prior unrecorded conveyance of legal title, 2211, 2256.
- of servient tenement, as subject to easement, 1316.
- protection against prescriptive easement, 1386.
- recording laws, effect, 2180.
- take subject to license made irrevocable by improvements, 1217.
- with notice from purchaser without notice, 1440, 2257, 2264.
- without notice from purchasers with notice, 2258.
- see "Bona Fide Purchaser"; "Notice"; "Purchase Money"; "Purchaser for Value"; "Record"; "Restrictive Agreements"; "Sale"; "Vendor and Purchaser"; "Vendor's Lien."

**Q****QUALIFIED FEE**

- as resulting from limitation over, 559.
- estate to terminate on contingency, 334.

**QUANTITY**

- of land conveyed, as part of description, 1654.

[REFERENCES ARE TO PAGES.]

**QUARANTINE**

- widow's, 807.
- effect of remarriage, 808.
- execution levy on, 808.
- liability for taxes on property, 808.
- transfer, 808.

**QUARRIES**

- dower in, 743.
- ownership, 866.
- waste by opening, 956.
- waste by working, 955.

**QUARTERLY TENANCY**

- nature, 235.
- see, also, "Periodic Tenancy."

**QUASI CONTRACT**

- liability for contribution to cost of party wall, 1419, 1422.
- liability for use of party wall, 1265.

**QUASI DOMINANT TENEMENT**

- nature, 1272.

**QUASI EASEMENT**

- implied grant of corresponding easement, 1272.
- implied reservation of corresponding easement, 1292.
- meaning of expression, 1272, 1608.
- when apparent, 1278, 1281.
- when necessary, 1284.
- when permanent, 1284.
- see, also, "Easements."

**QUASI ENTAIL**

- nature, 58, 95.

**QUASI SERVIENT TENEMENT**

- nature, 1272.

**QUIA EMPTORES**

- effect on determinable fee, 336.
- rent service, 1464.
- provisions of statute, 26.

**QUIET ENJOYMENT, COVENANT FOR**

- as preventing assertion of after-acquired title, 2126.
- as running with land, 178, 1718.
- breach, act of covenantor, 127, 1696.
- assertion of easement, 1700.

[REFERENCES ARE TO PAGES.]

**QUIET ENJOYMENT, COVENANT FOR**—Continued.

breach—continued.

burden of proof as to paramount title, 1704.

claim of dower, 1698.

exclusion from possession, 1699.

existence of highway, 1694.

existence of lien, 1698.

failure of title to easement, 1700.

lessor's failure to give possession, 131.

mortgage, 1693, 1698.

necessity of eviction, 128, 1696-1700.

not by wrongful act of third person, 128, 1695.

outstanding lease for years, 1694.

paramount claim, 128, 1697, 1699.

construction with regard to what purports to be conveyed, 1693, 1694.

damages for breach, 129, 1709.

general or limited, 1696.

implication in favor of tenant, 125.

implication of covenant, 126.

runs with land, 178, 1718.

similar to covenant of warranty, 1692.

**QUIETING TITLE**

as mode of enforcing forfeiture, 309.

decree as interrupting adverse possession, 1957.

**QUIT**

notice to tenant to, 208, 223, 239.

**QUITCLAIM DEED**

as notice of defective title, 2244.

effect as to after acquired title, 1577, 2120, 2123.

grantee as bona fide purchaser, 1577, 2173, 2204.

nature, 1576, 2123, 2207, 2208.

necessity of record as against, 2204.

priority of unrecorded instrument, 2204.

**R****RAILROAD**acquisition of land for railroad purposes, implied grant of easements,  
1296.

adverse possession against, 1977.

cattleguards, release of right, 1310.

construction, as causing flowage of land, 1148.

conveyance of land for, implied grant of easements, 1296.

covenant as to transportation, running with land, 1413.

covenant to maintain station, as running with land, 1414.

covenant to stop trains, as running with land, 1414.

[REFERENCES ARE TO PAGES.]

**RAILROAD**—Continued.

- dedication of land for, 1858.
- easement of crossing, extinction by severance of ownership, 1365.
- easement to flood land, 1169.
- fences on right of way, 1005.
- grant of public lands to, 1553.
- grant of right of way, incidental covenant as running with land, 1411.
- in highway, as additional servitude, 1528.
  - compensation to abutting owner, 1532.
  - reservation on dedication, 1882.
- issuance of pass as payment of rent, 1462.
- liability for waste by receiver, 974.
- license to use land for, 1203.
- materials for, as passing by conveyance of land, 1675.
- mortgage of property subsequently to be acquired, 2369.
- obstruction of stream by, 1148.
- property as subject to adverse possession, 1977.
- right of way, as extinguishing private way on same line, 1376.
  - as within covenant for title, 1687, 1694, 1695.
  - landowner not liable for personal injuries, 1351.
  - nature, 1250.
  - pasturing cattle on, 1352.
- use of water from stream for engines, 1138.
- way of necessity across, 1304.

**RANGE**

- of townships, 1649.
- removable as domestic fixture, 929.

**RATIFICATION**

- of conveyance by cotenant, 682.
  - conveyance not properly delivered, 1744.
  - infant's conveyance, 2337.
  - insane person's conveyance, 2345.
  - lease by cotenant, 684.

**REAL ACTIONS**

- nature, 6.

**REAL ESTATE**

- see "Real Property."

**REAL PROPERTY**

- annuities as, 13.
- corporate stock as, 13.
- fixtures as, 905, 931.
- franchises as, 12.
- grasses as, 876.
- ice as, 1031.

[REFERENCES ARE TO PAGES.]

**REAL PROPERTY**—Continued.

- includes soil and minerals in place, 866.
- manure as, 948.
- origin of expression, 6.
- passes to personal representative in some states, 1890.
- pews as, 1251.
- rent as, 1475.
- trees and bushes as, 876.
- vegetation as, 877.
- wharves as, 1028.
  - see "Crops"; "Fixtures"; "Ownership"; "Personal Property."

**REASSIGNMENT**

- of leasehold estate, effect on liability under covenant, 168, 183.
- effect on liability for rent, 1472.

**RECEIPT**

- of purchase money, conclusiveness of acknowledgment, 1626.

**RECEIVER**

- for mortgaged property, 2441, 2445.

**RECIPROCAL EASEMENTS**

- as arising by prescription, 2075.
- in case of party wall, 1262.
- of support, implied reservation, 1294.
- what are, 1294.

**RECITALS IN CONVEYANCE**

- as notice to subsequent purchaser, 2241, 2242.
- estoppel by, 2118.
- in chain of title as notice, 2240.
- of consideration, 1625.

**RECLAMATION**

- of land under navigable water, 1024, 1033.
  - deprivation of right, 1027.
  - diversion of land reclaimed, 1033.
  - severance of right from upland, 1029.
  - transfer of right to stranger, 1028.
    - see, also, "Accretion."

**RECOGNITION**

- of rightful title, as interrupting adverse possession, 1962.

**RECONVERSION**

- in case of trust for conversion, 453.



[REFERENCES ARE TO PAGES.]

**RECORD**

- as creating presumption of delivery, 1754, 1758.
- as notice, 2181.
  - conveyance prior to grantor's acquisition of title, 2131.
  - instrument executed after apparently parting with title, 2191.
  - instrument improperly executed or certified, 2185.
  - instrument recorded after parting with title, 2191.
  - not to party to instrument recorded, 2202.
  - not to previous mortgagee, 2202.
  - not to previous purchaser, 2202.
  - to cotenant of grantor, 2018.
  - to mortgagee making subsequent advances, 2571.
  - to prior purchaser of neighboring land, 2190.
  - to subsequent purchaser, 2202.
  - to subsequent purchaser of neighboring land, 2188.
- delay in recording, 2194, 2196, 2199, 2200.
- destruction of records, effect, 2193.
- failure to record, not fatal to validity, 2180.
- in wrong book, effect, 2199.
- index to records, 2192, 2200.
  - as notice, 2187, 2188.
- instrument not duly authenticated, actual notice of record, 2185.
- instruments capable of, 2182.
- mistakes of recording officer, 2197.
- necessity as against assignee of mortgage, 2547.
  - creditors, 2212.
  - grantee in quitclaim, 2204.
  - grantee in restricted conveyance, 2210.
  - grantor in instrument, 2180.
  - judgment creditor, 2783.
  - mortgagee, 2559.
  - person not paying consideration, 2247.
  - prior mortgagee, 2202.
  - purchaser from heir, 2211.
  - purchaser not for value, 2247.
  - purchaser of equitable interest, 2211.
  - quitclaim deed, 2204.
- notice as substitute for, 2213.
  - burden of proof, 2263.
- of assignment of mortgage, 2546, 2548, 2550, 2558.
  - chattel mortgage, as notice to purchaser of land to which article annexed, 923.
  - conditional sale, as notice to purchaser of land to which article annexed, 923.
  - conveyance before acquisition of title, effect as notice, 2139.
  - conveyance of other land, as notice, 2188.
  - conveyance to cotenant, as notice to other cotenant, 2018.
  - defeasance of mortgage, 2379.

[REFERENCES ARE TO PAGES.]

**RECORD**—Continued.

- of assignment of mortgage—continued.
  - equitable restriction, 2190.
  - equitable title, 2183.
  - grant of easement, 1386.
  - instrument in chain of title, immateriality, 1439.
  - instrument not duly acknowledged, 2185.
  - instrument not duly executed, 2184.
  - instrument not entitled to record, 2185.
  - later instrument as essential to priority over earlier unrecorded instrument, 2203.
- lease, 150, 2184.
- lis pendens, 1099.
- mortgage, 2375, 2559.
  - not necessary to validity, 2375.
  - of other land as notice, 2190.
- mortgage of fixture, among conveyances of land, 941.
- notice to mortgagor, 2593, 2594.
- notice to purchaser of land, 2637.
- plat, as involving dedication, 1871, 1873.
- power of attorney, 2184.
- restrictive agreement, 1440, 2183.
- transfer of mortgaged land, 2508.
- transfer of part of mortgaged land, notice to mortgagee, 2515, 2516.
  - notice to transferee of other part, 2508.
- persons charged with notice by, 2202.
- presumption of delivery from, 1754, 1758.
- priority of, as determining rights, 2203.
  - restrictive agreement, 1440.
- statutory provisions, 2180.
- time of filing, as determinative of rights, 2193, 2199.
  - statutory provision, 2194.
- what constitutes recording, 2193.
  - see “Bona Fide Purchaser”; “Notice”; “Priorities”; “Purchaser for Value”; “Purchasers”; “Registration of Title.”

**RECOVERIES**

- as method of transfer, 1567.
- bar of fee tail by, 70.

**RECTANGULAR SURVEYS**

- description by reference to, 1648.
- meander lines under, 1649.

**REDELIVERY**

- of conveyance, effect, 1804.

[REFERENCES ARE TO PAGES.]

**REDEMPTION**

- from deed of trust, 2395.
- execution sale, 2149.
- foreclosure sale, 2694.
- judicial sale as mortgage, 2393.
- mortgage, 2359, 2645.
  - allowance for improvements, 2449.
  - amount to be paid, 2659.
  - bar by lapse of time, 2021, 2656, 2659.
  - by cotenant, 695.
  - by widow, 755.
  - by wife, 800.
  - clog on right, 2365.
  - contribution towards, 2505, 2506.
  - decree for, 2663.
  - enforcement of right, 2660.
  - equitable right, 2645.
  - exoneration of person redeeming, 2506.
  - foreclosure of right, 2654, 2675, 2683.
  - persons entitled, 2645.
  - release of right nugatory, 2472.
  - right essential to mortgage, 2361.
  - subrogation of person redeeming, 2664.
  - tacking unsecured claims, 2652.
- from tax sale, 2158.

**REDUCTION**

- of estate, provision for, 565.

**RE-ENTRY**

- by disseisee, necessity for trespass, 243.
- by landlord, on tenant's abandonment, 1585.
  - effect on rent, 1485, 1493, 1495.
  - effect on right to remove fixtures, 938.
  - stipulation for continuance of rental liability, 1494.
- condition providing for, 262-325.
  - annexed to particular estate, 482.
- for breach of condition, 305.
- necessity for enforcement of forfeiture, 307, 308.
- passes with reversion, 316.
  - to what extent transferable, 313, 314.
- provision for, in case of breach of covenant, 265.
  - in lease, 263, 268.
- right of, destruction by attempted transfer, 316.
  - devise, 315.
  - entitles to injunction against waste, 988.
  - not inconsistent with equitable restriction, 1427.
  - see "Conditions": "Entry."

[REFERENCES ARE TO PAGES.]

**REFORMATION**

- of conveyance, for mistake, 1633.
- by insertion of words of inheritance, 46.
- of deed of gift, 1624.

**REGISTRATION OF TITLE**

- equitable interests, 2276.
- legislation opposed to doctrine of adverse possession, 1919.
- liens, 2277.
- method of registration, 2274.
- purpose of the system, 2273.
- transfers after registration, 2276.
- transfers of decedent's land, 2278.

**RELATION**

- back of possession, entry by disseisee, 243.
- by adoption, 1909.
- computation of degrees, canon and civil law rules, 1897.
- doctrine of representation, in law of descent, 1899.
- for purpose of descent, 1890, 1897.
- necessary to support covenant to stand seised, 1574.
- to interested party, not disqualification to take acknowledgment, 1731.

**RELEASE**

- as between cotenants, 1569.
- as grant of easement, 1259, 1289.
- by joint tenant, 639.
- classes of, 1569.
- consideration unnecessary, 1482, 1487.
- construed as bargain and sale, 1570.
- conveyance by, 1568.
- implied, of easement, 1378.
- lease and, conveyance by, 350, 1573.
- nature of, 1568.
- necessity of seal, 1487, 1570.
- necessity of word "heirs," 1569.
- not to holder of interesse termini, 1569.
- not to lessee before entry, 115.
- not to tenant at sufferance, 1569.
- of assumption of mortgagee, who may give, 2497.
  - condition, 295.
  - contingent remainder, 525, 526.
  - covenant for title, by one who has parted with land, 1722.
    - effect as against innocent purchaser, 1722.
  - curtesy, 841.
    - husband's joinder in conveyance, 841.
    - husband's joinder in wife's will, 841.

[REFERENCES ARE TO PAGES.]

**RELEASE**—Continued.

of assumption of mortgagee—continued.

dower, 774, 802.

acknowledgment necessary, 780.

avoidance of conveyance containing, 781.

by contract, 791.

by infant married woman, 779.

by joinder in husband's conveyance, 779, 1592.

directly to husband, 777.

does not estop to assert after-acquired title, 2122.

in conveyance fraudulent as to creditors, 781.

in mortgage, effect of nullity of mortgage, 781.

joinder of husband necessary, 775.

only to one having estate, 776.

to whom available, 776, 777, 805.

dower consummate, 805.

easement, 1376, 1378.

by cotenant, 1377.

part performance, 1382.

executory interest, 589.

homestead claim of widow, 858.

land in adverse possession, 2290, 2291.

liability on assumption of mortgage, 2497.

mechanic's lien, 2774.

mortgage, 2583, 2630-2636.

as discharge of obligation or of lien, 2631.

as implied grant of easement, 1289.

by assignor, 2636.

conclusiveness, 2629, 2640, 2673.

nature, 2631.

on part of land subject, 2515.

power to execute, 2633.

mortgage debt, 2583.

mortgagor's right of redemption, 2472.

part of mortgaged land, effect, 2515.

power, 1103, 1105.

primary liability for debt secured by mortgage, 2644

profit à prendre, 1399.

rent, 1482, 1487.

restriction on use of land, 1455.

reversion or remainder, 1569.

right of user in another's land, 1570.

right to cattle guards on railroad, 1310.

oral, of easement, 1382.

to one not in possession, 115.

to whom to be made, 526.

word "heirs" sometimes necessary, 1569.

[REFERENCES ARE TO PAGES.]

**RELETTING**

- after reentry, effect on rent, 1494.
- of premises abandoned by tenant, effect as surrender, 1586.
- provision for, on forfeiture of tenancy, 1494.

**RELICION**

- acquisition of land by, 2094.
- see "Accretions."

**RELIGIOUS ASSOCIATION**

- dedication in favor of, 1857, 1858, 1860.
- power to acquire land, 2348.
- rights of pew holder, 1250.

**REMAINDERS**

- acceleration, 519.
- adverse possession as against remainderman, 1950, 1982, 2012.
  - in favor of remainderman, 1984.
- alternative remainders, 510.
- as springing from act of parties, 479.
- as subject of mortgage, 2367.
- by way of use, 554.
- changed into executory devise, 563.
- contingent, 484
  - and vested distinguished, 490.
- creation by devise, 555.
  - no technical language necessary, 480.
- cross remainders, 513.
- curtesy in, 835.
- death of life tenant lessor, remainderman entitled to possession, 83.
- death of particular tenant before testator, effect, 521.
- dedication by particular tenant, 1861.
- descent, 524, 528, 1892.
- devise, 524, 527.
- devise by way of remainder, 555.
- distinguished from reversion, 479.
- dower in, 755.
- effect of partition, 715.
- equitable, 515.
  - time of vesting, 505.
- executory devise or remainder according to event, 563.
- failure of contingent remainder, 500.
  - particular estate, effect on remainder, 505, 519.
- for years, 583.
- homestead in, 860.
- in chattels real, 584.
- in favor of class, 497, 503, 556.
  - donor's heirs, as reversion in donor, 470.

[REFERENCES ARE TO PAGES.]

**REMAINDERS**—Continued.

- in favor of class—continued.
  - issue of person unborn, 517.
  - survivors, no succession from nonsurvivor, 529.
  - uncertain person, contingent, 486.
- independent of intention of creator, 479.
- is not residuary part of grantor's estate, 478.
- merger of particular estate in, 89-93.
- nature, 476, 484.
- not residuary part, 478.
- on contingency with double aspect, 510.
  - estate during widowhood, vested, 497.
  - fee tail estate, 481.
    - vested or contingent, 491, 492.
  - life estate, legislation modifying fee tail estate, 56.
  - life estate in grantor, 552.
- opening to let in other members of class, 498.
- origin of term, 478.
- particular estate, 481.
  - destruction, 502, 505, 519.
  - determinable fee, 481.
  - effect of failure, 505, 519.
  - fee tail, 481, 491.
  - nature, 469, 481.
  - re-entry destroying, 483.
  - subject to condition subsequent, 482.
  - term of years, 481, 501.
- particular tenant, adverse possession in favor of remainderman, 1984.
  - dedication by, 1861.
  - lease by, 213.
  - purchasing paramount title, 88.
  - release to, 1569.
  - waste by, 291, 950, 984.
- particular tenant and remainderman, adverse possession against, 1982.
  - adverse possession between, 1982, 2012.
  - contribution between, 84-89.
  - tacking of possessions, 1970.
- power operating by way of remainder, 1046.
- prescription as against remainderman, 2057.
- presumption in favor of vesting, 495, 497, 499.
- remainderman, adoption of life tenant's lease, 83.
  - adverse possession against, 1950, 1982, 2012.
  - adverse possession in behalf of, 1984.
  - easement in favor of, 1200.
  - not barred by adverse possession in third person, 1950.
  - prescriptive right against, 2057, 2058.
  - release to particular tenant, 1569.
  - rights as against life tenant, 81-89.

[REFERENCES ARE TO PAGES.]

**REMAINDERS—Continued.**

remainderman—continued.

rights as to partition, 713, 714, 716.

rights as to waste, 291, 950, 984.

rights under lease by life tenant, 213.

rule in Shelley's case, 529.

statutory modifications, 590.

subject to power, not necessarily contingent, 492.

successive, 480, 511.

to ascertained person, 489.

to survivors, 580.

transfer, 524.

vested, 476.

vested although liable to be divested, 492.

vested and contingent distinguished, 490, 511.

see, also, "Contingent Remainders"; "Executory Devise"; "Executory Interest"; "Executory Limitations"; "Future Estates and Interests"; "Vested Remainders."

**REMARRIAGE**

gift until, 79.

**REMONSTRANCES**

by landowner, as precluding prescription, 2066.

**REMOTENESS OF VESTING**

see "Perpetuities, Rule Against."

**RENEWAL OF LEASE**

by agreement, 256.

by trustee, subject to trust, 418.

covenant for perpetual renewal, validity, 610.

covenants for, as running with the land, 178.

effect on right to remove fixtures, 938.

**RENT**

abandonment by tenant, effect, 1492.

acceleration, whole rent due on contingency, 1478.

acceptance from assignee, as relieving original lessee, 1472.

as waiver of breach of condition, 302.

accrues not from day to day, 1478.

accruing after end of term, 251.

action for, assumpsit, 1512.

covenant, 1471, 1473, 1485, 1504, 1511.

debt, 159, 166, 1509, 1511.

lack of title no defense, 188, 193.

use and occupation, 1514.

already accrued, not affected by forfeiture of leasehold, 1493.

not affected by surrender, 1491.



[REFERENCES ARE TO PAGES.]

**RENT**—Continued.

- apportionment as to amount, 1473, 1482.
  - by division of rent, 1484.
  - not as regards liability of land, 1484.
  - partial condemnation of leased premises, 1495.
  - partial eviction, 1502.
  - partial extinction of rent, 1484.
  - partial merger or surrender, 1485.
  - partial re-entry by landlord, 1485.
  - partial transfer of rent, 1484.
  - partial transfer of reversion, 1483.
  - severance of leasehold, 1484.
  - severance of reversion, 1483.
- apportionment as to time, 1478.
  - statutory provisions, 1480.
- apportionment in action on covenant, 1485.
  - of rent charge, 1486.
- as incident to cropping agreement, 123.
- as part of the profits of land, 1460.
- as payable out of profits of land, 1460.
- as real or personal property, 1474.
- as subject of mortgage, 2367.
- ascertainment of amount, 1481.
- assignee's liability, terminated by reassignment, 1472.
- assignment of leasehold, effect, 1470.
- assumpsit for, 1511, 1512, 1514.
- attachment for, 1517, 1522.
- certainty as to amount, 1480.
- change of ownership, effect on rent, 1483.
- change of title to reversion on rent day, effect, 1477.
- charge, 1463.
  - apportionment, 1486.
- claim to past due rent, chose in action, 1470.
- classes, 1462.
- classes of rents, 1462.
- condemnation of leased premises, 1495.
- condition restricting amount, validity, 288.
- continuing liability of lessee, 167.
  - landlord's recognition of assignee, 1583.
- contractual liability after re-entry, 1494.
- covenant to pay, 167, 169, 1471, 1486, 1504, 1511.
  - action, 1511.
  - apportionment, 1473, 1485.
  - runs with the land, 177, 1471.
- covenant to pay rent in fee, as running with land, 1473.
- curtesy in, 833.
- day for payment, 1475.
- death of person entitled, 1474.

[REFERENCES ARE TO PAGES.]

**RENT**—Continued.

- demand for payment, as prerequisite to forfeiture, 293.
- destruction of building, effect, 214, 1497.
- different senses of term, 1459.
- distress for, 1516.
- division of liability, 1484.
- division of rent, 1483.
- dower in, 746.
- due and to become due distinguished, 1470.
- equitable proceeding for, 1513.
- eviction, effect, 205, 1467, 1477, 1479, 1485, 1486, 1500, 1501.
- exclusion of lessee from possession, 1488, 1490.
- expiration of landlord's estate as defense, 195.
- extinguishment or suspension, 1487.
  - accidental injuries to premises, 1497.
  - breach of lessor's covenant, 1504.
  - condemnation of land, 1496.
  - destruction of building, 214, 1497.
  - eviction, 205, 1467, 1477, 1479, 1485, 1486, 1500, 1501.
  - exclusion of lessee, 1488, 1490.
  - expiration of landlord's estate, 195.
  - failure of water supply, 1504.
  - illegality of use for which leased, 1506.
  - lack of heat on premises, 1504, 1505.
  - merger, 1490.
  - noncompliance with covenant to repair, 1505.
  - re-entry for breach of condition, 1485, 1493.
  - release, 1482, 1487.
  - surrender, 1490.
  - surrender to head landlord, 211.
  - untenantable condition, 204, 1499, 1503.
  - withdrawal of license for business, 1507.
  - withholding of possession, 1488-1490.
- failure to demand for twenty years, effect, 1487.
- failure to heat premises, effect, 1504, 1505.
- failure to take possession, effect, 1488.
- for mining privilege, 870, 871, 1462.
- forfeiture for nonpayment, relief in equity, 320.
- forfeiture of leasehold, effect, 1485, 1493, 1516.
- from incorporeal things, 1466.
  - land and chattels, 1467.
  - minerals, 870, 1462.
  - personal chattels, 1466.
- illegality of business for which lease made, 1505.
- implied covenant to pay, 169.
- inclusion of chattels in lease, effect, 1467.
- increase by agreement, 1482.
- inference of periodic tenancy, 236.

[REFERENCES ARE TO PAGES.]

**RENT**—Continued.

- installment not apportionable, 1479.
- interference with security for, as waste, 964, 978.
- lessee's continuing liability after assignment, 167, 1472, 1510.
- liability by reason of priority of estate, 1470.
- lien for, on tenant's personal property, 1522.
- merger, effect, 1490.
- mortgage of, 2367.
- nonpayment as ground of forfeiture, 267.
- nonpayment for period of limitations, effect, 1487.
- not reservable out of chattels, 1466.
- occasionally payable in services, 1462.
- ordinarily payable in money, 1461.
- ordinarily reserved in lease, 149.
- partial eviction, effect, 1485, 1500, 1502.
- partial extinction, 1484.
- partial surrender, as effecting apportionment of rent, 1485.
- passes on transfer of reversion, 1469.
- payable in advance, by express stipulation, 1477.
  - effect of eviction, 1501, 1502.
- payable until midnight, 1477.
- payment and receipt of, as evidencing new tenancy, 256.
  - as evidencing periodic tenancy, 231.
- payment by assignee of leasehold, effect on continuing liability of lessee, 1472, 1483.
- payment to transferee of reversion, 151.
- payments by tenant not necessarily rent, 1468.
- periodic, inference of periodic tenancy, 233, 234.
- premises leased for liquor sales, effect of illegality, 1506.
- properly payable to landlord, 1469.
- reduction by agreement, 1481.
- re-entry, effect, 1485, 1493.
- re-entry on part of premises, as effecting apportionment of rent, 1485.
- release, 1482, 1487.
- remedies, assumpsit, 1512.
  - attachment, 1522.
  - covenant, 1473, 1485, 1511.
  - debt, 159, 166, 1509, 1511.
  - distress, 1516.
  - forfeiture for nonpayment, 1516.
  - lien, 1522.
  - proceeding in equity, 1513.
- reservation, 1469.
- reserved on bailment of chattel, 1466.
- reserved on lease of incorporeal thing, 1466.
- retention on transfer of reversion, 1470.
- reversion in beneficiary of reservation not necessary, 1469.
- seek, what is, 1463, 1516, 1518.

[REFERENCES ARE TO PAGES.]

**RENT**—Continued.

- security for, injunction to protect, 964, 978.
- service, what is, 1463, 1464.
- stipulation for continuance, in spite of termination of tenancy, 1494.
- subsequent lease by landlord, effect, 156.
- subsequently to accrue, nature of claim, 1461.
- surrender, effect, 1490-1493.
- surrender to head landlord, 211.
- suspension, 1487.
- time at which due, 1475.
- time of day for payment, 1477.
- transfer of liabilities, 177, 1470.
  - running of covenant to pay, 1473.
- transfer of rights, 149, 152, 156, 158, 1469, 1479, 1510.
- untenantable condition of premises, effect, 204, 1499, 1502.
- various meanings of term, 1459.
- what is, 1459, 1468.
- what may be reserved as, 1460.
- withdrawal of license for business, effect, 1507.
- withholding of possession, effect, 1488.
- yearly rent paid monthly not monthly rent, 236.
  - see "Distress"; "Landlord and Tenant"; "Lease"; "Rents and Profits"; "Will, Tenancy at"; "Year to Year, Tenancy from"; "Years, Estate for."

**RENTAL CONTRACT**

- meaning of phrase, 99.

**RENTS AND PROFITS**

- grant of, carries the land, 1647.
- in wife's land, husband's rights at common law, 726.
- liability of cotenant in possession, 674.
- meaning of phrase, 1460.
- of dower interest, accounting, 820.
- of mortgaged land, application on debt secured, 2434, 2441.
  - accounting by mortgagee, 2438.
  - sequestration by receiver, 2441.
  - who entitled, 2433.
    - see "Mesne Profits."

**REPAIRS**

- by cotenant, contribution, 689.
  - landlord, 140.
    - as indicating resumption of vacant possession, 1585.
    - negligently made, 143, 145.
    - under covenant, 141, 142.
  - life tenant, 84, 969.
  - mortgagee, reimbursement, 2448.
  - tenant under lease, 139, 969, 972.

[REFERENCES ARE TO PAGES.]

**REPAIRS**—Continued.

- condition requiring, relief from forfeiture, 322.
- covenant by lessee for, effect, 139.
  - obliging to rebuild, 139.
- covenant by lessor for, effect of breach on rent, 1505.
  - liability for damage to strangers, 146.
  - liability for damage to tenant, 141.
- covenant to repair, as running with land, 177, 1414.
- failure to make, as defense to rent, 1503, 1505.
  - as permissive waste, 968.
- necessary to exercise of easement, 1348.
- obligation on landlord, 140, 141.
- obligation on tenant under lease, 139, 968, 971.
- on building, for purpose of support, 1349.
  - in divided ownership, 945.
- on fence, duty of tenant, 973.
- on highway, as showing acceptance of dedication, 1875.
- on partition fence, 1247.
- on party wall, 1343, 1350.
- on wall or bank, duty of tenant, 973.
  - see, also, "Contribution"; "Improvements."

**REPLEVIN**

- by mortgagee, for parts severed, 2463.
- for goods distrained, lessor's lack of title immaterial, 189.
- for things severed in commission of waste, 989, 2463.

**REPRESENTATION**

- of ancestor by issue, for purpose of descent, 1899.
  - heirs by ancestor, for purpose of partition, 703.
- persons not in esse, for purpose of partition, 703, 721.

**REPRESENTATIONS**

- estoppel by, to assert title, 2134.
  - street or square appearing on plat, 1319.
  - see "Estoppel."

**REPUBLICATION**

- of will, 1851.

**REPUDIATION**

- of tenancy, as ground of forfeiture, 266.

**REPUGNANCY**

- between executory interest and prior estate, 568-577.
- of condition, 287.

**REPURCHASE**

- stipulation for right, distinguished from mortgage, 2389.

[REFERENCES ARE TO PAGES.]

**RESCISSION**

- of conveyance, by consent, 1804.
  - for breach of promise of support, 325-330.
  - for duress, 1639.
  - for fraud, 1639.
  - for mistake, 1636.
- of lease, by consent, 1579.

**RESERVATION**

- by implication, of easement, 1293.
- distinguished from exception, 1609.
- in favor of third person, 1610.
  - operating as exception, 1612, 1613.
- of easement, 1266, 1607.
  - creation of appurtenance, 1231.
  - implication, 1270.
  - necessity of words of inheritance, 1268, 1617.
- highway, 1612.
- life estate, 551, 1606, 1613.
  - in connection with delivery of conveyance, 1749.
- minerals, 867.
- particular estate, 551, 1606, 1613.
- power of disposition, 1050, 1606.
- profit à prendre, 1398.
- rent, 1469.
- right of repurchase, 1606.
- right to damages, 1606.
- trees, 878.
- way of necessity, 1298.
- on conveyance, 1605, 1617.
- on dedication, 1881.
- oral, validity, 879, 1631.

**RESERVOIR**

- bursting of, to injury of neighbor, 1184.
- easement of maintaining on another's land, 1255.
- water in, ownership, 1131.

**RESIDENCE**

- of debtor, exemption by homestead law, 2291.
- of decedent, widow's temporary right of possession, 807.
- on land as actual possession, 1925.
- way of necessity for, 1308.

**RESIDUARY DEVISE**

- as applied to subject of lapsed or void devise, 1836, 1837.
- as execution of power, 1085.
- effect as passing after-acquired interest, 1808.
- mode of operation, 1808.

[REFERENCES ARE TO PAGES.]

**RESIDUARY DEVISE**—Continued.

of reversion, in case of contingent remainder, 510, 511.  
 subject to limitation over, 553.

**RESTRAINT OF MARRIAGE**

condition in, 281, 284.

**RESTRAINTS ON ALIENATION**

agreement not to partition, 712.  
 at common law, 25.  
 at suit of creditors, 2315.  
 bankrupt act, 2287.  
 charitable gift, 2312.  
 conveyance by disseisees, 2288.  
 conveyance in fraud of creditors, 2280.  
     marriage, 762, 837.  
     subsequent purchaser, 2284.  
 fee simple estate, 51, 2306.  
     alienation by conveyance, 567, 576.  
     alienation by will, 567, 576, 2309.  
     involuntary alienation, 2315.  
     limited as to mode of alienation, 567, 576, 2308.  
     limited as to persons, 2310.  
     limited as to time, 2311.  
 fee tail, 2313.  
 life estate, 2313.  
 provisions of Magna Charta, 25.  
 provisions of Quia Emptores, 26.  
 rule against perpetuities, 591.  
 sole and separate estate, 730.  
 spendthrift trusts, 2319.  
 statutory provisions, 621.  
 term of years, 160, 2315.  
 trust estate, 2317, 2319.

**RESTRICTIVE AGREEMENT AS TO USE**

applies to land added by accretion, 2108.  
 as extending to subsequent purchasers, 1438.  
 available to mortgagee, 2461.  
 benefit passing on transfer of land, 1442.  
 effect as against holder by adverse possession, 1437.  
 effect of acquiescence in breach, 1453.  
 enforcement against purchasers with notice, necessity of writing, 1431, 1433.  
 enforcement in equity, 1425.  
     by mortgagee, 2461.  
     change in neighborhood, 1455, 1458.  
     defenses, 1452.  
 in pursuance of general plan of improvement, 1446.

[REFERENCES ARE TO PAGES.]

**RESTRICTIVE AGREEMENT AS TO USE**—Continued.

- necessity of writing, 1431, 1433.
- notice from record, 2183, 2190.
- taking of land for public use, 1428.
- violation under power of eminent domain, 2162.
- who entitled to enforce, 1441.
- within covenant against incumbrances, 1686.
- see "Easements"; "Equitable Restrictions."

**RESULTING TRUST**

- dower in, 749, 750.
- in case of trust for conversion, 448.
- in favor of donor or grantor, 393-397.
  - beneficial interest not exhausted, 394.
  - conveyance without consideration, 394.
  - exclusion by recital of payment of consideration, 1625, 1626.
  - trust for conversion, 449.
- in favor of person paying consideration, 397, 400.
  - mode of payment, 400.
  - oral evidence, 398.
  - payment by furnishing materials, 400.
  - payment by giving of note, 401.
  - payment by husband or father, 404.
  - payment by performance of labor, 400.
  - payment by release of claim, 400.
  - payment by several, 402.
  - payment by wife, 649.
  - time of payment, 401.
- land purchased with partnership funds, 664.
- land purchased with trust funds, 310.
- nature, 391-406.
- not in favor of lender of price, 399.
- partnership property, 664.
- possession of trustee not ordinarily adverse to cestui, 2003.
- undue trust for conversion, 448.

**RESULTING USE**

- after statute of uses, 352, 354, 546.
- before statute of uses, 344.
- nature, 344.
- to grantor, on partial declaration of use, 353.

**REVERSION**

- as springing from act of parties, 479.
- as subject of mortgage, 2367.
- change of ownership, effect on rent, 1469, 1477-1479.
  - on rent day, 1477.
- curtesy in, 835.



[REFERENCES ARE TO PAGES.]

**REVERSION**—Continued.

- descent of, 1892.
- devise in remainder to testator's heir, 1893.
- distinguished from vested remainder, 468, 479.
- division, effect on rent, 1510.
- dower in, 755.
- easement in favor of reversioner, 1200.
- in case of contingent remainder, 509.
- is present not future estate, 467
- lease in reversion, 155.
- lease of, 471.
- life tenant leasing for years, 468.
- merger of particular estate in, 89-93.
- nature and mode of creation, 100, 467.
- necessity in case of distress for rent, 1518.
- no express limitation of, 470.
- not barred by adverse possession in third person, 1951.
- on dower estate, 480, 825.
- on estate for years, 100.
- on fee tail estate, 54, 467.
- on life estate, 468, 469.
- on partial failure of trust, 396.
- on sublease, 170.
- surrender to original lessor, 211, 1492.
- on two or more particular estates, 469.
- particular estate and, 469.
- prescription as against reversioner, 2057.
- rent as incident to, 1469, 1475.
- reversioner, action for disturbance of easement, 1359.
  - and particular tenant, adverse possession against, 1982.
  - entitled to proceeds of waste, 988.
  - not affected by dedication by particular tenant, 1861.
  - prescriptive right against, 2057, 2058.
  - release to particular tenant, 1569.
  - right to sue for waste, 949, 984, 987.
- right of entry passing with, 316.
- sale under mortgage, 154.
- severance, resulting apportionment of rent, 1483.
- transfer, 149-159, 471.
  - by operation of law, 153.
  - during rent period, rent not apportioned, 1479.
  - effect on liabilities of transferor, 158.
  - effect on rent, 1510.
  - effect on rights of transferor, 158.
  - in bankruptcy, 154.
  - rights of transferee, 158.
  - see "Landlord and Tenant"; "Rent"; "Reverter"; "Reverted  
Possibility of."

[REFERENCES ARE TO PAGES.]

**REVERTER**

- by way of escheat, 475.
- in case of conditional fee, 473.
  - determinable fee, 472.
- of land dedicated, on abandonment of public use, 1887.
- on dissolution of corporation, 475.
- on extinction of highway, 1538.
  - see "Reversion"; "Reverter, Possibility of."

**REVERTER, POSSIBILITY OF**

- descent of, 474.
- devise of, 474.
- escheat, 475.
- not an estate, 473.
- on conditional fee, 473.
- on determinable fee, 472.
- on dissolution of corporation, 475.
- right of re-entry for breach of condition distinguished, 474.
  - see, also, "Re-Entry"; "Reversion"; "Reverter"; "Right of Entry."

**REVIVAL OF WILL**

- by revocation of revoking will, 1850.

**REVOCATION**

- absence of express power, does not show instrument not to be will, 1812.
- of dedication, 1872, 1873.
  - delivery of conveyance, 1768, 1769.
  - devise of particular estate, effect on remainder, 521.
  - license, 1206, 1218, 1220.
  - power, by death of donor, 1055, 1101, 2718.
    - by voluntary act, 2717.
- power of, 1049.
  - does not show instrument to be will, 1811.
  - in voluntary deed of trust, 1049.
  - release, 1103.
  - to be exercised by conveyance or devise, 1050.
- power of sale in mortgage, 2717.
- revival of revoked will, 1849.
  - trust, not unless power expressly reserved, 423.
  - will, 1837.
    - accidental destruction insufficient, 1838.
    - alienation of land subsequently reacquired, 1847.
    - birth of issue, 1844.
    - by mistake, 1841, 1843.
    - cancellation or destruction, 1838.
    - cancellation or destruction of signature, 1840.
    - conveyance of land devised, 1847.

[REFERENCES ARE TO PAGES.]

**REVOCATION**—Continued.

- revival of revoked will—continued.
  - dependent relative, 1841.
  - destruction of document, 1839, 1841.
  - destruction of seal, 1840.
  - during testator's insanity, 1838.
  - in part, 1840.
  - intention to revoke in itself insufficient, 1839.
  - invalid conveyance, 1848.
  - marriage, 1844.
  - marriage and birth of issue, 1845.
  - presumption from loss of document, 1841.
  - sale of land, 1847.
  - subsequent will, 1842.

**RIGHT OF ENTRY**

- for breach of condition, applicability of rule against perpetuities, 603
- only in grantor or heirs, 312.
- not transferable, 313-315.
- who may enforce, 311.
- sufficiency for curtesy, 829.
- dower, 738.
- see, also, "Re-Entry."

**RIGHT OF WAY**

- see "Way, Easement of."

**RIGHT TO CONVEY, COVENANT OF**

- as running with land, 1719.
- damages, 1709.
- notice, 1683.

**RIGHTS**

- above the surface, 864.
- as to another's land, 5, 1116, 1123.
- below the surface, 864.
- classes of rights in land, 4.
- in rem and in personam, in connection with trusts, 362.
- nature of legal rights, 5.
- of ownership, 4.
- of reverter, 472.
- to dispose of another's land, 1040.

**RIGHTS OF ALIENATION**

- see "Alienation"; "Personal Capacity"; "Restraints on Alienation."

[REFERENCES ARE TO PAGES.]

**RIGHTS OF USER**

- incident to ownership, fee simple estate, 952.
- fee tail estate, 953.
- life estate, 953.
- restrictions in favor of neighbor, 1117.
- term of years, 953.
- of another's land, 1116, 1197, 1388.
  - based on presumption, 2069.
  - release, 1570.
- of private land, in favor of public, 1523, 1884.
  - see, also, "Easements"; "Natural Rights"; "Prescription"; "Profits à Prendre"; "Public Rights"; "Waste"; "Water"; "Water-course."

**RIPARIAN LAND**

- what is, 1139.
- see "Nonriparian Land"; "Riparian Owners."

**RIPARIAN OWNERS**

- access to water, 1022, 1132.
- accretion, 2093.
- apportionment of bed of river between, 1034.
- appropriation of water, 1132.
  - by municipality, 1138.
  - for domestic use, 1133.
  - for purpose of sale, 1136.
  - for use on nonriparian land, 1136.
  - transfer of rights, 1138.
- bed of highway abutting on water, 1665.
- bed of lake or pond, 1018.
  - stream, 1012, 1016.
  - tide waters, 1007.
- boundary lines between, 1032.
- diversion of water, 1132, 1140.
- grant of water power by, 1239.
- ice, 1030, 1031.
- increase of flow of stream, right of action, 1150.
- necessity that land abut on water, 1023.
- obstruction of flow, 1144.
- on natural watercourse, 1131, 1237.
- pollution of water, 1142.
- prior appropriation of water, 1155.
- reasonableness of use of water, question for jury, 1134.
- reclamation of land, 1024.
  - transfer of right to stranger, 1029.
- riparian rights as vested in nonriparian owner, 1150.
- shore, 1009.
- transfer of rights, 1029, 1139, 1151.

[REFERENCES ARE TO PAGES.]

**RIPARIAN OWNERS**—Continued.

who are, 1023, 1139.

see "Accretion"; "Boundaries"; "Description"; "Littoral Rights";  
"Navigation"; "Rivers"; "Shore"; "Stream"; "Water-  
course."

**RIVERS**

accretion, 2093.

boundaries on, 1656, 2093.

change in course, 1141, 2093.

ice in, rights to, 1030, 1031.

island in, ownership, 2115.

ownership of bed in navigable, 1007, 1012.

in non-navigable, 1016.

in tidal, 1007.

public rights of anchorage, 1547.

fishing and hunting, 1547.

navigation, 1545.

riparian rights, 1128.

access to water, 1022.

appropriation of water, 1132, 1136.

diversion without appropriation, 1140.

increase of flow, 1150.

obstruction of flow, 1144.

pollution of water, 1142.

reclamation of land, 1024, 1029.

transfer of riparian rights, 1029, 1139, 1151.

**ROADS**

see "Highways."

**ROLLING STOCK**

of railroad, as fixture, 911.

**ROOF**

landlord's liability for defects in, 147, 148.

repair of, in case of divided ownership of building, 945.

water accumulated on, liability for damage by escape, 1186.

**ROOF WATER**

liability for discharge, 1186.

**ROOM**

separate ownership of, 945.

**ROPE WALK**

conveyance of in terms, extends to land, 1647.

**RULE AGAINST PERPETUITIES**

see "Perpetuities, Rule Against."

[REFERENCES ARE TO PAGES.]

**RULE IN DUMPOR'S CASE**

nature, 298, 300.

**RULE IN SHELLEY'S CASE**

see "Shelley's Case, Rule in."

**RULE IN WILD'S CASE**

nature, 61.

**RULES OF CONSTRUCTION**

accretion as, 2095.

earlier clause controls, 1619.

effect of habendum, 1620.

grantee favored, 75, 1618.

**RUNNING OF COVENANTS**

as to things not in esse, 182, 1414.

continuing liability of original covenantor, 158, 166, 1471.

for title, 1718.

in conveyance in fee simple, 1400.

in lease, 173.

not on sublease, 173.

on equitable assignment, 180.

on mortgage of leasehold, 2424.

on oral transfer of possession, 180.

reassignment, 183, 1472.

see "Covenants"; "Equitable Restrictions"; "Restrictive Agreement."

**S****SALE**

according to plat, creation of easements, 1320.

resulting dedication, 1868, 1870, 1873.

at instance of creditors, 2150, 2151.

by husband, effect on dower, 774.

conditional sale, of article annexed to land, 921.

contract of sale, equitable rights of parties, 456.

death of party, 461.

risk of loss before conveyance, 459.

contract of sale, interest of purchaser, 456.

dower in, 750.

homestead in, 860.

direction for sale of land, conversion by, 438.

entry pending negotiations, tenancy at will, 217.

for purpose of partition, 721, 2153.

for taxes, validity, 2156.

gift of proceeds of land to be sold, gift of personalty, 441.

lien for price, 2763.

[REFERENCES ARE TO PAGES.]

**SALE**—Continued.

- of chattels, license to remove, 1205.
- chattels on vendor's land, license coupled with interest, 1216.
- crops, 880, 888.
  - need not be in writing, 888.
- decedent's land, 2150.
- fixture, as contract concerning land, 942.
  - when removable by tenant, 932.
- fruit, 886.
- grass, 880, 886.
- ice, 1031.
- infant's land, 2153.
- land, effect in equity, 456.
  - death of party to contract, 461.
  - includes vegetation, 978.
  - of decedent, 2150.
  - of infant, 2153.
  - of insane person, 2153.
  - previously devised, 462, 463.
  - proceeds occasionally regarded as land, 454.
  - terminates license, 1220.
- lunatic's land, 2153.
- manure, 949.
- minerals in place, 869.
  - mining lease insufficient, 869.
- reversion, 149-154.
- trees, 880, 881, 886.
  - as revocable license, 887, 1216.
  - mortgage by purchaser, 883.
  - oral, 886.
  - to be cut, 880.
- trust property, direction of court of equity, 4059.
- on condition, of article subsequently annexed to land, 921.
  - rights of prior mortgagee of land, 924.
  - rights of subsequent purchaser of land, 924.
- power of, 1042, 1046, 1053, 1064, 1066, 1070, 1088, 1111.
- powers of, in mortgage, 2709.
- trust for sale of land, effect, 438.
- under deed of trust, 2715.
- under execution, 2146.
  - priorities, 2258.
- under mortgage, effect, 2692.
  - in parcels, 2690.
  - part of debt not due, 2687.
  - proceeding for decree, 2686.
- under order of probate court, 2151.
- with reference to plat, resulting dedication, 1860, 1870, 1873.

[REFERENCES ARE TO PAGES.]

**SALE**—Continued.

with reference to plat—continued.

creation of easements, 1320.

see, also, "Contract of Sale"; "Powers"; "Purchase Money";  
"Purchaser"; "Vendor and Purchaser"; "Vendor's  
Lien."

**SALT**

in underground water, abstraction from another's land, 1180.

**SAND**

right to take from another's land, 1389.

**SATISFACTION**

of mortgage, 2630-2640, 2673.

**SCHOOL**

dedication for, 1854, 1855, 1856, 1884.

**SCHOOL LANDS**

grants by United States, 1555.

**SCIRE FACIAS**

foreclosure of mortgage by, 2686.

**SCROLL**

sufficiency as seal, 1726.

**SEA**

boundary on, 1656.

change by natural causes, 2093.

damage by, as act of God, 977.

ownership of bed, 1007.

referred to as boundary, 1656.

rights of private owner, 1011.

rights of access, 1022.

shore, 1009.

erections and reclamations, 1022.

public rights, 1011.

see, also, "Accretion"; "Littoral Rights"; "Navigable  
Waters"; "Seaweed"; "Shore"; "Water."

**SEAL**

effect of omission, in equity, 1258, 1625, 1725.

entry under unsealed instrument, tenancy at will, 216.

imports consideration, 1625.

may be affixed before signing, 1727.



[REFERENCES ARE TO PAGES.]

**SEAL**—Continued.

- necessity, conveyance of land, 1724.
  - grant at common law, 1568.
  - grant of easement, 1257.
  - grant of incorporeal thing, 1568.
  - grant of profit à prendre, 1397.
  - lease of incorporeal thing, 1568.
  - mortgage, 2746.
  - power of attorney, 1797.
  - release, 1570.
  - release of easement, 1377.
  - running of covenant, 1417.
  - transfer of reversion, 472.
- omission in execution of power, 1092.
- on license, does not render irrevocable, 1206.
- recital of sealing insufficient, 1726.
- recital of sealing unnecessary, 1726.
- statutory provisions, 1724.
- sufficiency, 1725, 1726.

**SEAWEED**

- on shore, right to, 1011.
- profit à prendre as to, 1388.

**SECONDARY EVIDENCE**

- as to execution of will, 1823.
- of cancelled conveyance, admissibility, 1804.

**SECTION**

- under government survey, 1648.

**SECURITY**

- agreement for, as creating lien, 2734.
- see "Equitable Lien"; "Mortgages."

**SEISIN**

- abeyance, 500, 545.
- as root of descent, 1890, 1892.
- as vested by deed of grant, 736.
- as vested by statute of uses, 350, 829.
- at common law, 28-31, 1679.
- by one cotenant for all, 831.
  - particular tenant in behalf of remainderman, 501.
  - tenant in behalf of landlord, 831.
- covenant for, see "Seisin, Covenant for."
- disseisin, 1923, 1938, 1981, 1985.
- for purpose of curtesy, 828, 830.
  - of dower, 735, 831.
- in law and in deed, 30, 738.
- in wife, effect of curtesy initiate, 846.

[REFERENCES ARE TO PAGES.]

**SEISIN** --Continued.

- instantaneous, 739.
- livery of, 33, 1566.
  - as represented by record of conveyance, 736.
- not to be placed in abeyance, 500.
- of equitable estate, 831.
- of husband and wife, in wife's land, 727.
- transitory, 739.
- unity of, as extinguishing easement, 1372.

**SEISIN, COVENANT FOR**

- as precluding subsequent assertion of after-acquired title, 2126.
- as running with land, 1719.
- breach by adverse possession, 1682.
  - existence of easement, 1681
  - existence of lien, 1681.
  - existence of right to divert water, 1681.
  - lack of rightful title, 1681.
  - lack of title to appurtenances, 1681.
  - outstanding life estate, 1682.
  - outstanding term of years, 1682.
  - outstanding undivided interest, 1681.
- damages, 1706.
- effect of recovery on, 781.
- reconveyance by covenantee as condition of recovery 1708.
- satisfied by tortious possession, 1679, 1680

**SEPARATE ESTATE**

- of married woman, in equity, 728-730.
- under statute, 731.

**SEPARATE PROPERTY**

- as distinguished from community property, 658.

**SEPARATE USE**

- of married woman, not executed by statute of uses, 356.

**SERGEANTY**

- species of tenure, 19, 20.

**SERVIENT TENEMENT**

- alterations and repairs, for exercise of easement, 1348.
- and dominant, unity of ownership, 1371-1374, 1399.
- change in, as extinguishing easement, 1369.
- damage by negligence of owner of easement, 1350.
- dedication of, effect on easement, 1375.
- easement follows into hands of purchaser, 1304, 1305.
- effect of increase of burden of easement, 1346.

[REFERENCES ARE TO PAGES.]

**SERVIENT TENEMENT**—Continued.

- improvement by owner, not to interfere with repairs by owner of easement, 1349.
- in law of easements, 1223.
- profits à prendre, 1392.
- need not adjoin dominant tenement, 1224.

**SERVITUDES**

- see "Easements"; "Equitable Restrictions"; "Natural Rights"; "Profits à Prendre"; "Public Rights"; "Restrictive Agreements."

**SETTLEMENT**

- strict, 517.

**SEVERAL**

- right of profit, 1394.

**SEVERALTY**

- ownership in, 624.

**SEVERANCE**

- by partition, 704.
- involving waste, right to things severed, 988.
- of crops, 881, 2435.
- by disseisor, effect, 895.
- fixtures, 940.
- by conveyance or mortgage, 941.
- by exception in conveyance of land, 941.
- constructive and actual, 940.
- for temporary purpose, 940.
- joint tenancy, 637.
- leasehold, effect on rent, 1484.
- minerals, 867, 989.
- minerals by stranger, rights of tenant, 989.
- ownership, as basis of implied grant, 1270.
- rent and reversion, 1470.
- rent from reversion, running of covenant to pay rent, 1473.
- reversion, effect on condition, 317.
- effect on rent, 1482, 1510.
- right of wharfing out from ownership of land, 1029.
- tenements, implied grant of easement, 1272.
- implied reservation of easement, 1292.
- trees, 881, 2435.
- by elements, 989.
- right to proceeds, 989.
- vegetation from land, 881.

**SEWER**

- as additional servitude on highway, 1529.
- as within covenant against incumbrances, 1687.
- estoppel of vendor to deny right to use, 1326.
- misuse by landlord, as eviction, 203.

[REFERENCES ARE TO PAGES.]

**SHARING OF CROPS**

contract for, 121-124.

**SHELLEY'S CASE, RULE IN**

applicability to chattel interests, 543.  
 equitable limitations, 541.  
 gift over on failure of issue, 67.  
 as rule of construction, 535, 537.  
 both estates must arise under same instrument, 532.  
 effect of intermediate estate, 531.  
 existence of power of appointment immaterial, 531.  
 fee tail in ancestor, 534.  
 freehold in ancestor, 534.  
 freehold in two or more persons, 535.  
 life estate in ancestor, 534.  
 nature, 529.  
 not rule of construction, 535.  
 origin and purpose of rule, 533.  
 practical merits, 544.  
 qualification of word "heirs," effect, 538.  
 remainder to heirs of particular tenant and another, 532.  
 remainder to issue, 535.  
 statement of rule, 529.  
 statute modifying estates tail, effect, 544.  
 statutory abolition, 543.  
 what interests subject to, 541, 543.

**SHERIFF**

sale on execution by, 1044.

**SHERIFF'S SALE**

as transferring title, 2148.  
 conveyance to execution purchaser, 2149.  
 rights of purchaser, 2258.  
 see, also, "Execution."

**SHIFTING USES**

nature, 547, 1623.

**SHORE**

as boundary, 1656, 1658.  
 change by artificial causes, 2105.  
 change by natural causes, 2093.  
 change of location, accretion, 2094.  
 division of frontage on, 1032.  
 erections and reclamations, 1022.  
 nature, 1009.  
 object on as monument, 1660.

[REFERENCES ARE TO PAGES.]

**SHORE**—Continued.

- on tidal waters, acquisition by individual by length of time, 1010.
  - as belonging to state, 1009.
  - grant by state to individual, 1010, 1011.
  - presumption of grant by state, 1011.
- public rights, to bathe, 1011.
  - to fish, 1545, 1548.
  - to take fish shells, 1011.
  - to take sand or gravel, 1011.
  - to take seaweed, 1011.
- referred to as boundary, 1658, 1659.
  - see, also, "Accretion"; "Littoral Owners"; "Riparian Owners"; "Sea"; "Streams"; "Tidewaters"; "Water."

**SHORT LIMITATION ACTS**

- nature, 1919.

**SHRUBBERY**

- as passing with land, 878.

**SHUTTERS**

- easement of swinging over another's land, 1255.

**SICKNESS**

- as justification of holding over by tenant, 250.
- terminating adverse possession, 1960.

**SIDE**

- of highway, referred to as boundary, 1662.

**SIGNBOARD**

- easement of maintaining on another's land, 1255.

**SIGNING**

- by agent, 1798, 1800.
- by another's hand, 1723, 1818, 1819.
- by mark, 1723, 1818.
- by part of grantors, 1724.
- not necessarily subscription, 1723.
- of conveyance, 1723.
  - declaration of trust, 378, 383.
  - will, 1818.
- place of signature, 1819.
- use of another name, 1819.

**SILT**

- drainage of, resulting in subsidence of land, 1189.

**SMOKE**

- pollution of air by, 1124, 1234.

[REFERENCES ARE TO PAGES.]

**SOCAGE TENURE**

nature, 20.

**SOIL**

in place, ownership, 866.

removal as waste, 955.

injunction to restrain, 983.

right to take from another's land, 1389.

**SOLE AND SEPARATE ESTATE**

of married woman, 728-731.

conveyance, 730.

curtesy in, 835, 838, 839.

bar by disposition by wife, 838, 839.

bar by terms of creation of trust, 840.

death of wife, 730.

termination of trust, 430.

trustee not necessary, 729.

**SOVEREIGN**

adverse possession against, 1975.

**SOVEREIGN RIGHTS**

eminent domain, 2160.

escheat, 2142.

in minerals, 872.

**SPANISH GRANTS**

as basis of private ownership, 1560.

operation, 1560.

**SPECIAL ASSESSMENT**

as within covenant against incumbrances, 1684.

**SPECIAL LIMITATION**

as to time of removal of trees conveyed, 884.

default by tenant, election by landlord, 301.

distinguished from condition, 263, 264, 331.

how created, 332.

in restraint of alienation, validity, 2306, 2314.

language creating, 332.

nature of, 331.

no act of enforcement necessary, 332.

not within rule against perpetuities, 603.

on estate in fee simple, 333, 334.

fee tail estate, 333.

life estate, 333.

periodic tenancy, 239.

[REFERENCES ARE TO PAGES.]

**SPECIAL LIMITATION**—Continued.

- on estate in fee simple—continued.
  - tenancy at will, 227.
  - tenancy from year to year, 239.
  - term of years, 118, 208, 300.
- particular estate subject to, 481.
- until marriage, validity, 285, 286.
- see, also, "Determinable Fee."

**SPECIAL OCCUPANCY**

- on death of tenant *pur auter vie*, 94.

**SPECIAL TAIL**

- nature, 57, 95.

**SPECIFIC PERFORMANCE**

- against purchaser with notice, 1429, 1430, 1437.
- of agreement as to land, 1337, 1430, 1436.
  - condition, 310.
  - contract of sale, estoppel of tenant to deny landlord's title, 191.
  - covenant for further assurance, 1706.
  - covenant in lease, 264, 309.
  - oral transfer of land, improvements, 2040.
- suit for, as interrupting adverse possession, 1961.

**SPENCER'S CASE**

- rules of, 177, 182.

**SPENDTHRIFT TRUSTS**

- in favor of creator of trust, 2325.
- language creating, 2324.
- nature and validity, 2319.

**SPITE FENCE**

- as tort, 1123.

**SPRING**

- dedication for public use, 1856.
- right to take water, 1159, 1235.
  - effect of subdivision of dominant tenement, 1347.
  - prescription, 2057.
- supplying natural watercourse, rights as to water, 1159.

**SPRINGING USES**

- nature, 545.

**SPURIOUS EASEMENT**

- nature, 1199, 1247.
- of fencing, 1247. •
- 3 R. P.—85

[REFERENCES ARE TO PAGES.]

**SQUARES**

- for use of public, 1539.
- appearing on plat referred to by seller, 1319.
- dedication for, 1854.

**SQUATTER**

- adverse possession by, 1944.

**STAIRWAYS**

- easement of maintaining on another's land, 1255.
- landlord's liability for defects in, 147.
- right of way over, 1250.
  - extinction by destruction of building, 1367.
  - implied grant, 1276.

**STATE**

- acquisition of rights by, adverse possession, 1953.
  - condemnation, 2160.
  - escheat, 2142.
  - forfeiture, 2143.
- adverse possession against, 1975.
- adverse possession in favor of, 1953.
- as cestui que trust, 370.
- as lord paramount, 28.
- as trustee, 370.
- conveyance by, presumption from possession, 1922.
- dedication by, 1862.
- forfeiture to, commission of crime, 2143.
  - nonpayment of taxes, 2159.
  - land improperly acquired by corporation, 2144.
- grant by, presumed from long continued possession, 1922.
- grant of exclusive fishing right, 1037.
  - land under water, 1008, 1020.
  - shore, 1010.
- grant to state by United States, 1554.
- ownership of bed of river, 1012, 1132.
  - bed of lake, 1018.
  - land under tide waters, 1007.
  - shore, 1009.
- prescription against, 2032.
- transfer by, of land in adverse possession, 2290.
  - way of necessity, 1301, 1302.

**STATION**

- covenant by railroad to maintain as running with land, 1414.

**STATUTE OF ENROLLMENTS**

- see "Enrollments, Statute of."



[REFERENCES ARE TO PAGES.]

**STATUTE OF FRAUDS**

see "Frauds, Statute of."

**STATUTE OF LIMITATIONS**

see "Limitations, Statute of."

**STATUTE OF USES**

see "Uses, Statute of."

**STATUTORY EASEMENTS**

nature, 1310.

**STATUTORY LIENS**

for improvements, 2795.

for rent, 1522, 2794.

widow's allowance, 2795.

general nature, 2766.

mechanics' liens, 2766.

of attachment, 2786.

decedent's debts, 2793.

execution, 2790.

judgment, 2775.

taxes and assessments, 2791.

on crops, for rent, 2794.

for supplies, 2794.

**STATUTORY POWERS**

defective execution not aided, 1093.

nature, 1044.

**STATUTORY SEPARATE ESTATE**

of married woman, 728, 731.

husband's right of possession, 731.

not liable for husband's debts, 731.

transfer by wife's sole conveyance, 732.

**STIRPES**

descent per stirpes, 1894, 1899, 1901.

**STOCK**

in corporation, is personal property, 13.

see, also, "Live Stock."

**STONE**

in highway, rights of removal, 1525.

removal as waste, 955, 957.

**STOVE**

removable as domestic fixture, 929.

[REFERENCES ARE TO PAGES.]

**STRAW**

as subject of doctrine of emblements, removal by outgoing tenant, 890.

**STREAMS**

accretion, 2093.

appropriation of water, 1132.

    action by nonriparian owner, 1150.

    by municipality, 1138.

    easement of right to excessive appropriation, 1390.

    prescriptive right, 2056, 2060, 2062, 2064, 2065.

boundaries on, 1656, 2093.

change of channel, 1130, 1140, 1141.

    restoration, 1153, 1237, 1239, 1327.

cutting new channel, change in ownership of land, 2115.

erection of dam, 1144.

    statutory authority, 1149.

estoppel to restore former conditions, 1153, 1237, 1327.

floatable streams, 1546.

flood water, 1173.

    right to appropriate, 1137.

heating of water, 1143.

increase of flow, by artificial means, 1150.

    drainage of surface water, 1162.

    rights of riparian owner, 1150.

islands in, ownership, 2115.

natural watercourses, 1128.

obstruction of flow, 1144.

    damage to upper proprietor, 1145.

    easement allowing, 1234.

overflow water as part of watercourse, 1174.

ownership of bed of navigable stream, 1007, 1012.

    of nonnavigable stream, 1016.

    of tidal stream, 1007.

pollution of water, 1143.

    action by nonriparian owner, 1150.

    necessity of showing of damage, 1144.

    prescriptive easement, 1234, 1345, 2074.

power from, nature of grant, 1239.

prior appropriation of water, establishment of rights, 1155, 1157.

public rights of anchorage, 1547.

    fishing and hunting, 1547.

    navigation, 1545.

referred to as boundary, 1656.

riparian land, what is, 1139.

riparian rights, 1128, 1131.

    appropriation of water, 1132.

    diversion without appropriation, 1140.

    increase of flow, 1150.

[REFERENCES ARE TO PAGES.]

**STREAMS**—Continued.

- riparian rights—continued.
  - obstruction of flow, 1144.
  - pollution of water, 1142.
- use for floating timber, 1546, 1547.
  - see, also, "Accretion"; "Fish"; "Flowage"; "Littoral Rights"; "Navigation"; "Riparian Owners"; "Rivers"; "Tidal Waters"; "Water"; "Watercourse."

**STREET RAILWAY**

- as additional servitude, 1528.
- rights of abutting owners, 1533.

**STREETS**

- additional servitude in, 1528.
- appearing on plat, estoppel to deny existence, 1319.
- as highways, 1526.
- control by municipality, 1526.
- reference to supposed street, as creating easement of passage, 1313.
  - no covenant as to existence, 1316.
- subject to same rules as suburban highway, 1526, 1527.
  - see, also, "Highway."

**STRICT FORECLOSURE**

- of mortgage, 2682.

**STRICT SETTLEMENT**

- nature, 517.

**STRUCTURE**

- as charging purchaser of land with notice of adverse right, 2217.
- erection to injury of neighbor, 1121, 1123.
  - malicious motives, 1123.
  - statutory prohibition, 1123.
  - unsightly structure, 1121.
- interfering with easement, abatement, 1362.
  - erection under license, 1203, 1383.
- license to erect, construction, 1205.
- preventing escape of surface water, 1167.
- unsightly character, not ground for objection by neighbor, 1121.
  - see, also, "Buildings"; "Party Walls."

**SUBCONTRACTORS**

- rights under mechanic's lien law, 2767.

**SUBINFEUDATION**

- before Quia Emptores, 26.

[REFERENCES ARE TO PAGES.]

### SUBJACENT SUPPORT

- casement as to withdrawal, 1242.
- not inferred from grant of minerals, 1243.
- natural right, 1193.
- does not extend to buildings, 1194.
- of upper floor of building, 1349.
- withdrawal by mine owner, effect of custom, 1194.

### SUBLEASE

- covenant against, 161.
- distinguished from assignment, 170, 189.
- does not affect head landlord's rights, 174.
- holding over by subtenant, responsibility of head tenant, 252.
- holding under, effect of surrender by head tenant, 1588.
- lessee's contractual liabilities not affected, 174.
- merger of subreversion, effect on subtenant's liability for rent, 1492.
- right to make, effect of stipulation, 160, 161.
- subtenant accepted as tenant of head landlord, surrender, 1587.
  - bound by forfeiture of head lease, 213, 319.
  - holding over, tenant at sufferance, 242.
  - not in privity with head landlord, 173.
  - refusing to vacate, responsibility of sublandlord, 251.
  - right to crops, effect of forfeiture by head tenant, 895.
  - rights not affected by surrender by tenant, 210.
- surrender by headtenant, effect on subtenant's liability for rent, 211.
- surrender by subtenant to head landlord, 1580.

### SUBMERSION OF LAND

- bounding on water, change of ownership, 2093.
- effect on adverse possession, 1960.
- tenant's liability, 977.
  - see "Flowage."

### SUBREVERSION

- see "Sublease."

### SUBROGATION

- as basis for recovery on assumption of mortgage, 2492.
- of cotenant paying incumbrance, 691.
- of insurer, to rights of mortgagee, 2458.
  - junior to rights of prior lienor, 2674.
- mortgagee paying taxes, 2448, 2450.
  - removing incumbrance, 2448.
- person paying mortgage debt, 2482, 2489, 2499, 2501, 2543, 2664.
- purchaser at invalid foreclosure sale, 2695.
- purchaser at sale under power in mortgage, 2728.
- to vendor's lien, 2758.

[REFERENCES ARE TO PAGES.]

**SUBSCRIPTION**

necessity of, in case of signature, 1820.

**SUBSIDENCE OF LAND**

caused by withdrawal of lateral support, 1188.  
    percolating water, 1189.  
    pitch or asphalt, 1189.  
    sand or running silt, 1189.  
    subjacent support, 1193.  
    weight of building, 1190, 1194.

**SUBSTITUTION**

of trustee, 421.

**SUBSTITUTIONAL GIFT**

on death, 78, 79.  
on death without issue, 68.  
on failure of previous gift, 1832.

**SUBTENANCY**

see "Sublease."

**SUBTERRANEAN WATERS**

interference with, 1175.  
percolating, 1175.  
pollution, 1181.  
watercourse, 1181.

**SUBTRUST**

meaning of expression, 362.

**SUBWAY**

not additional servitude on highway, 1529.  
not interference with rights of abutting owners on street, 1533.

**SUCCESSION**

on death of tenant *pur auter vie*, 93.  
    party to contract of sale, 461.  
    tenant in tail, 73.  
    vendee of land, 462.  
    vendor of land, 461.  
to ownership of vegetation, 877.  
    see, also, "Descent."

**SUFFERANCE, TENANT AT**

cannot take release, 1569.  
forcible expulsion, 253.  
grantor as tenant at sufferance, 2008.

[REFERENCES ARE TO PAGES.]

**SUFFERANCE, TENANT AT**—Continued.

- landlord's option as to, 247.
- liability in use and occupation, 245.
- nature, 241, 244, 246.
- no privity with rightful owner, 244.
- no right to growing crop, 894.
- notice to terminate, tenancy, 246.
- severance of crop by tenant, effect, 895.
- tenant at will distinguished, 245.
- tenant is wrongdoer, 245.
- trespass against tenant, 243.
- who is, 242.
- see, also, "Holding Over."

**SUMMARY PROCEEDING**

- against tenant at will, 245.
- to compel assignment of dower, 818.
- to oust tenant under lease, 253.
- lack of title no defense, 187.

**SUPPORT OF BUILDING**

- by building, no duty of repair, 1349.
- by party wall, 1244, 1266, 1341.
- easement of, 1243, 1294, 1296, 1297.
- implied grant of easement, sale of adjoining buildings, 1275.
- conveyance for building purposes, 1296.
- in case of divided ownership of building, 945.
- of upper by lower floor of building, 1244.
- reciprocal easements of, implied on severance of ownership, 1294.

**SUPPORT OF INDIVIDUAL**

- as consideration for conveyance, 325.
- charge on land to secure, 2735.
- conveyance in consideration of, 325-330.
- mortgage to secure, 330, 2404, 2585.
- transferability of rights, 2406, 2520.
- oral evidence of contract for grantor's support, 1631.
- power to sell for, death of beneficiary, 1101.
- implication in life tenant, 1058.
- mortgage not authorized, 1064.
- showing as to necessity, 1089.

**SUPPORT OF LAND**

- damages for withdrawal, 1190.
- easement as to, 1242.
- lateral support, 1187.
- subjacent support, 1193.
- substitution of artificial for natural, 1188.
- weight of building cause of subsidence, 1190.
- see "Lateral Support": "Subjacent Support."

[REFERENCES ARE TO PAGES.]

**SURFACE OF LAND**

- rights above, 864.
- rights below, 865.
- subsidence, caused by withdrawal of subjacent support, 1193.
- easement allowing withdrawal of support, 1242.

**SURFACE WATER**

- appropriation by landowner, 1174.
- discharge at new place, to detriment of neighbor, 1164.
  - into natural water course, 1162.
  - on lower land, 1162.
- distinguished from lake or pond, 1160.
  - from watercourse, 1161.
- diversion to other land, 1166, 1169.
- drainage, 1162, 1175.
- easement as to discharge or flow, 1235.
- erection of barriers against, 1166, 1169.
- flood water of stream as, 1173.
- flow on lower land, barriers to prevent, 1167.
- in cities and towns, obstruction of flow, 1170.
- increase of flow, 1163.
- interference with flow from higher land, 1167.
- obstruction of flow, 1167.
  - by railroad embankment, 1170.
  - civil and common law rules, 1167.
  - in reasonable use of land, 1172.
- ownership, 1166.
- pollution, to detriment of adjoining owner, 1175.
- prescriptive rights as to, 2038, 2039.
- removal of natural barrier, to neighbor's detriment, 1167.
- resulting from flood, 1168.
- what constitutes, 1160.

**SURPRISE**

- as ground for relief against forfeiture, 325.

**SURRENDER**

- as terminating tenancy for years, 210.
- by operation of law, 1581.
  - acceptance of new interest, 1582.
  - acceptance of new lease, 1582.
  - acceptance of rent from assignee of leasehold, 1583.
  - element of intention, 1581, 1583.
  - lease to third person with tenant's assent, 1587.
  - relinquishment of possession, 1584.
  - resumption of possession by landlord, 1584.
- by particular tenant, effect on remainder, 506.
- effect, 1588.

[REFERENCES ARE TO PAGES.]

**SURRENDER**—Continued.

- effect as against third persons, 210, 937, 1588.
  - on remainder, 506.
  - on rent, 1490-1493, 1588.
  - on right to remove fixtures, 937.
- express, 1580.
  - necessity of writing, 1580.
- nature, 1578.
- of leasehold in part, effect on rent, 1485.
- of particular estate, effect on contingent remainder, 506.
- requisites, 1579, 1580.
- terminates right to remove fixtures, 937.
- to whom to be made, 1580.
  - see, also, "Merger."

**SURVEY**

- by government, description by reference to, 1648.

**SURVIVORS**

- gift over in favor of, prior gift vested, 493.
  - definite failure of issue, 66.
- right to, as creating contingent remainder, 489, 493, 529.
  - does not usually mean others, 579.
  - time of survivorship, 579.

**SURVIVORSHIP**

- as between joint mortgagees, 2697.
- in case of joint tenancy, 627.
  - joint trustees, 421.
- takes precedence of dower, 758.
- in case of tenancy by entireties, 645, 653.
- of power, 1076.
  - given to joint executors or trustees, 1076.

**SWITCH TRACK**

- easement of, effect of change in dominant tenement, 1346, 1347.

**T****TACKING**

- of adverse possessions, 1968.
  - adverse users of land, for prescription, 2067.
  - disabilities, for purpose of adverse possession, 1974.
- mortgages, 2581.
- unsecured claim to mortgage, 2652.

**TAPESTRIES**

- removable as ornamental fixtures, 930.



[REFERENCES ARE TO PAGES.]

**TAX TITLE**

- acquisition as interrupting adverse possession, 1963.
  - by cotenant, 695.
  - by life tenant, 86.
  - by mortgagee, 2453.
  - by mortgagor, 2452.
- remedial legislation, 2159.
- uncertainties of, 2157.
  - see, also, "Taxes."

**TAXES**

- cotenant paying, contribution, 691, 692.
- covenant to pay, as running with land, 177, 179, 1414.
- forfeiture for nonpayment, 2159.
- inheritance tax applicability to curtesy, 827.
  - applicability to dower, 734.
  - applicability to gift to wife, 734.
- judgment for, as preliminary to sale, 2158.
- liability of land and not individual owner, 2157.
- lien for, 2791.
  - within covenant against incumbrances, 1684, 1689.
- life tenant paying, 86, 823.
- on leased premises, forfeiture for nonpayment by tenant, 321.
  - paid by tenant, not rent, 1468.
  - tenant's failure to pay, as waste, 952.
- on mortgaged land, foreclosure for nonpayment, 2678.
  - payment by mortgagee, 2448, 2450, 2454, 2650.
  - payment by mortgagor, 2452.
  - sale for nonpayment, 2452, 2453.
- on water power, 1241.
- payment as evidence of adverseness of possession, 1933.
  - as excluding inference of dedication, 1867.
  - by cotenant, contribution, 691, 692.
  - by life tenant, 86, 823.
  - by mortgagee, 2448, 2450, 2454, 2650.
  - by tenant under lease, 1468.
- does not constitute adverse possession, 1925.
- sale for, nature of title acquired, 2156, 2159.
  - curative acts, 2159.
  - deed to purchaser, 2158.
  - prior judgment for taxes, 2158.
  - purchase by cotenant, 695.
  - purchase by life tenant, 86.
  - purchase by mortgagee, 2453.
  - purchase by mortgagor, 2452.
  - purchase by mortgagor's transferee, 2451.
  - redemption by cotenant, 695.
  - right of redemption, 2158.
    - see, also, "Tax Title."

[REFERENCES ARE TO PAGES.]

**TELEGRAPH LINE**

as additional servitude on highway, 1529.

**TELEPHONE**

acknowledgment by, 1734.

**TELEPHONE LINE**

as additional servitude on highway, 1529.

**TEMPEST**

destroying building, effect on rent, 1498.

**TENANCY BY ENTIRETIES**

see "Entireties, Tenancy by."

**TENANCY IN COMMON**

action by tenants in common, 698.

as arising when two persons equally entitled, 642.

as between husband and wife, 646.

contribution for improvements, 687.

for repairs, 689.

cotenant, accounting for rents and profits, 674.

acquisition of adverse title, 692.

conveyance of land by, 679.

conveyance of minerals, 685.

conveyance of specific part of land, 679.

conveyance of timber, 685.

grant of easement, 684.

improvements by, 687.

lease, 683.

ouster of, 671.

payment of incumbrance by, 691.

repairs by, 689.

creation, 633, 641.

by conveyance of undesignated part of land, 642.

by descent, 643.

curtesy in share, 837.

distinguished from joint tenancy, 640.

dower in share, 758.

equality of estates unnecessary, 641.

equality of shares unnecessary, 641.

exception of minerals in conveyance by one tenant, 685.

favored as against joint tenancy, 636, 633, 642.

improvements by tenant, contribution, 687.

in crops, 899.

in easement, 1201.

joinder in actions, 698.

nature, 640.

[REFERENCES ARE TO PAGES.]

**TENANCY IN COMMON.** Continued.  
 presumption as to, 630, 632, 642.  
 statutory presumption of, 633, 642.  
 termination, 643.

**TENANT**

distinguished from cropper, 121.  
 from lessee, 101.  
 from licensee, 120.  
 entitled to possession, 118.  
 meaning of term, 100, 101.  
 not under lease, 101.  
 under lease, 100.  
 see, also, "Landlord and Tenant."

**TENANT AT SUFFERANCE**

see "Sufferance, Tenant at"; "Tenant Holding Over."

**TENANT AT WILL**

see "Will, Tenant at."

**TENANT FOR YEARS**

see "Landlord and Tenant"; "Years, Estate for."

**TENANT FROM MONTH TO MONTH**

see "Month to Month, Tenancy from"; "Periodic Tenancy."

**TENANT FROM YEAR TO YEAR**

see "Periodic Tenancy"; "Year to Year, Tenancy from."

**TENANT HOLDING OVER**

as tenant at sufferance, 241.  
 by consent, new tenancy, 256.  
 ejectment against, 253.  
 forcible resumption of possession by landlord, 253.  
 landlord's option, 247.  
 liability in use and occupation, 245, 251.  
 pecuniary liability, 244, 245, 251, 252.  
 possession not adverse to landlord, 2001.  
 right to remove fixtures, 935, 939.  
 summary proceedings against, 253.  
 tenant *pur auter vie*, 2014.  
 under agreement, 256.

**TENANT IN DEMESNE**

under feudal system, 18.

**TENANT IN FEE SIMPLE**

see "Fee Simple, Estate in."

[REFERENCES ARE TO PAGES.]

**TENANT IN FEE TAIL**

see "Fee Tail Estate."

**TENANT PUR AUTER VIE**

adverse possession by, 244, 2014.  
as tenant at sufferance, 244.  
creation of tenancy, 76.  
death, right of succession, 93-95.  
death of cestui que vie, right to crops, 891.  
holding over by, 242, 244.  
improvements by, compensation, 85.  
no dower in widow, 747.

**TENDER**

of mortgage debt, effect, 2599.

**TENEMENTS**

meaning of term, 14.  
within statute De Donis, 69.

**TENURE**

classes at common law, 19.  
feudal, 16.  
in case of particular estate and reversion, 100, 469.  
in United States, 27.  
military abolished, 27.  
nature of, 16-27.  
no tenure in uses, 342.  
nonexistent in case of tenant at sufferance, 245.  
on lease for years, 100.

**TERM OF YEARS**

as passing to personal representative, 97.  
cannot be entailed, 70.  
must be certain, 117.  
originally not right of property, 97.  
statutory limit on duration, 100.  
see, also, "Landlord and Tenant"; "Years, Estate for."

**TESTAMENT**

see "Will."

**TESTAMENTARY CAPACITY**

infants, 2341.  
married women, 2332.  
persons mentally defective, 2347.

[REFERENCES ARE TO PAGES.]

**TESTAMENTARY INTENTION**

evidence as to, 1809, 1817, 1818.  
how determined, 1810.

**TESTAMENTARY PROVISION**

in lieu of curtesy, 842.  
in lieu of dower, 782.  
in lieu of homestead, 858.  
see, also, "Devise"; "Will."

**TESTAMENTARY TRUST**

creation, 389.  
see, also, "Trusts."

**TEXAS**

land grants 1560.

**THEATRE**

cancellation of ticket, 1208.  
ticket as license, 1204.

**THELLUSON ACT**

limiting period of accumulation, 620.

**THREAD**

of lake, for purpose of division of bed, 1021.  
of stream, as boundary, 1010, 1012, 1016, 1656.  
effect of change, 2098, 2101, 2102.  
location of side lines, 1034.

**THREATS**

conveyance extorted by, 1639-1641.

**TICKET OF ADMISSION**

as license, 1204.  
right of revocation, 1208.

**TIDAL WATERS**

accretion, 2094.  
change of character, 1007.  
grant by state of land under, 1008.  
land under, ownership by state, 1007, 1558, 1559.  
shore, acquisition by individual, 1010, 1011.  
as belonging to state, 1009.  
change of location, 2093, 2105.  
division of frontage on, 1032.  
erections and reclamations, 1022.  
nature, 1009.  
public rights in, 1011, 1545, 1548.  
tidal creeks, ownership of bed, 1007.  
what are, 1007.

[REFERENCES ARE TO PAGES.]

**TIMBER**

see "Trees"; "Vegetation"; "Waste."

**TIME**

for asserting forfeiture for breach of condition, 303.  
payment of rent, 1475.  
performance of condition, 291.

**TITHES**

not recognized in this country, 9.

**TITLE**

covenants for, 1675.  
modes of acquiring, 1549-2355.  
original title from government, 1549.  
possession as species of, 1978.  
registration of, 2273.  
tenant's estoppel to deny landlord's, 185-196.

**TITLE DEED**

deposit as security, 2749.

**TITLE PARAMOUNT**

see "Paramount Title."

**TORRENS SYSTEM**

of registration of title, 2273.

**TORTIOUS CONVEYANCE**

as destroying contingent remainder, 505.  
by life tenant, 82.  
doctrine obsolete, 82, 266.  
nature, 33, 1566.  
not by grant, 34.

**TORTIOUS FEE SIMPLE**

acquisition by adverse possession, 1981.  
acquisition by disseisin, 1981, 1982.  
as subject to defeasance, 1372.

**TOWNSHIP**

description of land by, 1648.

**TOWNSITES**

on public lands, 1555.

**TRADE**

covenant preventing competition, as running with land, 177, 1413, 1431.  
implements of, exemption from distress, 1520.  
things on leased premises for purpose of, exemption from distress,  
1520.

[REFERENCES ARE TO PAGES.]

**TRADE FIXTURES**

- annexed by life tenant, removability, 929.
- annexed by tenant under lease, removability, 927.
- articles annexed to place of public amusement, 928.
- loss of right to remove, acceptance of renewal lease, 938.
- forfeiture of lease, 938.
- relinquishment of possession, 934.
- plants grown by nurseryman, 928.
- removal after term, 934.
- restrictions on right of removal, 932.

**TRADESMEN**

- right to use right of way, 1333.

**TRANSFER**

- by alien, 2350.
  - corporation, 2347.
  - cotenant, 678.
  - criminal, 2353.
  - government, 1552-1564.
  - infant, 2332.
  - insane person, 2342.
  - landlord at will, 226.
  - married woman, 730, 2330.
  - tenant at will, 227.
- essentials of conveyance of land, 1565.
- devise of land, 1818-1825.
- method, assignment, 1570.
  - bargain and sale, 1572.
  - covenant to stand seised, 1572.
  - devise, 51, 1806.
  - exchange, 1571.
  - feoffment, 33, 1566.
  - fines, 1567.
  - grant, 1567.
  - lease, 1568.
  - livery of seisin, 33, 1566.
  - patent, 1561.
  - quitclaim, 1576.
  - recoveries, 1567.
  - release, 1568.
  - surrender, 1578.
- of bare legal title, 419.
  - beneficial interest under trust, 448.
  - benefit and burden of covenants, 474, 1401.
  - cestui que trust's interest, 418, 2319.
  - condition in lease, 316.
  - contingent remainder, 525.
  - dower interest or estate, 803, 804, 824.

[REFERENCES ARE TO PAGES.]

**TRANSFER**—Continued.

- of bare legal title—continued.
  - easement, 1226.
  - equitable interest, 418, 2319.
  - estate by curtesy, 845, 847.
  - estate for years, 159.
  - executory interest, 588.
  - fee simple, 51, 1589.
  - fee tail estate, 71.
  - growing trees, 881, 883.
  - homestead, 850, 856.
  - interesse termini, 115.
  - interest under trust for sale, 443.
  - joint interest, 679.
  - land, as passing benefit of covenant, 1404.
    - effect of adverse possession, 2288.
    - express restrictions, 2306.
    - priorities, 2169.
  - lease, meaning of expression, 153.
  - leasehold estate, 159, 163.
  - license, 1221.
  - life estate, 81.
  - minerals in place, 867.
  - mortgage debt, 2518-2542.
  - mortgaged land, 2471-2518.
  - part of mortgage debt, 2551.
  - part of mortgaged land, 2505.
  - possibility of reverter, 474.
  - pre-emption right, 1553.
  - remainder, 524.
  - rent, 1469-1471.
  - reversion, 149-159, 471.
    - as passing burden and benefit of covenant, 174.
    - as passing right of re-entry, 316.
    - effect on lessor's liabilities, 158.
    - effect on lessor's rights, 157.
    - in part of leased premises, 150.
    - rights of transferee, 158.
    - tenant not estopped to show, 186.
  - right of entry, 313.
  - right of reclamation and wharfing out, 1028.
  - rights and liabilities as to rent, 1469.
  - riparian rights, 1138, 1151.
  - tenancy at will, 227.
  - tenancy from year to year, 237.
  - term of years, 159.
  - trustee's title, 419.
- personal capacity, 2329.



[REFERENCES ARE TO PAGES.]

**TRANSFER**—Continued.

- restrictions on freedom of, 2279.
- see, also, "Assignment"; "Conveyances"; "Judicial Sale"; "Lease"; "Mortgages"; "Personal Capacity"; "Release"; "Restraints on Alienation"; "Sale"; "Surrender."

**TRANSITORY SEISIN**

- does not support dower, 739.

**TRANSPORTATION**

- covenant to give, as running with land, 1413.

**TREES**

- as fructus naturales, 876.
- branches extending over another's land, as tort, 864, 896.
- constructive severance from land, 881.
- conversion into personalty, 881.
- conveyance by cotenant, 685.
- life tenant, 1083.
- conveyance of, 883.
- as effecting constructive severance, 881.
- limitation as to time of removal, 884.
- way of necessity to remove, 1299.
- cotenant's rights as to, 685, 993.
- cutting, as terminating tenancy at will, 223.
- as waste, 957, 983, 993.
- by landlord not eviction, 202.
- by mortgagor, 2459.
- for firewood, right of estovers, 961.
- for repairs, right of estovers, 961.
- on land held by entireties, ownership, 650.
- dower in, 742.
- estates in, 882.
- estovers, 961.
- exception from conveyance of land, 878, 882, 1609, 1614.
- as constructive severance, 881.
- extending over another's land, 896.
- floating timber to market, floatable streams, 1546.
- implied license in tenant to cut, 960.
- in highway, control by municipality, 1526.
- rights of abutting owner, 1534.
- rights of owner of fee, 1525.
- lease of, 882.
- license to cut, 887, 968, 1200, 1203.
- as coupled with interest, 1216, 1217.
- grant by one cotenant, 686.
- implication in favor of tenant, 960.
- inferred from sale, 887, 1216, 1217.
- lying on ground, as passing by conveyance of land, 878.

[REFERENCES ARE TO PAGES.]

**TREES**—Continued.

- mortgage of, 883.
- not subject to levy as personalty, 881.
- on boundary line, 896.
- oral sale, effect, 1217.
- ownership, 876.
- part of the land, 876.
- pass by conveyance of land, 878.
- pass by devise of land, 877.
- profit à prendre as to, 1388.
- projecting over another's land, 864.
- roots extending into another's land, 896.
- sale of, separate from land, 881, 886.
  - as involving license to cut and remove, 887, 1216, 1217.
- severed by elements, rights of tenant, 989.
- tenancy by entireties in, 649, 650.
- waste in, 957, 961, 983.
  - by cotenant, 686, 993.
  - by mortgagor, 2459.
  - by tenant under lease, 983.

**TRESPASS**

- ab initio, in case of wrongful holding over, 242.
- action of, against landlord resuming possession, 254.
  - against tenant at sufferance, 243.
  - against tenant at will damaging premises, 980.
  - by cestui que trust, 366.
  - by holder of profit à prendre, 1389.
  - by lessee before entry, 115, 116.
  - by mortgagee, 2462.
  - by owner of land under highway, 1526.
  - by proprietor of cemetery lot, 1254.
  - by tenant against landlord, 119, 254.
  - for burial lot, 1254.
  - for disturbance of easement, 1358.
  - for interference with pew right, 1359.
  - for mesne profits, 1516.
  - for value of things severed, 989.
  - possession to support, 350.
  - tenant at will, 215.
- as breach of covenant for quiet enjoyment, 1697.
- by cattle on unfenced land, 1003, 1005, 1249.
  - encroachment on air space above land, 865.
  - landlord on tenant, distinguished from eviction, 202.
  - owner of easement, wrongful exercise, 1331.
  - passing above surface of land, 865.
  - tenant at will, 215.
  - underground encroachment, 866.

[REFERENCES ARE TO PAGES.]

**TRESPASS—Continued.**

does not support action for use and occupation, 1515.  
 see, also, "Trespasser."

**TRESPASS TO TRY TITLE**

estoppel of tenant to deny title, 187.

**TRESPASSER**

ab initio, 243.  
 annexation of fixture by, 916.  
 distinguished from tenant at sufferance, 242, 243.  
     tenant at will, 222.  
 severance of crops by trespasser, effect, 895.

**TROVER**

by mortgagee, for parts severed, 2463.  
 for value of things severed in commission of waste, 989.  
 for wood taken by tenant, estoppel to deny title, 190.

**TRUST DEED**

see "Deed of Trust."

**TRUSTEE**

acceptance of conveyance, 1794.  
     office, 422.  
 acknowledgment before, deed to trustee, 1730.  
 appointment by court, 421, 422.  
 as joint tenant with cotrustee, 634.  
 beneficiary as, 371, 425.  
 cannot profit from trust, 417.  
 cessation of active duties, effect on title, 429.  
 compensation of, 417.  
 conveyance to, necessity of acceptance, 1794.  
     necessity of word "heirs," 47.  
 conveyance to cestuis, option to demand, 430.  
 corporation as trustee, 370.  
 de son tort, 412.  
 death, effect, 420.  
 death of joint trustee, survivorship of power, 1076.  
 descent from, 421.  
 devise by, 421.  
 disclaimer of office, 422.  
 discretion as to distribution of income, rights of cestuis creditors,  
     2322.  
 does not necessarily have legal title, 362.  
 duties and powers, 415.  
 estate of, termination, 390, 391.  
 estoppel to assert after-acquired title, 2128.  
 filling of vacancy, 422.

[REFERENCES ARE TO PAGES.]

**TRUSTEE**—Continued.

- legal title, when terminated, 428, 429.
- liability for negligence of cotrustee, 417.
- may not have legal title, 362.
- person taking subject to trust as, 412.
- possession not adverse to cestui, 2001.
- power in, effect of death or resignation, 1070.
  - effect of termination of trust, 1101.
  - restriction as to time of exercise, 1102.
- power of sale, as equitable power, 1046.
  - discretion not controlled by court, 1053.
  - exercise before time named, 1087.
  - implication, 1057, 1059.
  - rule against perpetuities, 1111.
- power to make leases, 1060.
- purchase from, subject to trust, 411.
- quantum of estate, 390, 428, 429.
- removal and appointment, 422.
- right to partition, 717.
- running of limitations against, effective against cestui, 1954.
- substitution, 421.
  - exercise of express power by substitute, 1070.
- survivorship as between joint trustees, 634.
- to preserve contingent remainders, 508.
- transfer by, 419.
- unauthorized conveyance by, adverse possession of grantee, 2004-2006.
- who may be, 370.
  - see "Trusts."

**TRUSTS**

- acceptance by trustee, necessity, 388.
- action by cestui que trust, 365, 366.
- active, not executed by statute of uses, 355.
- active and passive, 412, 416.
- adverse possession against trustee as binding cestui, 368, 1954.
  - by cestui against trustee, 2006.
  - by trustee against cestui, 2002.
- application of rule against perpetuities, 608.
- appointment of new trustee, transfer of legal title, 423.
- arising from fraud, 406.
  - on sale of land, 457.
- assignment by cestui, as terminating trust, 424.
- bare or naked trust, 412.
- beneficial interest, as subject to execution, 2148.
- capacity of parties, 369, 370.
- cestui que trust, action by, 366.
  - as party to foreclosure proceeding, 2703.
  - as trustee of subtrust, 371.
  - barred by limitations if trustee barred, 368, 954.

[REFERENCES ARE TO PAGES.]

**TRUSTS**—Continued.

- cestui que trust—continued.
  - capacity to sue, 365, 367.
  - entitled to call for legal title, 430.
  - must be definite, 372.
  - nature of rights, 362.
  - protected in equity only, 369.
  - right to partition, 716.
  - right to possession, 416.
- charitable, 433.
  - beneficiaries indefinite, 435.
- classes of, 374.
- constructive, arising from fraud, 406.
  - based on oral promise to hold in trust, 408, 409.
  - property acquired by express trustee, 410, 418.
  - property conveyed by express trustee, 411.
  - trustee de son tort, 412.
- conveyance in trust, acknowledgment before trustee or beneficiary 1730.
- conveyance of legal title to cestui, presumption, 432.
- conveyance to trustees, word "heirs" unnecessary, 47.
- creation of express trust, 374.
  - by appointment under power, 1062.
  - by conveyance in trust, 378, 384.
  - by precatory words, 375.
  - by will, 389.
  - consent of beneficiary not necessary, 1794.
  - consideration unnecessary, 383.
  - language necessary, 375.
  - necessity of writing, 377.
  - without conveyance, 378.
  - word "heirs" unnecessary, 47.
- curtesy, 834, 839.
- cy pres doctrine in case of charity, 436.
- death of trustee, effect, 420.
- declaration of trust, 374.
  - apart from conveyance, 378.
  - as part of conveyance, 378.
  - delivery, 386.
  - language necessary, 375.
  - necessity of writing, 377.
  - unaccompanied by conveyance, 384.
  - who may make, 378.
- devise to trustees, quantum of estate, 50.
- discretionary, validity of trust, 373.
  - rights of cestui's creditors, 2322.
- distinguished from condition, 265, 271.
- dower in beneficial interest, 748.

[REFERENCES ARE TO PAGES.]

**TRUSTS—Continued.**

- duration, 423-433.
  - intention of creator as controlling, 424, 432.
- enforcement in chancery, 361.
- evidence of express, 377, 383.
- executory and executed, 413.
- exemption from forced sale, 2317, 2319.
- expiration, 424, 428.
- failure in whole or in part, resulting trust, 395.
- failure to name trustee, effect, 411.
- favored as against conditions, 271.
- for benevolent but noncharitable purpose, 372.
  - conversion, 438.
  - married woman, 730.
  - masses, 373.
  - partnership purposes, 660-670.
    - statute of frauds, 663.
  - purchase of land, 438.
    - interest of beneficiary as realty, 440.
  - repair of graves, 373.
  - sale of land, 438.
    - interest of beneficiary as personalty, 440.
    - oral trust in proceeds, 382.
  - separate use of married woman, execution by statute of uses, 356.
- identity of trustees and cestuis, 371, 425.
- implied and express, 374.
- implied on sale of land, 456.
- in land purchased with trust funds, 410.
- in land to be purchased, 438.
- in proceeds of sale of land, 382, 438.
  - necessity of writing, 382.
- incomplete trust, effect of consideration, 385.
- indefinite continuance, 432, 609.
- invalid gift not trust, 376.
- involve obligation on trustee, 373.
- language creating, 375.
- legal title of trustee, 419-423, 428.
  - effect of termination of trust, 428.
  - transfer to new trustee, 422, 423.
- limit on possible duration, 432.
- merger of equitable in legal title, 425.
- naked or bare, 412.
- nature and origin, 361.
- nature of cestui's interest, 362.
- necessity of acceptance, 387, 1794.
- necessity of writing, 377.
- nonexistent in case of mortgage, 2425.
- not created by invalid gift, 376.

[REFERENCES ARE TO PAGES.]

**TRUSTS—Continued:**

- not executed by statute of uses, 398.
- notice to cestui unnecessary, 389.
- option in cestuis as to termination, 430.
- oral declaration, performance by trustee, 380.
  - rights of creditors of trustee, 381.
  - sufficiency, 377.
- performed by trustee, lack of writing immaterial, 381.
- possible period of duration, 432.
- power in trust, 1051, 1069.
- power of sale in trustee, 1046, 1053, 1070, 1112.
  - rule against perpetuities, 1111.
- power operating on beneficial interest, 1046.
- presumption of surrender of legal title, 433.
- proceeds of sale of land, oral trust in, 382.
- profits made by trustee subject to trust, 418.
- purchase with trust funds, 410.
- purchaser subject to trust, character of trust, 411.
- quantum of estate, 390.
- recognized only in equity, 369.
- relationship to uses, 361.
- restraints on alienation, 2317.
- resulting trusts, 391.
  - adverse possession against cestui, 2003.
  - in case of trust for conversion, 448.
  - in favor of donor or grantor, 393-397.
    - beneficial interest not exhausted, 394.
    - conveyance without consideration, 394.
    - exclusion by recital of payment of consideration, 1625, 1626.
    - trust for conversion, 449.
  - in favor of one paying consideration, 397, 400.
    - mode of payment, 400.
    - oral evidence, 398.
    - payment by furnishing materials, 400.
    - payment by giving of note, 401.
    - payment by husband or father, 404.
    - payment by performance of labor, 400.
    - payment by release of claim, 400.
    - payment by several, 402.
    - payment by wife, 649.
    - time of payment, 401.
  - land purchased with partnership funds, 664.
  - land purchased with trust funds, 410.
  - nature, 391-406.
  - not in favor of lender of price, 399.
  - partnership property, 664.
- revocation by creator, 423.
- right of action in cestui, 365.

[REFERENCES ARE TO PAGES.]

**TRUSTS**—Continued.

- rights of cestui, in rem or in personam, 362.
- rights of creditors of cestui, 2319, 2326.
- sale by order of court, 1059.
- sale by trustee, application of purchase money, 420.
- sole and separate use of wife, 729.
- spendthrift, 2319.
  - in favor of creator of trust, 2325.
  - language creating, 2324.
- statutory systems, 413.
- substitution of trustees, power of sale, 1070.
- suit to establish, as *lis pendens*, 2268.
- termination, 423.
  - accomplishment of purpose of trust, 424, 428.
  - at option of cestuis, 430.
  - by agreement, 423.
  - effect on legal title, 428.
  - impossibility of purpose, 424.
  - merger, 425-427.
  - of beneficial interest, effect, 428.
- to endure for life, 424, 425.
  - indefinitely, 609.
- transfer by trustee, subject to trust, 419.
  - possession of transferee adverse, 2004.
- transfer of beneficial interest, 418.
- trustee's estate, quantum, 390, 391.
- uncertain beneficiaries, 372.
- unity of ownership of legal and equitable title, 427.

**TUNNEL**

- character of interest, 1260.
- under highway, compensation, 1529, 1533.

**TURBARY**

- common of, what is, 1293, 1594.

**TURNPIKES**

- what are, 1539.

**TURPENTINE**

- as *fructus industriales*, 877.
- as subject of doctrine of emblements, rights of outgoing tenant, 890.

**U****UNDERGROUND**

- encroachment as tort, 866.



[REFERENCES ARE TO PAGES.]

**UNDERGROUND WATER**

- in one body, reasonable user allowed, 1179.
- interference with, 1175.
- percolating, 1175.
  - appropriation for purpose of waste, 1179.
  - appropriation for sale, 1178.
  - exhaustion to detriment of neighbor, 1175.
  - interference with percolation, 1176.
  - malicious appropriation, 1180.
  - pollution, 1181.
- watercourse, 1181.
  - pollution, 1181.
  - see, also, "Percolating Water"; "Watercourse."

**UNDUE INFLUENCE**

- conveyance procured by, 1640.
- in securing devise, 1829.
- inference from lack of power of revocation, deed of trust, 1050.

**UNITED STATES**

- acquisition of land by, 1549.
- adverse possession against, 1975.
- assertion by, of paramount title, as requisite to eviction, 1701.
- dedication by, 1862, 1878.
- forfeiture to, lands of alien enemies, 2143.
  - violation of internal revenue law, 2144.
- grants by, 1552.
  - way of necessity, 1301.
- origin of titles in, 1549.
- prescription against, 2032.

**UNITY OF TITLE**

- as affecting prescription, 2044.
- dominant and servient tenements, 1371-1374, 1399.
- equitable and legal, 425-427, 1904, 2318.
- mortgage and ownership, 2601.
- rent and land, 1485, 1490.
- see, also, "Extinguishment"; "Merger."

**UNLAWFUL DETAINER**

- to recover possession from tenant, 252.

**UNTENANTABLE CONDITION**

- of leased premises, 136, 148.
  - as defense to rent, 1502.
  - as eviction, 204.
- at commencement of term, 136.
- effect on rent, 1499, 1502.

[REFERENCES ARE TO PAGES.]

## USAGE

see "Custom."

## USE AND OCCUPATION, ASSUMPSIT FOR

against lessee after assignment, 166.  
against tenant holding over, 245, 251.  
by cotenant ousted, 677.  
liability of lessee obtaining possession of part of premises, 1489.  
nature, 1514.

## USER OF LAND

adverse to exercise of easement, 1384.  
agreement binding on purchaser with notice, 1425.  
as charging purchaser with notice of easement, 2226.  
as limiting duration of estate, 333, 334.  
by public, as showing acceptance of dedication, 1875, 1876.  
by public, as showing dedication, 1865, 1866.  
conveyance of in terms, as passing land, 1648.  
covenants as to, 1403.  
interference with by neighbor, 1118.  
limited restrictions in favor of neighbor, 1121.  
    suspension and extinguishment, 1195.  
objectionable to neighbor, 1116.  
oral permission to use, effect of improvements, 1210.  
public rights, in private land, 1523, 1884.  
unreasonable as against neighbor, 1120.  
    see, also, "Adjoining Owners"; "Easements"; "License"; "Natural Rights"; "Nuisance"; "Prescription"; "Rights of User"; "Waste."

## USES

active, not executed, 355.  
by way of remainder, 554.  
cestui que use, 340.  
characteristics, 342.  
charitable uses, statute of, 434.  
creation, 343.  
    by bargain and sale, 344.  
derivation of word, 340.  
execution by statute of uses, 346.  
feoffee to uses, 341.  
in chattel interests, not executed, 357.  
in futuro, 343, 354.  
    execution by statute, 354.  
jurisdiction assumed by chancery, 340.  
not binding on paramount title, 347.  
not executed by statute, 354, 398.  
origin, 340.

[REFERENCES ARE TO PAGES.]

**USES—Continued.**

- partial declaration of use, 353.
- persons bound by the use, 344.
- relationship to trusts, 361.
- resulting uses, 344, 354.
  - effect of statute of uses, 352.
- separate use of married woman, 356.
- shifting, 547.
- springing, 545.
- statute of, 347. See "Uses, Statute of."
- subject to condition precedent, 545-552.
- to legal grantee, not executed by statute, 358, 360, 361.
- to legal grantee and another, execution by statute, 358.
- transferable and devisable, 342.
- upon a use, not executed by statute, 359.

**USES, STATUTE OF**

- applicability in case of will, 351.
- as divesting trustee's title, on termination of active duties, 429.
- as effecting creation of future estate, 545-552.
- as transferring seisin, 115, 736, 829.
- conveyance under, 348, 349.
  - as dispensing with attornment, 152.
  - as vesting seisin and possession, 829.
- creation of estate in futuro by force of, 545, 547.
- divests trustee's legal title on completion of purpose, 429.
- does not execute active use, 355.
  - use in chattel interest, 357.
  - use to legal grantee, 358.
  - use to person paying consideration, 398.
  - use upon a use, 359.
- executes passive use, 346-360.
  - to extent of feoffee's estate, 246.
  - to legal grantee and another, 359.
  - to one of legal grantees, 358.
  - when resulting, 352, 397.
- in connection with bargain and sale, 348.
  - covenant to stand seised, 349.
  - lease and release, 350.
- jointure under, 789.
- not in force in all states, 347.
- power operating by force of, 1044, 1045, 1047, 1056.
- provision as to jointure, 789.
- purpose and effect, 346-360.
- shifting uses, 547.
- springing uses, 545.
- uses not within, 354-360, 398.
  - see, also, "Uses."

[REFERENCES ARE TO PAGES.]

**USURY**

in debt secured by mortgage, 2574, 2576.

**V****VACATION**

of highway, compensation to persons injured, 1536.

**VALUABLE CONSIDERATION**

agreement to support as, 2247.

assumption of debt as, 2248.

for purpose of bargain and sale, 1574, 1576.

lack as showing fraud as to creditors, 2282.

need not be adequate, 2251.

notice to purchaser before full payment, 2253.

pre-existing debt as, 2248.

recital of payment as showing, 2265, 2266.

see "Bona Fide Purchaser"; "Notice"; "Purchase Money"; "Purchasers"; "Record."

**VALUATION**

of dower interest, 801, 812.

incumbrance paid by life tenant, 87.

land for purpose of dower, 813.

**VEGETATION**

conveyance separate from land, 881-886.

emblems, tenant's right to, 888.

excepted in conveyance, 878.

fructus naturales and industriales, 876.

liability for debts, 881.

ownership, 876.

passes usually on conveyance of land, 878-880.

sale apart from land, 886.

severance from land, 881.

succession on owner's death, 877.

see, also, "Crops"; "Emblems"; "Trees."

**VEIN**

within statute as to mineral lands, 1556.

**VENDOR AND PURCHASER**

adverse possession by purchaser, 2010.

annexations by purchaser, 919.

vendor, 918.

assignment of contract by purchaser, 2183, 2368, 2745.

contract to purchase from rightful owner, as interrupting adverse possession, 1962.

covenants as to use of land, enforcement in equity, 1425

[REFERENCES ARE TO PAGES.]

**VENDOR AND PURCHASER** Continued.

- death of purchaser, 461.
- vendor, 461, 1847.
- default by purchaser, 2763.
- dower claim of purchaser's widow, 774.
- vendor's widow, 774.
- effect of contract in equity, 456.
- fixtures annexed by purchaser, 919.
- fraud in entering into contract, 1639.
- homestead in purchaser's interest, 860.
- lien of vendor, 2761, 2763. See "Vendor's Lien."
- loss by fire, by whom borne, 459.
- mechanic's lien, under contract with purchaser, 2770.
- mistake in entering into contract, 1636.
- mortgage by purchaser, 2368.
- offer to purchase by wrongful possessor, as interrupting adverse possession, 1962.
- purchaser, annexations by, 919.
- as tenant at will, 217.
- death, 461.
- entitled to homestead exemption, 2298.
- regarded in equity as owner, 457.
- purchaser entitled to priority over judgment against vendor, 2784.
- purchaser's interest, as subject to judgment lien, 2782.
- curtesy in, 832.
- dower in, 750.
- mechanic's lien on, 2770.
- mortgage on, 2368, 2745.
- purchaser's lien for payments made, 2765.
- record of contract of sale, 2183.
- risk of loss before conveyance, 459.
- title based on adverse possession, sufficiency, 1979.
- valuable consideration, 2247.
- vendee's lien, 2765.
- vendor as trustee for purchaser, 459.
- entitled to possession, 458.
- liable for waste, 458.
- may enjoin waste by purchaser, 458.
- vendor's interest, as subject to judgment lien, 2781.
- dower in, 751.
- vendor's lien, after conveyance, 2761. See "Vendor's Lien."
- before conveyance, 2763.
- see "Bona Fide Purchaser"; "Consideration"; "Contract of Sale"; "Conveyances"; "Notice"; "Purchase Money"; "Purchasers"; "Sale"; "Vendor's Lien."

**VENDOR'S LIEN**

- arising by implication, 2752.
- bona fide purchaser protected against, 2756-2758, 2762.

[REFERENCES ARE TO PAGES.]

**VENDOR'S LIEN**—Continued.

- priority over dower claim, 740, 2757.
- transfer, 2758.
- waiver, 2759.
- within covenant against incumbrances, 1684.

**VESTED**

- construction in favor of vesting, 495, 577.
- meaning of term, 477.
- remoteness of vesting, 591.

**VESTED REMAINDER**

- acceleration, 519.
- descent, 524.
- destruction of particular estate, effect, 483.
- distinguished from contingent, 490.
- failure of particular estate, effect, 519.
- in favor of class, 497.
- is present not future estate, 477.
- nature, 476.
- not within rule against perpetuities, 602.
- particular estate, effect of destruction by reentry, 483.
  - effect of failure, 519.
- preceded by contingent remainder in fee simple, 512.
- remainder presumed vested, 495.
- remaindermen **must** be certain, 486.
- transfer, 524.

**VESTED RIGHTS**

- access to navigable water, 1022, 1027.
- as to curtesy, 845, 849.
- as to dower, 799, 810.
- as to fee tail, 57, 72.
- in future accretions, 2109.
- wharfing out into navigable water, 1027.

**VIBRATION**

- right of immunity from, use of neighboring premises, 1118, 1125.

**VIEW**

- dedication of land to protect, 1856.
- easement of, in favor of abutting owner on highway, 1534.
- no natural right of, 1122.

**VILLEIN TENURE**

- nature, 19.

**VIOLENCE**

- in expulsion of tenant by landlord, 255.

[REFERENCES ARE TO PAGES.]

**VISITORS**

landlord's liability for injuries to, 147.

**VOLUNTARY CONVEYANCE**

see "Consideration."

**VOLUNTEER**

appointment in favor of, rights of creditors, 1107.

**W**

**WAIVER**

breach of condition, 297-300.  
 delay in asserting forfeiture, 304.  
 condition, 295, 298.  
 condition precedent, 298.  
 homestead right, 2305.  
 mechanic's lien, 2774.  
 priority of mortgage, 2561.  
 vendor's lien, 2759.

**WALLS**

agreements as to erection and use, 1262.  
 as covenants running with land, 1416, 1418.  
 alterations by one adjoining owner, 1342.  
 building against wall, as user of wall, 1246, 1312.  
 easement in, 1262, 1340.  
 erection from malicious motive, 1123.  
 erection on another's land, 1262.  
 statutory authority, 1311.  
 user by landowner, 1246.  
 on adjoining land, mode of utilization, 1266.  
 on division line, liability for use, 1246, 1247.  
 party walls, see "Party Walls."  
 prescriptive rights in, 2072.  
 projection over adjoining land, right of user, 1246.  
 repairs, rights and duties of adjoining owners, 1343.  
 duties of landlord, 148.  
 utilization by nonowner, 1246.  
 see "Flues"; "Party Walls."

**WARDSHIP, RIGHT OF**

under feudal system, 23.

**WARRANT**

for entry on public land, 1559.

**WARRANTY, COVENANT OF**

as enlarging estate, 45.  
 as preventing assertion of after-acquired title, 2126.  
 3 R. P.—87

[REFERENCES ARE TO PAGES.]

**WARRANTY, COVENANT OF**—Continued.

- as running with land, 1718.
- breach, assertion of easement, 1700.
  - burden of proof as to paramount title, 1704.
  - claim of dower, 1698.
  - eviction under outstanding mortgage, 1712.
  - exclusion from possession, 1699.
  - existence of highway, 1695.
  - existence of lien no breach, 1698.
  - necessity of eviction, 1696, 1700.
  - outstanding lease for years, 1694.
  - paramount claim, 1699.
  - prior conveyance last recorded, 1697.
  - subsequent conveyance, 1697.
- by husband, effect on dower, 811.
- construction with reference to what purports to be conveyed, 1693, 1694.
- damages, 1709.
- distinguished from common law warranty, 1675.
- dower claim as breach, 1698.
- easement as breach, 1700.
- eviction as requisite for breach, 811.
- exclusion from possession as breach, 1699.
- failure of title to easement as breach, 1700.
- general or special, 1696.
- highway as breach, 1695.
- implication on partition, 708, 723.
- knowledge by covenantee of defect in title, ordinarily immaterial, 1693.
- lease for years breach, 1694.
- lien does not involve breach, 1698.
- limitation in, as notice to subsequent purchaser, 2245.
- mortgage as breach, 1712.
- paramount title as breach, 1699.
  - burden of proof, 1704.
- prior conveyance as breach, 1697.
- runs with land, 1718.
- similar to covenant of quiet enjoyment, 1692.
- statutory implication of other covenants, 1677.
- subsequent conveyance as breach, 1697.
- tortious disturbance by stranger not breach, 1695.

**WASTE**

- accidental injuries, tenant not liable, 977.
- accounting in equity, 984, 986.
- alteration of character of land, 954, 963.
- as question of law or fact, 951.
- as regards buildings, 962, 983.
  - earth, 955



[REFERENCES ARE TO PAGES.]

**WASTE**—Continued.

- as regards buildings—continued.
  - fixtures, 962.
  - minerals, 869, 955.
    - opening new mines, 955.
    - sinking new shafts in mine, 957.
    - working opened mine, 955.
  - natural gas, opening new well, 955.
  - oil, opening new well, 955.
  - stone, 955, 957.
  - timber, 957, 983.
- beneficial alterations of building, 962.
- building, injuries to, 962, 983.
- by cotenant, accounting, 992.
  - boring for oil or gas, 992.
  - cutting of timber, 993.
  - extraction of minerals, 990.
- by life tenant, 953.
  - mortgagee, 2464.
  - mortgagor, 2459.
  - public enemy, tenant's liability, 140, 977.
  - tenant at will, 225, 954, 980.
  - tenant by curtesy, 847.
  - tenant for years, 953.
  - tenant in dower, 824.
  - tenant in fee simple, 952, 979.
    - as against beneficiary under limitation over, 952.
  - tenant in fee tail, 953.
  - tenant in tail after possibility of issue extinct, 979.
  - tenant under lease, 138.
- by third person, tenant's liability, 974.
- character of land, alteration, 954.
- conversion of meadow land into cemetery, 955.
- cutting trees, 957-959.
- deposit of refuse on land, 955.
- equitable, 978.
  - by tenant in fee simple, 953.
  - by tenant in fee tail, 953.
  - by tenant in tail after possibility of issue extinct, 953.
- erection of building as, 965.
  - chimney, 964.
  - fence, 965.
- express restrictions on liability, 967.
- extraction of minerals, 869, 955.
- forfeiture for, 267, 988.
- infection of premises with disease, 966.
- injunction to prevent, 974, 979, 982, 987, 990.
  - against mortgagor, 2460

[REFERENCES ARE TO PAGES.]

**WASTE**—Continued.

- injunction to prevent—continued.
  - at suit of widow, 804.
  - at suit of wife, 802.
  - based on limitation over, 979.
  - estoppel to deny title, 190.
  - who entitled, 987.
- intention to restore previous condition immaterial, 950.
- local usage to be considered, 951.
- meliorating waste, 950.
- nature, 949.
- nonpayment of taxes, 952.
- of mortgaged property, receivership to prevent, 2445.
  - action by mortgagee against stranger, 2461.
- opening doorway in building, 964.
  - gas or oil well, 955.
  - new mines, 955, 957.
- permissive, 968.
- placing excessive weight in building, 966.
- ploughing of meadow land, 954, 955, 983.
- proceeds of, right to, 988.
- provision allowing waste, effect, 967.
- question of law and fact, 951.
- remedies, 979.
  - action for damages, 979.
  - action on the case, 981.
  - forfeiture, 988.
  - injunction, 982.
  - mandatory injunction, 984.
  - treble damages, 981.
- removal of partition in building, 964.
  - soil, 955.
  - stone, 955, 957.
- repairs by tenant, permissive waste, 969.
- right to proceeds, 291, 988.
- tenant without impeachment of waste, 967, 979.
- tenant's liability for acts of third persons, 974.
- tenant's liability for damage by public enemy, 140, 977.
- voluntary and permissive, 950.
- who may sue, 979.
- working opened mine, 955.

**WATER**

- access by, as precluding way of necessity, 1307.
- access to, for purposes of power, 1240.
- access to navigable water, 1132.
- accretion, 2093. See "Accretion."
- accumulation by artificial means, liability for escape, 1183, 1185, 1186.

[REFERENCES ARE TO PAGES.]

**WATER**—Continued.

- accumulation on roof, liability for escape, 1186.
- appropriation from stream, 1132.
- aqueduct, implied grant of easement, 1274.
- artificial watercourse, rights as to user of water, 1238.
- as personal property, 1131.
- as private property, 1130, 1131, 1390.
- avulsion, 2093.
- bearing strata, correlative rights of land owners, 1177.
- boundaries on, 1656.
  - change by natural causes, 2093.
  - conveyance of, not inclusive of land, 1647.
  - covenant for supply, as running with land, 1414.
  - description of land as bounded on, 1656.
  - dripping from eaves, liability of owner of building, 1186.
  - easement as regards, 1234.
    - of conducting, 1236.
    - of discharging, 1236.
    - of diverting, as easement in gross, 1224.
    - of taking, implied grant, 1283.
    - of taking from spring, 1235.
  - escape of, liability for damage, 1183, 1185, 1186.
  - failure to turn off, tenant liable as for permissive waste, 972.
  - floatable streams, 1546.
  - flowage of land by, 1141, 1145, 1162, 1169, 1234.
  - from oil well, discharge on neighboring land, 1184.
  - grant of privilege, incidental covenant as running, 1411.
  - heating of, in stream, 1142, 1143.
  - high and low water mark, 1014, 1015, 1658, 1659.
  - highway abutting on, ownership of bed, 1665.
  - ice, ordinarily belongs to owner of land under water, 1031.
  - in artificial watercourse, 1238.
    - lake or pond, 1157-1159.
    - pipe, ownership, 1131.
    - reservoir, ownership, 1131.
  - in stream, 1131.
    - diversion, 1140.
    - heating, 1143.
    - not subject of ownership, 1130, 1157.
    - pollution, 1142.
    - right to appropriate, 1132.
  - in underground watercourse, 1181, 1182.
  - islands newly formed, ownership, 2115.
  - land under, description in conveyance, 1647.
    - navigable nontidal stream, ownership, 1012.
    - non-navigable stream, ownership, 1016.
    - tidal waters, ownership, 1007.
  - natural rights as to, 1128-1186.

[REFERENCES ARE TO PAGES.]

**WATER**—Continued.

- natural watercourses, 1128.
- navigable waters, 1007, 1012, 1022, 1545.
- ownership of water, 1130, 1131, 1390, 1391.
- percolating through ground, 1175.
- pipes in street, no compensation to landowner, 1529.
- prescriptive rights as to, 1543, 2036, 2037.
- referred to as boundary, 1656.
- right to appropriate, as within covenant against incumbrances, 1685.
- right to take from another's land, 1389, 1235. •
  - as easement or profit à prendre, 1390.
- riparian rights as to, 1128-1160.
- surface, 1160. See "Surface Water."
- system, estoppel of vendor to deny right to use, 1326.
- underground, 1175.
- water power, 1141, 1240, 1275.
  - see, also, "Accretion"; "Artificial Watercourse"; "Banks"; "Flowage"; "Ice"; "Lakes"; "Littoral Rights"; "Navigable Waters"; "Navigation"; "Percolating Water"; "Ponds"; "Riparian Owners"; "Shore"; "Streams"; "Surface Water"; "Tide Waters"; "Water Power"; "Water Course."

**WATER COURSE**

- accretion, 2094.
- appropriation of water, 1132.
  - action by nonriparian owner, 1150.
  - action independent of damage, 1135.
  - by municipality, 1138.
  - easement allowing, 1234.
  - prescriptive right, 1345, 2036, 2074, 2077.
  - transfer of right, 1038.
- artificial, 1130, 1153.
  - as distinguished from natural, 1130, 1237.
  - as easement, 1236.
  - easements in, 1237.
  - rights of riparian owners, 1238.
- as boundary of land, 1656.
  - change of location, 2093.
- as outlet from lake or pond, duties as to flow, 1158.
- change of channel by artificial means, 1130-1141.
- characteristics of natural watercourse, 1128.
  - duty to continue, 1153, 1239, 2075, 2077.
- cutting new channel, change in ownership of land, 2115.
- diminution of flow, by interference with percolating water, 1176.
- discharge of surface water into, 1162.
- distinguished from surface water, 1161.
- diversion and return of water, 1130, 1140.

[REFERENCES ARE TO PAGES.]

**WATER COURSE**—Continued.

- casement of obstructing, 1234.
  - polluting, 1234, 1345.
  - taking water, 1234, 1390.
- erection of dam, 1144.
  - statutory authority, 1149.
- flood water as part of stream, 1137, 1173.
- flowage of land by reason of obstruction, 1141.
  - freshet as contributing cause, 1147.
- heating of water, 1142, 1143.
- ice on, right to take, 1030.
- increase of flow, 1150.
  - drainage of surface water, 1162.
  - rights of riparian owners, 1150.
- island newly formed, ownership, 2115.
- natural flow, interference, 1131.
- natural watercourse, characteristics, 1128.
  - distinguished from artificial, 1430, 1237.
  - rights as to water, 1131.
- obstruction of flow, 1144.
  - casement allowing, 1234.
  - interference with drainage of upper land, 1146.
- overflow water as part of stream, 1137, 1174.
- ownership of land under, 1012, 1016.
- ownership of water in, 1130.
- permanency of flow, 1128.
- pollution, 1142.
  - casement allowing, 1234.
  - prescriptive right, 2070.
- power from, nature of grant of, 1239.
- prescriptive rights, 2038, 2057, 2060, 2062, 2064, 2074.
- prior appropriation of water, establishment of rights, 1155, 1157.
- referred to as boundary, 1656.
- riparian land, what is, 1139.
- state ownership of bed, effect on rights as to use of water, 1132.
- supplied from spring, rights as to water, 1159.
- underground, 1181.
  - pollution, 1182.
  - rights of appropriation, 1181.
- use for floating timber, 1546, 1547.
  - see, also, "Accretion"; "Artificial Watercourse"; "Banks"; "Boundaries"; "Flowage"; "Ice"; "Natural Rights"; "Navigable Waters"; "Navigation"; "Riparian Owners"; "Streams"; "Water"; "Water Power."

**WATER PIPES**

- landlord's liability for defects in, 147.

[REFERENCES ARE TO PAGES.]

**WATER POWER**

- contract for, 1241.
- grant by riparian owner, 1139, 1141, 1237.
- implied grant, corresponding to previous user, 1275.
- incidental right to use dam, 1242.
- nature of grant of, 1240.
- what is, 1241.

**WAY, EASEMENT OF**

- adaptation of servient tenement, 1348.
- apparent user of land for, implied grant, 1280.
- arching, rights of servient owner, 1353.
- as boundary, 1660, 1665.
- as within covenant against incumbrances, 1685.
- bars over, 1354, 1355.
- cessation of necessity, effect, 1366, 1368.
- change in dominant tenement, effect as extinguishment, 1346.
- change of location, 1338.
  - acquiescence in obstructions, 1383.
  - by agreement, 1383.
- concurrent grants over one route, 1353.
- concurrent user by owner of servient tenement, 1352.
- dedication of servient tenement, effect, 1375.
- deviation, rights of, 1334.
- estoppel to deny existence, 1326.
  - appearance on plat referred to, 1319.
- expressly subject to interruption, 1333.
- extinction, cessation of necessity, 1366, 1368.
  - establishment of highway over same route, 1374.
  - impossibility of exercise, 1369.
- fence over, 1354.
- for carriage of particular articles, 1332.
- gates over, 1354.
- general or limited, 1332.
- grant of, 1331.
- grant over existing road, 1338.
  - hallway or stairway, 1250.
- herbage, right to, in way, 1352.
- highway established on same route, effect, 1375.
- implied grant, 1279, 1283.
  - boundary on assumed highway, 1313, 1317.
  - boundary on assumed way, 1314.
  - when apparent user, 1279.
  - when continuous user, 1283.
- in gross, 1224.
- incidental privileges, 1334.
  - freedom of space above, 1353.
  - to build bridge, 1334.

[REFERENCES ARE TO PAGES.]

**WAY, EASEMENT OF**—Continued.

incidental privileges—continued.

to fence, 1334.

to lay pipes, 1334.

to place goods on servient tenement, 1334.

to stand carriages, 1334.

to string wires, 1334.

to swing gate, 1334.

to take herbage, 1334.

to take ice, 1334.

leading to highway, 1332.

location, construction of grant, 1335.

determination by servient owner, 1335.

determination in equity, 1336.

may be limited as to mode of use, 1332.

as to persons, 1333.

as to time of use, 1333.

nature, 1249.

necessity to dominant tenement, 1225.

obstruction by license, 1383.

of necessity, 1297. See "Way of Necessity."

of railroad, as easement in gross, 1250.

on line of footway, 1376.

as within covenant against incumbrances, 1687.

practical location, 1336, 1337.

prescription for, 2034, 2059, 2063, 2072.

mode of user permissible, 2072.

passage along different lines, 2062.

presumption as to adverseness of user, 2045-2049.

user need not be constant, 2060.

relocation, 1338.

rights of deviation, 1334.

servient owner's rights, arch over way, 1353.

bars over way, 1354.

gates over way, 1354.

minerals under way, 1352.

pasturing of cattle, 1352.

profits of land, 1352.

to refrain from fencing, 1349.

subdivision of dominant tenement, effect, 1346, 1347.

substitution, 1338.

suspension by creation of highway, 1375.

terminus on dominant tenement, necessity, 1225.

user only in connection with dominant tenement, 1331.

who may utilize, 1333.

width of exercise, 1337.

see, also, "Easements"; "Highways"; "Way of Necessity."

[REFERENCES ARE TO PAGES.]

**WAY OF NECESSITY**

- across railroad right of way, 1304.
- arises in favor of grantor or grantee, 1297, 1298.
- arising on contemporaneous conveyances, 1305.
  - condemnation of part of land, 1305.
  - conveyance of minerals, 1299, 1300.
  - conveyance of part of land, 1297.
  - conveyance of trees, 882, 1299.
  - devise, 1305.
  - execution sale, 1305.
  - foreclosure sale, 1305.
  - grant by state, 1301, 1302.
  - grant by United States, 1301.
  - grant of easement, 1300.
  - lease of part of land, 1305.
  - partition deed, 1303.
  - severance of ownership only, 1301.
- cessation of necessity, 1368.
- determination of necessity, as of what time, 1303, 1308.
  - degree, 1306.
  - excessive cost of other access, 1306, 1307.
  - existence of other limited way, 1303.
  - existence of right of condemnation, 1309.
  - lack of access except by water, 1307.
- existence determined as of time of conveyance, 1303, 1308.
- extinction on cessation of necessity, 1368.
- for purpose of access to land, 1297.
  - removal of minerals, 1299.
  - removal of trees, 882, 1299.
- implied grant or reservation, 1297.
- lack of other access insufficient, 1300.
- location by servient owner, 1335.
- not if contrary intention appears, 1302.
- not way of convenience, 1306.
- subdivision of dominant tenement, 1347.

**WAY-GOING CROP**

- rights of tenant, 888.
  - based on local custom, 893.

**WEATHER**

- landlord's liability for damage by, 148.

**WEEKLY TENANCY**

- nature, 235.
- notice to terminate, 240.
  - see "Periodic Tenancy."



[REFERENCES ARE TO PAGES.]

**WELL**

- conveyance of in terms, extends to land, 1647.
- for oil or gas, 872.
- in street, as additional servitude, 1530.
- right to sink through minerals belonging to another, 1300.
- sinking to detriment of neighbor's water supply, 1175.

**WHARF**

- dedication for, 1854, 1856.
- public right to use private land for wharf, 1543.
- right of littoral owners to wharf out, 1024, 1033.
  - as between contiguous proprietors, 1033.
  - grant to stranger, 1029.
  - not to interfere with navigation, 1026.

**WIDOW**

- adverse possession by, as against heirs, 2022, 2023.
- and heir, tacking of possessions, 1970.
- dower right, 733.
- gift during widowhood, 75, 79, 284.
- homestead rights of, 854.
- possession of, tacking to possession of heirs, 1970.
- quarantine, 807.
  - see, also, "Dower"; "Homestead."

**WIDOWER**

- adverse possession by, as against heirs, 2024.
- curtesy in favor of, 826.
  - see, also, "Curtesy."

**WIDTH**

- of highway based on prescription, 2090.
- of way, construction of grant, 1337.

**WIFE**

- see "Dower"; "Entireties, Tenancy by"; "Husband and Wife"; "Married Women"; "Widow."

**WILD LAND**

- dower *in*, 745.
- seisin of, necessity for curtesy, 830.
- user presumed not adverse, 2083.

**WILD'S CASE, RULE IN**

- nature, 61.
- not universally accepted, 61.

**WILL, TENANCY AT**

- as inclusive of periodic tenancy, 229.
- assignment by tenant, as termination, 227.
  - position of assignee, 227.

[REFERENCES ARE TO PAGES.]

**WILL, TENANCY**—(Continued.)

- changed into periodic tenancy, 232.
- creation, 215-222.
  - acquiescence in another's possession, 221.
  - entry by expectant purchaser, 217.
  - entry under invalid lease, 107, 216.
  - holding over by agreement, 258.
  - lease at will of lessee, 219.
  - lease at will of lessor, 221.
  - lease not naming duration, 217, 218.
  - permissive possession, 215, 216.
  - under invalid conveyance, 216.
- distinguished from tenancy at sufferance, 245.
- ejectment by tenant, 215.
- holding over by tenant, 241.
- nature, 214.
- no liability for permissive waste, 970.
- not superseded by periodic tenancy, 235.
- tenancy at sufferance distinguished, 245.
- tenant's interest is estate, 214.
- tenant's interest not subject to execution, 2147.
- termination, 215, 223.
  - acts of landlord, 223.
  - acts of voluntary waste, 225.
  - conveyance by landlord, 226.
  - death of party, 225.
  - demand by landlord for possession, 223.
  - dissolution of corporation party, 225.
  - lease by landlord, 226.
  - mortgage by landlord, 226.
  - notice to terminate, 224.
  - passing of landlord's interest by operation of law, 226.
  - special limitation, 227.
  - tenant's disclaimer, 225.
  - tenant's relinquishment of possession, 224.
  - transfer of interest, 226.
- termination, right to crops, 228, 891.
  - right to remove chattels, 228.
  - right to remove fixtures, 937.
  - right to remove goods, 228.
- termination during rent period, rent not apportioned, 1479.
  - on rent day, effect on rent, 1477.
- transfer by landlord, 226.
  - tenant, 226.
- trespass by tenant, 215.
- waste by tenant, 225, 970, 980.
  - see, also, "Landlord and Tenant."

[REFERENCES ARE TO PAGES.]

**WIND**

- causing damage, as act of God, 977, 989.
- damage by, liability of tenant, 977.

**WINDFALL**

- right of tenant, 940, 977, 989.

**WINDOWS**

- blocking of, by neighbor, 1121.
- easement as to passage of light to, 1233.
- in party wall, 1341, 1343.
- light passing to, implied grant of easement, 1276.
- obstruction by adjoining building, 1121.
- overlooking neighbor's premises as nuisance, 1122.

**WILLS**

- acknowledgment of signature, 1821.
- alienation of land devised, effect, 1807.
- as operating on after acquired property, 1848.
- attestation by witnesses, 1827.
- attestation clause, necessity, 1828.
- bar of curtesy by, 838.
- by infant, 2341.
  - insane person, 2347.
  - married woman, 2332.
    - husband's joinder to release curtesy, 841.
- charge of debts or legacies on land, 2734.
- codicil, effect, 1843, 1852, 1853.
- competency of witness, 1824.
- condition against contest, validity, 281.
- creation of fee simple, words indicating intention, 48, 49.
  - power by, 1044, 1056.
  - trust by, 389.
- curtesy excluded by, 842.
- death of devisee, 1832, 1835.
- dependent relative revocation, 1841.
- destruction as revocation, 1838, 1841.
- devise in lieu of dower, 782.
- disposing of right of re-entry, 315.
- disqualification of witness as beneficiary, 1824.
- distinguished from conveyances, 1809.
- effect as barring dower, 782.
- equitable conversion by, 438.
- estate tail not devisable, 72.
- execution of power by, 1078, 1083-1085.
  - will prior to power, 1079.
- holographic, 1829.
- instrument not necessarily will because no immediate right of enjoyment, 1810.

[REFERENCES ARE TO PAGES.]

**WILLS**—Continued.

- lapsed devise, 1831.
- loss of, presumption, 1841.
- mental capacity, 2347.
- nuncupative, 1829.
- omission of children or issue, statutory provisions, 1849, 1915.
- operating on after acquired property, 1807, 1837.
- partial revocation, 1840.
- place of signature, 1819.
- power of appointment in, 1045, 1047.
- power to pass land by, 1806.
- provision against partition, validity, 712.
- publication, 1822.
- real property not devisable at common law, 1806.
- republication, 1851.
- revival, 1849, 1850.
- request to witnesses, 1727.
- residuary clause, operation, 1836.
- restraint on alienation by, 576, 2309.
- revival, revocation of revoking will, 1850.
- revocation, 1837.
  - accidental destruction insufficient, 1838.
  - alienation of land subsequently reacquired, 1847.
  - birth of issue, 1844.
  - by mistake, 1841, 1843.
  - cancellation or destruction, 1838.
  - cancellation or destruction of signature, 1840.
  - conveyance of land, 1847.
  - dependent relative, 1841.
  - destruction of document, 1844.
  - destruction of seal, 1840.
  - during testator's insanity, 1838.
  - in part, 1840.
  - intention to revoke in itself insufficient, 1839.
  - invalid conveyance, 1848.
  - marriage, 1844.
  - marriage and birth of issue, 1845.
  - of revoking will, 1850.
  - presumption from loss of document, 1841.
  - sale of land, 1847.
  - subsequent will, 1842, 1850.
- signing, 1818.
  - by another's hand, 1818, 1819.
- statute of, 51.
- statute of uses in connection with, 351.
- subscription, necessity, 1820.
- substitutionary devise, 1832.
- undue influence, 1829.

[REFERENCES ARE TO PAGES.]

**WILLS**—Continued.

- who competent as witness, 1823, 1824.
  - beneficiary under will, 1824.
  - husband or wife of beneficiary, 1825.
- witness as devisee, 1824.
- witnesses, signing by, 1821, 1826.
  - see "Devise"; "Executory Devise."

**WIRES**

- extending over another's land, as tort, 864.

**WITNESSES**

- to conveyance, 1727.
  - competency, 1728.
  - need not be present at signing, 1727.
  - proof by, 1736.
  - signatures of witnesses, 1727.
- to will, 1823.
  - attestation, 1826.
  - competency, 1823.
  - disqualification as beneficiaries, 1824.

**WOOD**

- piling on premises by landlord not eviction, 202.
  - see, also, "Trees"; "Waste."

**WOODS AND FORESTS**

- conveyance in terms of, effect as including land, 1647.

**WORDS OF INHERITANCE**

- necessity, conveyance in fee simple, 44-52.
- conveyance in fee tail, 58, 59.
- creation of power to dispose of fee simple, 1064.
- devise of fee simple, 48.
- exception, 46, 1269, 1614, 1616.
- grant of easement, 1230, 1259.
- reservation, 1268, 1607, 1617.
- statutory provisions, 48.
- sufficiency of insertion in habendum, 45.
- sufficiency of insertion in warranty, 45.

**WORDS OF LIMITATION**

- "children" as word of purchase or limitation, 64.
- "issue" as word of purchase or limitation, 64.
- meaning of expression, 37.
- to create fee simple estate, 44-50.
- to create fee tail estate, 58-69.

[REFERENCES ARE TO PAGES.]

**WORDS OF PURCHASE**

- “children” as word of purchase, 64.
- “issue” as word of purchase, 64.
- meaning of expression, 37.

**WRIT OF ATTACHMENT**

- see “Attachment.”

**WRIT OF ENTRY**

- foreclosure of mortgage by, 2685.

**WRIT OF EXECUTION**

- see “Execution, Writ of.”

**WRITING**

- necessity, agreement as to boundary line, 996.
- agreement as to use of land, 1431.
- agreement relinquishing dower, 796.
- assignment of leasehold, 163, 1571.
- change of location of way, 1339.
- conveyance in fee simple, 1566, 1589, 1722.
- creation of easement, 1211, 1258, 1271.
- declaration of trust, 377, 392, 405, 408.
- exemption of fixture, 942.
- exchange, 1571.
- implied grant of easement, 1271.
- lease for years, 103, 216, 233.
- mortgage, 2372.
- partition, 700.
- party-wall agreement, 1264.
- permission to commit waste, 968.
- release, 776, 1571.
- release of dower, 776.
- restrictive agreement, 1431.
- revocation of will, 1838.
- sale of crops, 887.
- sale of fixtures, 932, 942.
- sale of trees, 880, 886, 887.
- security agreement, 2748.
- surrender, 1580.
- transfer by mortgagor to mortgagee, 2474.
- trust, 377, 392, 405, 408.
- trust for partnership, 663.
- see, also, “Parol Evidence.”

**Y****YEAR TO YEAR, TENANT FROM**

- as class of tenant at will, 229.
- at option of landlord, in case of tenant holding over, 248.

[REFERENCES ARE TO PAGES.]

**YEAR TO YEAR, TENANT FROM**—Continued.

- creation of tenancy, 231.
  - by express language, 231.
  - entry under invalid lease, 108.
  - in case of renewal tenancy, 257.
  - inference from yearly rent, 232, 234, 236.
  - lease for no definite period, 232.
  - tenant holding over, 248, 257.
- crops, rights of outgoing tenant, 894.
- lease by tenant, 170, 237, 238.
- nature, 228.
- notice to terminate tenancy, 259.
  - express provision as to, 240.
- one continuous tenancy, 230.
- repairs, obligation on tenant, 970.
- sublease and assignment, 170, 237.
- termination of tenancy, 230, 238.
  - express provision for, 238.
  - not by death, 237.
  - notice to quit, 239.
  - right of tenant to crops, 894.
- transfer of interest, 237.
  - see "Landlord and Tenant"; "Periodic Tenancy."

**YEARS, ESTATE FOR**

- as breach of covenant for title, 1682, 1687, 1689, 1694.
  - as personal property, 8, 97.
  - as subject of mortgage, 2367.
  - assignment, form, 163, 1571.
  - by way of vested remainder, 583.
  - certain term necessary, 117, 217.
  - computation of term, 207.
  - condition against alienation, 2315.
  - creation usually by lease, 98.
  - crops, outgoing tenant not entitled, 892.
  - dower nonexistent in, 748.
  - duration must be named in lease, 118.
  - entry not necessary, 116.
  - eviction as terminating, 205, 206.
  - forfeiture for breach of condition, 308.
  - in easement, 1229.
  - lease by life tenant, effect of death, 82.
  - merger, 90, 211.
  - nature, 96.
  - no limit on possible duration, 100.
  - option to terminate, 208.
  - origin and history, 97.
  - outgoing tenant, rights as to crops, 892, 893.
- 3 R. P.—88

[REFERENCES ARE TO PAGES.]

**YEARS, ESTATE FOR** Continued.

- passes to personal representative, 98.
- personal and not real property, 98.
- provision for termination on sale by landlord, 209.
- repairs, obligation of tenant, 270, 969.
- restrictions on assignment, 159-162, 2313, 2315.
- special limitation on, 333.
- statute of frauds, applicability, 103-112.
- subject to judgment lien, 2779.
- surrender, 210.
- tenant's right of possession, 118, 119.
- termination, contingency named in lease, 208.
  - eviction, 205, 206.
  - expiration of landlord's estate, 212.
  - forfeiture, 212.
  - lapse of time, 207.
  - merger, 211.
  - special limitation, 208.
- transfer, 159.
  - see, also, "Crops"; "Fixtures"; "Landlord and Tenant"; "Lease";  
"Waste."





















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